

## ETHICAL RESPONSIBILITIES AND THE INTERNATIONAL LAWYER: MIND THE GAPS

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*As more American lawyers are practicing abroad, the result of a growing global market, additional ethical questions are presented. More specifically, attorneys' responsibilities have changed: in addition to knowing the law, transnational attorneys must also understand the cultures, traditions, and languages of the foreign societies in which they practice. Also crucial is an understanding of foreign codes of professional conduct, which can differ markedly from the American Bar Association's Model Rules used in the United States.*

*In this student note, the author details relevant provisions of the Model Code, then compares them both to the codes of selected European countries and, more broadly, to a multinational code the European Community has fashioned. Important differences in areas such as conflicts of interest and attorney-client privilege are illustrated.*

*Finally, the author proposes that American attorneys working abroad undergo a formal certification process to ensure their proficiency and understanding of these ethical issues. Suggestions for both law students and practicing attorneys are offered.*

### I. INTRODUCTION

With the proliferation of a global market and many American businesses taking advantage of economic opportunities abroad, the American legal profession similarly has expanded. American lawyers are following their clients abroad, broadening their legal services to provide counsel to clients uncertain how to proceed in a foreign environment. In 1995, for example, U.S. international trade amounted to \$753 billion in exports and \$641 billion in imports.<sup>1</sup> Correspondingly, U.S. law firms, within the past few years, have grossed more than \$1.4 billion annually from foreign-based clients.<sup>2</sup> In 1992, legal services ranked fourth on the

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1. See John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings, but Too Few Students*, 31 INT'L LAW. 845, 847 (1997) (citations omitted) [hereinafter Barrett, *U.S. Law Schools*].

2. See Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small-Firm and Solo Practitioners*, PROF. LAW., June 1995, at 123; see also David S. Clark, *Transnational Legal Practice: The Need for Global Law Schools*, 46 AM. J. COMP. L. 261, 273 (1998). Professor Clark reports that in

Department of Commerce's list of highest grossing export business and professional services.<sup>3</sup>

Yet American firms are not only expanding globally to meet the needs of existing clients but are searching for new clients as well.<sup>4</sup> The economic recession in the United States during the late 1980s forced several firms to look for new markets and business opportunities in Japan, Eastern and Western Europe, and Central America.<sup>5</sup> This trend was mirrored by events in those regions making legal inroads much more accessible: the opening up of Japan to foreigners, the collapse of communism and the introduction of capitalism in Eastern Europe, the increasing strength of the European Union, and the signing of NAFTA promoting free trade between the United States and Mexico.<sup>6</sup>

These growing numbers of American lawyers practicing abroad face many of the same legal and ethical issues as their domestic counterparts, issues invariably addressed in the practice of law. The foreign environments in which American lawyers practice, however, engender additional and sometimes greater ethical questions, stemming from the different laws, customs, and traditions they encounter daily. Moreover, each foreign jurisdiction promulgates its own rules of professional conduct, and these rules can differ markedly from jurisdiction to jurisdiction. In short, pitfalls abound for the inexperienced.

Effective overseas representation thus cannot be drawn solely from a law school education and on-the-job training. Rather, lawyers working in the international arena must be cognizant of the unique ways foreign countries structure their legal systems and ethical codes, often in manners entirely divergent from the American model—differences rooted in cultural, political, and social traditions. This note, therefore, proposes that before American lawyers practice law transnationally, they be required to undergo some form of a certification process validating their experience and knowledge. Starkly,

lawyers who do not command the law, language, and culture in which they are counseling their clients, whether for transactional or litigational purposes, are not performing their duties competently

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1994, foreign clients generated \$1.6 million for American lawyers, equaling about 10% of the total revenue of the country's largest 100 firms. *See id.* This represented an increase from \$451 million in 1990. *See id.* One firm, Shearman & Sterling, obtains almost 40% of its revenue from cross-border transactions. *See id.*

3. *See Clark, supra* note 2, at 273.

4. *See Peter Roorda, The Globalization of Law and Business in the 1990's*, 28 WAKE FOREST L. REV. 141, 142 (1993).

5. *See id.*

6. *See Stephanie B. Goldberg, Implementation of NAFTA Has U.S. Law Firms Looking to Mexico for New Business*, A.B.A. J., Mar. 1994, at 74.

and ethically, are courting malpractice on a personal level, and, on a broader level, are undermining the legitimacy of the profession.<sup>7</sup>

To illustrate the point, this note first will address the source of ethical regulations governing transnational practice in the United States, the American Bar Association's (ABA) Model Rules of Professional Conduct,<sup>8</sup> and then illustrate how those rules conflict with and differ from the codes of various Western European countries.<sup>9</sup> The note will also examine how the European Community has addressed its member countries' divergent ethical codes—specifically, focusing on the Council of Bars and Law Societies for the European Community's (CCBE)<sup>10</sup> 1988 adoption of the common Code of Conduct for Lawyers in the European Union.<sup>11</sup> The note, with specific examples, will show how the uninformed American lawyer could cause substantial harm to her client's interests, as well as to herself, without the additional expertise this note advocates.

## II. ETHICAL RULES AND THE TRANSNATIONAL LAWYER

### A. ABA Model Rules

The American Bar Association's conflicts rule is provided in Model Rule 8.5.<sup>12</sup> The rule, limited solely to conflicts within the United States, provided, prior to its amendment in 1993, only a jurisdictional rule with no choice of law rules.<sup>13</sup> In the absence of such conflicts rules, lawyers potentially could be subject to more than one set of rules, a confusing proposition for both lawyers and clients alike. For example, imagine the situation where a lawyer discovers that her client has committed or intends to commit fraud. If that lawyer is licensed in both the District of Columbia and New Jersey, the rules of the District of Columbia require her to remain silent, while, at the same time, the New Jersey standards mandate that she reveal the wrongdoing.<sup>14</sup>

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7. Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 SAN DIEGO L. REV. 635, 637 (1997).

8. MODEL RULES OF PROFESSIONAL CONDUCT (1996).

9. In this note, only selected western European countries are treated. The author recognizes that international law is not relevant only to western countries, but those are the countries within the scope of this particular article.

10. Delegations representing the legal profession in each member state of the European Committee make up the CCBE. See Robert J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556, 601 (1992) [hereinafter Goebel, *Lawyers in the EC*].

11. See CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY (1988) [hereinafter CCBE CODE], reprinted in Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code pt. I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. OF LEGAL ETHICS 1, app. B. (1993).

12. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1996).

13. See *id.* Specifically, Rule 8.5 provides that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." *Id.*

14. See Terry, *supra* note 11, at 3 (comparing D.C. Rules of Professional Conduct Rule 1.6(a) with N.J. Rules of Professional Conduct Rule 1.6(b)(1)).

Recognizing this deficiency, amended Rule 8.5 incorporated a choice of law rule.<sup>15</sup> Rule 8.5 now ensures that lawyers are “subject to only one set of rules” and makes determining which set of rules to apply “as straightforward as possible.”<sup>16</sup>

The newly crafted rule holds lawyers responsible only for the professional conduct rules in the jurisdiction in which they are licensed.<sup>17</sup> As a necessary corollary, lawyers admitted in more than one jurisdiction may be subject to disciplinary authority in each one.<sup>18</sup> Further, choice of law rules in paragraph (b)<sup>19</sup> dictate that lawyers appearing before courts in which they are admitted are subject to the rules of the jurisdiction in which the court sits;<sup>20</sup> and regarding noncourt conduct where the lawyer is licensed in multiple jurisdictions, the rule uses the law of the jurisdiction in which the lawyer “principally practices” or, in the alternative, the jurisdiction in which the “particular conduct clearly has its predominant effect.”<sup>21</sup>

Despite the promise Rule 8.5 seems to hold out for international practitioners searching for guidance, the rule’s effect is demarcated to America’s borders. Specifically, comment 6 to the rule explains that “[t]he choice of law provision is not intended to apply to transnational

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15. Rule 8.5, as amended, reads as follows:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1996).

16. *Id.* Rule 8.5 cmt. 3.

17. *See id.*

18. *See id.*

19. *See id.* Rule 8.5(b).

20. *See id.* Rule 8.5 (b)(1).

21. *Id.* Rule 8.5 (b)(2)(ii); *see also* Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J.L. & COM. 301, 305 n.8 (1998). Professor Brand points out that:

[a]n interesting comparison is found in Rule 1-100(D)(1) of the Rules of Professional Conduct of the State Bar of California, CAL. CODE vol. 23, pt. 2, Rule 1-100(D)(1) (West Supp. 1997), which provides that lawyers practicing outside California are exempted from California ethics rules if “specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from [the California] rules.”

*Id.*

practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.”<sup>22</sup>

American attorneys working abroad, therefore, have little American-based ethical guidance, as illustrated by Model Rule 8.5 and its comments. This lack of direction can be attributed to various factors. First, many legal organizations and the public at large are concerned more with disciplining lawyers working domestically than those practicing overseas.<sup>23</sup> Second, the legal bars and other international practice constituencies have expressed little urgency in expressly addressing these issues, preferring to work within a somewhat less ordered system.<sup>24</sup> Third, and perhaps most importantly, because existing U.S. ethical standards are geared toward litigation and not transactional work (which comprises the majority of international practice), American lawyers working internationally have few tenets to draw upon as a base.<sup>25</sup>

American lawyers, with the somewhat deficient Model Rules as their only guide, must navigate divergent legal, societal, and cultural traditions when working with and for European clients and lawyers. What follows is first a brief overview of the European Community Code of Conduct and then an in-depth examination of the legal and ethical hazards facing the uninitiated American lawyer.

### B. *European Community Code of Conduct*

In Europe today, an integrated market for the practice of law is quickly becoming workable,<sup>26</sup> the result of several economic, historical, social, and political factors functioning together. More narrowly, the principal impetus is financial, and as the European Union moves closer to creating an integrated internal market, more and more legal assistance will be needed to structure and oversee the various transactions that now reach from one country to another and form the backbone of this increased activity.<sup>27</sup>

Moreover, European law firms have expanded into a cross-border practice within the Community and elsewhere in Europe in the past decade.<sup>28</sup> This expansion has mirrored that of large international accounting

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22. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1996).

23. See Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53, 55 (1992) (positing that “[m]any bar associations consider repairing the image of lawyers as one of their prime obligations”).

24. See *id.* at 56 (“Leaving the status of certain professional responsibility concerns more ‘gray’ than ‘black-and-white’ ensures that lawyers will not face punishment for certain misdeeds and maintains a relatively less destabilizing order.”).

25. See *id.*

26. See Goebel, *Lawyers in the EC*, *supra* note 10, at 556.

27. See *id.* (“[T]he need for sophisticated legal assistance to commercial and financial enterprises operating on a Community-wide scale becomes ever more apparent. Client needs and desires drive the legal market, as they do other markets.”).

28. Professor Goebel reports that:

firms, providing clients with “easier communication with key advisors,” “the application of uniform standards of service,” and “reliable assurances of quality control.”<sup>29</sup> Cross-border practice has similarly been facilitated by important changes made to the laws of several key countries regarding regulations of foreign lawyers and domestic lawyers practicing in foreign countries.<sup>30</sup>

Paralleling Europe’s cross-border growth has been the CCBE. The organization was founded in 1960 to address the problems and opportunities for the legal profession stemming from the 1957 Treaty of Rome that created the European Economic Community (EC or EEC).<sup>31</sup> Its role is to “provide a forum for the interchange of views and information among its member bodies, as well as to represent the legal profession to the EEC Commission and before the Court of Justice.”<sup>32</sup> The CCBE has no binding legislative authority per se, but its recommendations are accorded much deference.<sup>33</sup>

The CCBE’s primary task was to draft a legal ethics code for EC lawyers working in and/or with other Community countries and lawyers.<sup>34</sup> The CCBE Code was promulgated on October 28, 1988, in Strasbourg, France, to address these issues and provide a guide for lawyers and countries working within the EC. Although other laws of the EC had addressed the mechanics of cross-border practice, little mention was made of legal ethics rules and the potential difficulties occurring when lawyers are subject to two divergent ethical codes—the code of the lawyer’s home country and the code of the country in which the lawyer is working.<sup>35</sup> To fill this gap, the then-twelve Member States of the EC, working together under the CCBE’s rubric, adopted a common code with two applications: (1) to all transnational activities between EC lawyers, including all work with lawyers of Member States other than their own and (2) to the professional activities of lawyers in a Member State

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National law firms have increased their in-house competence both in Community law itself and in corporate and commercial practice in other states, encouraging some of their lawyers to specialize in these fields and acquiring added expertise by recruiting competent personnel both at the partner and employee level. Large firms have aggressively expanded their European market service capabilities by opening new branches and expanding existing ones in other states, and/or by mergers, joint ventures or close association with law firms in other states.

*Id.*

29. *Id.* at 556–57; see also Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted in the United States*, 21 *FORDHAM INT’L L.J.* 190, 197 (1997) (arguing that accounting firms should be permitted to join together with law firms to form multidiscipline practices).

30. See Goebel, *Lawyers in the EC*, *supra* note 10, at 561–64 (explaining various modifications to the laws of Belgium, the United Kingdom, Germany, and France).

31. See Terry, *supra* note 11, at 5–7; see also Goebel, *Lawyers in the EC*, *supra* note 10, at 601 (likening the CCBE to an “umbrella organization that groups all the Community national bar associations that represent lawyers engaged in courtroom practice, as well as the law societies representing U.K. and Irish solicitors”).

32. Goebel, *Lawyers in the EC*, *supra* note 10, at 601.

33. See *id.*

34. See Terry, *supra* note 11, at 7.

35. See *id.*

other than their own.<sup>36</sup> Creating the Code avoided the possibility of each country being forced to recognize twelve or more different codes, the details of which might only be partially understood, if at all, by foreign lawyers.<sup>37</sup> In addition to the now fifteen Member States,<sup>38</sup> the CCBE Code has been implemented in four “observer countries” to the CCBE: Cyprus, Norway, Switzerland, and, most recently, the Czech Republic.<sup>39</sup>

The Code, although not binding law, is not a “purely advisory document” either.<sup>40</sup> In fact, the Code’s authors intended it to be adopted by the Member States. Rule 1.3 of the Code calls for the parties to adopt it as “enforceable rules as soon as possible in accordance with national or Community procedures in relation to the cross-border activities of the lawyer in the European Community.”<sup>41</sup> Most Member States have adopted the Code.<sup>42</sup>

The Code utilizes a structure similar to that of the ABA’s Model Rules, setting forth black letter rules that are mandatory principles, as opposed to mere guidelines for permissible conduct.<sup>43</sup> Yet the Code is not a panacea; in some instances, it does no more than serve as a conflicts of law code, determining which state’s ethical regulations to use, rather than creating one overarching legal ethics code acceptable to all. Nonetheless, the Code’s value in regulating cross-border lawyering is unquestioned.<sup>44</sup> Although the United States is not a party to the EC and, therefore, not subject to the CCBE Code, the Code is instructive as it, in conjunction with each European state’s own national code, delineates the parameters of ethical behavior for lawyers practicing in Europe.

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36. See John Toulmin, *A Worldwide Common Code of Professional Ethics*, 15 *FORDHAM INT’L L.J.* 673, 673 (1992) (providing examples of specific types of conduct that would fit within the code and those that would fall outside of its reach).

37. See Terry, *supra* note 11, at 10 (terming the Code a “practical damage limitation exercise” and equating the usefulness of a single code to that of a “common set of weights and measures”); see also *CROSS BORDER PRACTICE COMPENDIUM* 13 (Dorothy Margaret Donald-Little ed., 1991).

38. Until 1995, the European Union was comprised of 12 Member States: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. On January 1, 1995, Austria, Finland, and Sweden joined as well. See Roger J. Goebel, *The Treaty of Amsterdam in Historical Perspective: Introduction to the Symposium*, 22 *FORDHAM INT’L L.J.* S7, S10–15 (1999) (discussing the enlargement of the EU and the negotiations that accompanied each stage of its growth).

39. See Toulmin, *supra* note 36, at 674.

40. Goebel, *Lawyers in the EC*, *supra* note 10, at 602; see also *CCBE CODE*, *supra* note 11, Rule 1.3.

41. *CCBE CODE*, *supra* note 11, Rule 1.3.2.

42. See Goebel, *Lawyers in the EC*, *supra* note 10, at 602.

43. See Terry, *supra* note 11, at 14–15 (noting that the CCBE issued, along with the CCBE Code, the Explanatory Memorandum and Commentary on the CCBE Code of Conduct for Lawyers in the European Community, which seeks to “explain the origin of the provisions of the Code, to illustrate the problems which they are designed to resolve, particularly in relation to cross-border activities, and to provide assistance to the competent authorities in the Member States in the application of the code”).

44. See, e.g., Goebel, *Lawyers in the EC*, *supra* note 10, at 603; Toulmin, *supra* note 36, at 673.

## III. AMERICAN/EUROPEAN ANALYSIS

A. *Bridging the Cultural Gap*

One of the primary functions of the international or transnational lawyer is bridging the cultural gap—or helping the client understand the different cultural, social, political, and economic standards informing transactions, both commercial and social, in each country.<sup>45</sup> In other words, knowing the law is not enough. One commentator has emphasized the importance of culture in shaping societal interactions:

All human activity occurs against a background of assumed practices and unexpressed assumptions which, taken collectively, can be characterized as the community's tradition or culture. So long as all those participating in a given activity share a common cultural or traditional background, each is—or through reflection can become—aware of the degree of ambiguity and of the risk of possible misunderstanding in any given episode of social or economic intercourse. Where, however, such intercourse involves individuals with significantly different cultural or traditional backgrounds, it becomes very difficult, even upon mature reflection, to assess the risk of misunderstanding that may inhere in a situation.<sup>46</sup>

The lawyer must be prepared to assist clients in modifying their American-style legal and business practices to better accord with those of foreigners.<sup>47</sup> This includes conducting negotiation and general business dealings in styles amenable to all parties, helping a client manage a business in the customary ways of the unique environment in which it is located, and recognizing linguistic differences in negotiation and drafting.<sup>48</sup> Businesspeople in different countries subscribe to varying models of behavior and decorum, knowledge of which is a crucial component of any

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45. See Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 447 (1989) [hereinafter Goebel, *Professional Qualification*] (defining cultural gap to encompass the “tremendously important, yet sometimes hidden, barriers to international business and trade that are created by differing cultural, social, political, and economic systems”); see also Wolfgang G. Friedmann, *The Role of Law and the Function of the Lawyer in the Developing Countries*, 17 VAND. L. REV. 181 (1963) (further explaining lawyers' duties vis-à-vis traversing cultural differences); Louis B. Warren et al., *Role of the Lawyer in International Business Transactions*, A.B.A. J., Feb. 1972, at 181.

46. Arthur T. von Mehren, *The Significance of Cultural and Legal Diversity for International Transactions*, in 1 IUS PRIVATUM GENTIUM 247, 249 (Ernst von Caemmerer et al. eds., 1969), quoted in Robert W. Hillman, 19 INT'L LAW. 3, 24 (1985).

47. See Goebel, *Professional Qualification*, supra note 45, at 448.

48. See *id.* One scholar similarly likens the international lawyer's job to that of an interpreter: [T]he seamless web of [international] legal problems requires that for the proper conduct of the matter, the lawyer must be able to master the total legal situation, foreign as well as domestic or international. The law professional in international transactions is primarily an interpreter, a channel for communication between and among formally organized legal systems with differing national histories and experiences, traditions, institutions, and customs.

Henry P. DeVries, *The International Legal Profession—The Fundamental Right of Association*, 21 INT'L LAW. 845, 851 (1987).



successful business transaction.<sup>49</sup> For example, it is frowned upon to ask a French person about politics or religion, while these may be acceptable topics in an American conversation. Germans expect extreme organization and efficiency in business partners, while Italians prefer a less regimented, more spontaneous interaction.

It is, therefore, the ethical duty of the international lawyer to help the client negotiate the divergent cultural and social factors underlying the legal transaction, in addition to providing the legal advice for which all lawyers are responsible<sup>50</sup>— a difficult task if the lawyer does not know it is required of him or does not know how to do so. This view is supported by the ABA Model Rules of Professional Conduct. Rule 2.1 instructs attorneys that “[i]n rendering advice, a lawyer may refer not only to law but to *other considerations* such as moral, economic, social, and political factors that may be relevant to the client’s situation.”<sup>51</sup> The Model Rules’ predecessor, the ABA Model Code of Professional Responsibility, contains similar language. EC 7-8 reads: “A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . Advice of a lawyer to his client *need not be confined* to purely legal considerations.”<sup>52</sup>

International lawyers thus require a unique sort of training, one ideally obtained through exposure to different cultures.<sup>53</sup> Many Ameri-

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49. See, e.g., Terri Morrison & Wayne A. Conway, *Global Business Basics* (visited Jan. 21, 2000) <<http://www.getcustoms.com/omnibus/iw-arts.html>> (a compilation of *Global Business Basics*, a monthly column appearing at <<http://www.industryweek.com>>); *Business Travel Etiquette Club* (visited Jan. 21, 2000) <<http://www.travel-etiquette.com/etiindex.html>>.

50. See Goebel, *Professional Qualification*, *supra* note 45, at 447.

51. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1996) (emphasis added). Rule 2.1 also provides:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.

*Id.*

52. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980). The complete rule is as follows:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but is not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

*Id.*

53. See Goebel, *Professional Qualification*, *supra* note 45, at 458 (explaining that law schools are increasing offerings in international law classes, but most students, as well as administrators and fac-

can lawyers practicing abroad are, however, learning by doing; they have neither lived and studied in foreign countries nor taken international law courses as part of their law school curricula.<sup>54</sup> This trend results from two factors. First, much of the international work grows from domestic work for the client, and the client desires the same lawyer(s) to continue its representation.<sup>55</sup> These lawyers often have no educational qualifications for such legal work. Second, the in-house legal staff of many American multinational corporations often consists of lawyers who have limited experiences with international law and customs.<sup>56</sup> One must query if lawyers who are not conversant with foreign cultures (albeit extremely experienced domestically) are putting their clients at a disadvantage by being unable to bridge the often invisible, yet always important cultural gap.

### B. *Common v. Civil Law Systems*

Closely related to the issue of cultural differences are the different legal systems in which international lawyers practice.<sup>57</sup> Specifically, many European nations, such as France and Spain, utilize a civil law model, where codified law and tradition, and not case law precedent, form the backbone of judicial review.<sup>58</sup> This difference from the American (and British) common law system has important ethical ramifications for lawyers working in both systems.

In a civil law system, judges focus entirely on the written law in which customs and traditions are codified.<sup>59</sup> Lawyers present only relevant law to the judge; there is no arguing by analogy to other cases, as in American courts.<sup>60</sup> The civil law, or civilian, lawyer has less leeway to present facts subjectively, and some commentators interpret this limitation as leaving the civil law lawyer with less power in society and less freedom of action within the legal system than the common law counterpart.<sup>61</sup>

The civil law system thus has been characterized as “inquisitorial,” while the common law has been deemed litigious and adversarial.<sup>62</sup> The civilian lawyer is more than merely her client’s representative; she is also

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ulty, have not “realized that many lawyers will be substantially involved in international business practice during their careers”).

54. *See id.*

55. *See id.*

56. *See id.*

57. *See* Olga M. Pina, *Systems of Ethical Regulation: An International Comparison*, 1 *GEO. J. LEGAL ETHICS* 797, 798 (1988).

58. *See id.* at 800; *see also* RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 230 (4th ed. 1980) (comparing British/American and Spanish legal systems and finding that “[u]nder the Spanish system . . . when the written law is silent, before considering precedents in the cases the court is governed by the customs of the locality at the time”).

59. *See* Pina, *supra* note 57, at 800; *see also* SCHLESINGER, *supra* note 58, at 229–30.

60. *See* Pina, *supra* note 57, at 800.

61. *See id.*

62. *See id.* at 809.

part of the system of law, as evidenced by the lawyer's wearing of legal robes when she appears in court.<sup>63</sup> The common law lawyer, in contrast, wears no robe. She is set off from the judge, suggesting she is not there to cooperate with the judge but rather to present zealously her client's case.<sup>64</sup> Although in theory an officer of the court, the common law lawyer is less a part of the system and more a hired advocate for the client.<sup>65</sup>

These differences, grounded in two different schools of legal thought, translate into different ethical responsibilities for the respective lawyers as well—differences international lawyers must acknowledge to practice competently and effectively. Lawyers in both France and Spain, for instance, are regulated by law, rather than by a self-regulating bar.<sup>66</sup> A greater degree of mistrust of lawyers is grounded in the French and Spanish systems,<sup>67</sup> so authorities strive to limit the attorneys' power. For example, in these two countries, lawyers may not hold a wide variety of offices, including various public and corporate positions, while engaged in the practice of law, although they are less regulated in France<sup>68</sup> than in Spain.<sup>69</sup> American lawyers, in contrast, are only prohibited from holding positions creating a clear, articulable conflict of interest.<sup>70</sup>

The CCBE Code also addresses the issue of incompatible occupations but does not conclusively define what is or is not permissible.<sup>71</sup> In-

63. *See id.*

64. *See id.*

65. *See id.*; *see also* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 17 (1986) (finding that although American lawyers are technically considered officers of the court, this moniker is "merely suggestive of the close working relationship between judges and traditional courtroom practitioners and today lacks much definitive significance in the law").

66. *See* Pina, *supra* note 57, at 810.

67. *See id.*; *see also* James Beardsley, *Proof of Fact in French Civil Procedure*, 34 *AM. J. COMP. L.* 459, 478 (1986) (explaining the French system's dislike of lawyer-offered oral evidence).

68. *See* Pina, *supra* note 57, at 807 ("Lawyers [in France] may not serve as partners or managers of small businesses, nor as 'Directeurs Generals' (Chief Executive Officers) of corporations, unless the latter are set up solely for handling family or professional interests. Yet lawyers may, with the consent of the bar association, serve as members of boards of directors.").

Lawyers may also be elected to the French National Assembly but subject to certain restrictions intended to avoid potential conflicts of interest. *See id.*; *see also* SERGE-PIERRE LAGUETTE, *LAWYERS IN THE EUROPEAN COMMUNITY* 78–90 (1987) (explaining further the conflicts laws of 10 European countries).

69. *See* Pina, *supra* note 57, at 802 (noting that in Spain, lawyers may not hold a number of public offices, including president, prime minister, secretary of state, or any position within the *Secretariado de los Juzgados y Tribunaes*, the Spanish equivalent of the U.S. Department of Justice that regulates the court system; furthermore, lawyers may not serve as business agents, the title conferred upon anyone holding a position of responsibility in a business).

70. The Model Rules illustrate the American position:

(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 to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consults in writing thereto.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (1996).

71. *See* Terry, *supra* note 11, at 24. The CCBE materials explain:

stead, the Code provides a conflicts rule whereby lawyers should use host state rules in two situations: (1) where a lawyer is representing or defending a client in legal proceedings or before a public authority in the host state and (2) where the lawyer has permanently established himself in the host state.<sup>72</sup>

More generally, the Preamble to the Model Rules emphasizes a lawyer's obligation to his client. The Preamble to the CCBE, in contrast, consistent with the civil law traditions of its signatory nations, references a lawyer's obligations to society.<sup>73</sup> In addition, both French and Spanish laws restrict the number of attorneys permitted to join one firm, again an outgrowth of the pervasive suspicion of lawyers.<sup>74</sup> In Paris, for example, 5600 *avocats* (lawyers) practice there, and only 1540 law offices employ more than one lawyer; of these 1540, only 130 include five or more.<sup>75</sup> Very few offices have more than thirty attorneys.<sup>76</sup> Spain, in turn, limits the number of attorneys practicing in one firm to twenty.<sup>77</sup> Law firms in the United States, however, have no such restrictions on their ability to expand, as illustrated by the large number of megafirms employing a hundred or more lawyers.<sup>78</sup> Some critics denounce the large firms as resembling money-hungry big business, where billable hours, as opposed to legal integrity, are the lifeblood.<sup>79</sup>

Contingent fee agreements provide another significant difference between the two systems, again an important consideration for American

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There are differences both between and within Member States on the extent to which lawyers are permitted to engage in other occupations, for example in commercial activities. The general purpose of rules excluding a lawyer from other occupations is to protect him from influences which might impair his independence or his role in the administration of justice. The variations in these rules reflect different local conditions, different perceptions of the proper function of lawyers and different techniques of rule-making. For instance, in some cases there is a complete prohibition of engagement in certain named occupations, whereas in other cases engagement in other occupations is generally permitted, subject to observance of specific safeguards for the lawyer's independence.

EXPLANATORY MEMORANDUM AND COMMENTARY ON THE CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY § 2.5, *reprinted in* Terry, *supra* note 11, at app. C.

72. See CCBE CODE, *supra* note 11, Rules 2.5.2–2.5.3.

73. See Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 *FORDHAM INT'L L.J.* 1239, 1262–63 (1998).

74. See Pina, *supra* note 57, at 810.

75. See *id.*

76. See *id.*

77. See *id.*

78. See *id.*

79. One critic of large firm ethics found the following to be pervasive:

We can see . . . problems in the major law firms. There we see partners billing clients for associates' time three times what they are paid. We see associates being told, "[t]wo thousand billable hours a year or you're out." Is an honest two thousand billable hours possible? . . . These are young people. They're still learning; they've got to spend some of their time just trying to figure things out. [But yet] they have got to get those billable hours in. . . . The overhead is at such a level that the firm "has" to have it. It is teaching people to be soft on an ethical issue of critical importance.

Ramsey Clark, *The Lawyer's Duty of Loyalty: To the Client or to the Institution?*, 16 *LOY. U. CHI. L.J.* 459, 466–67 (1985).

lawyers practicing in other countries.<sup>80</sup> The Model Rules permit such agreements, whereby lawyers make their fees contingent upon winning for the client, except in certain contexts such as divorce and criminal litigation.<sup>81</sup> Civil law countries, however, do not countenance contingent fee agreements, as such arrangements raise questions of professional independence.<sup>82</sup> Lawyers as professionals are bound to serve the system, a duty separate from aiding the individual client, and if their remuneration were to depend upon the client's success, the client would garner more attention and care than the system at large.<sup>83</sup>

At first blush, the CCBE Code mirrors the laws of its Member States and bans contingency fees.<sup>84</sup> The accompanying CCBE Explanatory Memorandum conveys similar sentiments, providing that "these provisions reflect the common position in all Member States than an unregulated agreement for contingency fees is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused."<sup>85</sup> Yet the prohibition is not absolute. The Code permits a form of contingency fees where bar-approved fee schedules may be used to supplement a lawyer's fee if that lawyer is successful.<sup>86</sup>

Moreover, the concept of privilege is countenanced differently within the common and civil law systems, and its parameters are defined differently. Common law lawyers refer to "legal professional privilege,"

80. See Pina, *supra* note 57, at 814.

81. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.5(c), (d)(1)–(2) (1996) (delineating requirements for collecting contingency fees, including, for example, that the agreement be in writing and specify the "method by which the fee is to be determined"). Further, advocates of contingency fees point out that contingency fees allow those clients unable to pay an attorney up front the opportunity to pursue their claims in court. See Pina, *supra* note 57, at 814. Also mentioned, however, is the argument that this "very arrangement . . . gives American lawyers their reputation as shysters and ambulance chasers. Critics of the legal profession see American attorneys as looking to stir up trouble just so that they may benefit from such contingency contracts." *Id.*

82. See Pina, *supra* note 57, at 814. For example:

[An attorney's position as adviser to his client] is jeopardized and deprecated if the attorney amalgamates the interest which he has in an adequate remuneration, with the interests of his client, by making his remuneration depend upon the success of the action. . . . [S]uch an agreement[] violates the principles of professional ethics. . . . The unethical nature of an agreement by which a lawyer obtains a part of the product of his activities as his remuneration can be denied only by those who think the individual lawyer should enjoy complete freedom with respect to the economic side of his professional life.

*In re G. v. F.*, 1933 RGZ 142.70 (Reichsgericht 3d Civ. Div.), reprinted in SCHLESINGER, *supra* note 58, at 653–59.

83. See Pina, *supra* note 57, at 813; see also Daly, *supra* note 73, at 1293 (analyzing the prohibition of contingency fees "from an economic and historical perspective at a pronounced macrolevel. Many civil law countries and the U.K. have mandatory health insurance and labor legislation that provides a safety-net for injured workers, accident victims, and the disabled. Similarly comprehensive programs do not exist in the United States. Workers compensation laws and federal social security insurance programs are relatively new and their payments are usually inadequate.").

84. See CCBE CODE, *supra* note 11, Rule 3.3.1.

85. Toulmin, *supra* note 36, at 682 n.54.

86. See CCBE CODE, *supra* note 11, Rule 3.3.3; see also Terry, *supra* note 11, at 32 n.127 (explaining that contingency fees are strictly prohibited in Austria, Cyprus, Germany, Norway, and Spain and that contingency fees are prohibited "except in accordance with the CCBE Code of Conduct in Belgium, Denmark, France, and the Netherlands").

whereas civil law lawyers understand the “professional secret.”<sup>87</sup> The legal professional privilege is one falling within the common law of evidence that protects all facets of the attorney-client relationship.<sup>88</sup> One commentator has noted:

The rules usually refer to whether a question may be addressed to a witness and if so whether the answer may be used as evidence or whether a document may be used. Such circumstances assume that the witness or document [is] already in Court, the question . . . for the judge rather than the advocate or witness. It also presupposes a distinction between what is said or written, and what is evidence, a distinction which is not clear to a [c]ivil [l]awyer.<sup>89</sup>

Failure to observe these professional rules, which apply solely to the attorney-client relationship, may result in disciplinary sanctions and actions for damages but carry no criminal repercussions.<sup>90</sup> The client may, moreover, intentionally waive his right in writing and ask his lawyer to produce a document or testify, or he may involuntarily waive his right if he gives information to his lawyer concerning a prospective fraud or crime.<sup>91</sup>

The professional secret, in contrast, has as its source a specific law: a penal code provision that deems the revealing of another’s secret an offense; less, however, falls within its protection.<sup>92</sup> Information given by the lawyer to the client is not protected, unlike the common law rules where both information given by and to the lawyer is subsumed under the concept of privilege.<sup>93</sup> Further, correspondence between lawyers enjoys no protection.<sup>94</sup> The protection only arises where “protected information goes beyond the lawyer to anyone who by reason of their office, status or profession, may be recipient of another’s secret.”<sup>95</sup> Lawyers are not the only professionals charged with keeping the professional secret. The laws regulating the privilege are merely a specific application of more general

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87. LAGUETTE, *supra* note 68, at 139–57; *see also* LINDA S. SPEDDING, TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES 127 (1987).

88. *See* LAGUETTE, *supra* note 68, at 140 (defining the privilege as extending to all advice given by the lawyer to the client and all information given by the client to the lawyer; while correspondence between lawyers is similarly protected, requests can be made for its disclosure).

89. SPEDDING, *supra* note 87, at 127 n.252.

90. *See* LAGUETTE, *supra* note 68, at 141.

91. *See id.*

92. *See id.* at 141–42.

93. *See* SPEDDING, *supra* note 87, at 127–28 (“The secret has positive protection because the lawyer must keep it, and negative protection because the Courts must not force it from him.”).

94. *See id.*

95. *Id.* at 127 (explaining that the professional secret law does not “protect advice or information communicated by a lawyer, as it is concerned only with the duties and corresponding rights of the person to whom the secret as been communicated”).

rules applicable to other professionals.<sup>96</sup> A violation of the rules is a criminal offense.<sup>97</sup>

The CCBE Code, for its part, declares an absolute rule of confidentiality with no exceptions.<sup>98</sup> Despite the unequivocal nature of the rule, however, some scholars think reality is otherwise; that behind the rule, questions still lurk as to the contours of the privilege,<sup>99</sup> especially because privilege is understood somewhat differently in each country.<sup>100</sup>

### C. Other Ethical Differences

In addition to the civil law/common law differences elucidated above, other important ethical discrepancies exist in the international context. American lawyers are permitted to advertise themselves and their practices “through the public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.”<sup>101</sup> Yet this right does not follow them to every overseas jurisdiction. Lawyers in France and Belgium, for example, are forbidden to advertise,<sup>102</sup> and American lawyers practicing there must be cognizant of this ethical restriction. The CCBE only provides that lawyers are forbidden to advertise or otherwise garner personal publicity in countries where it is not already permitted.<sup>103</sup>

Another crucial difference relates to the attorney-client privilege, which is broadly defined to encompass the privilege in all its forms, including both the legal professional privilege and the professional secret. In the United States, Model Rule 1.6 emphasizes the importance of the “full and frank communication between attorneys and their clients”<sup>104</sup>

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96. See LAGUETTE, *supra* note 68, at 142 n.39. The book uses France as an example, where professional secrecy is required of physicians, surgeons, and other medical personnel, pharmacists, midwives, and all other persons who by virtue of their status or profession, or of their temporary or permanent office, are the recipients of secrets confided to them (Article 378 of the French Criminal Code), except in those cases where the law obliges or authorizes them to inform the authorities.

*Id.*

97. See *id.* at 140 (calling the professional secrecy law one of “public policy”).

98. See CCBE CODE, *supra* note 11, Rule 2.3.

99. See, e.g., Terry, *supra* note 11, at 27–28. Professor Terry explains:

While there can be no doubt as to the essential principle of the duty of confidentiality, the [CCBE] has found that there are significant differences between the member countries as to the precise extent of the lawyer’s rights and duties. These differences which are sometimes very subtle in character especially concern the rights and duties of a lawyer vis-à-vis his client, the courts in criminal cases, and administrative authorities in fiscal cases.

*Id.* Professor Terry thinks the “significant differences” have not yet been resolved. See *id.*

100. See SPEDDING, *supra* note 87, at 126–33.

101. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1996) (providing limits on lawyer advertising).

102. See Goebel, *Professional Qualification*, *supra* note 45, at 521.

103. See CCBE CODE, *supra* note 11, Rule 2.6.1.

104. *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) (holding that attorney-client privilege covers in-house corporation communications with all employees, not merely those in the company’s “control group”); see also *id.* at 389 (“The attorney-client privilege is the oldest of the privileges for

necessary for good, complete legal representation. Specifically, Rule 1.6 mandates that lawyers shall not reveal "information related to the representation of a client, unless the client consents after consultation."<sup>105</sup> Further, this overreaching principle of confidentiality applies both to confidentiality as defined in the rules of ethics, as well as attorney-client privilege situations (including work product doctrine) in the law of evidence.<sup>106</sup>

The American rules also extend the attorney-client privilege to all in-house and foreign counsel practicing in the United States.<sup>107</sup> In *Renfield Corp. v. E. Remy Martin & Co.*,<sup>108</sup> the court granted the attorney-client privilege to any individual who is "competent to render legal advice and is permitted by law to do so."<sup>109</sup> The case involved communications between employees of the defendant, a subsidiary of a French cognac producer, and the French in-house counsel of the parent company.<sup>110</sup>

Moreover, the American Law Institute (ALI) recently completed its first Restatement of the Law Governing Lawyers, which was approved at the organization's annual meeting in May 1998.<sup>111</sup> Included in the portion on attorney-client privilege is a section indicating that communications

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confidential privileges known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." (citation omitted)).

105. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6. Rule 1.6 further provides that:

- (a) a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent the client from committing a criminal act that lawyer believes is likely to result in imminent death or substantial bodily harm; or
  - (2) to establish a claim or defenses 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.

*Id.*

106. Comments to Rule 1.6 explains this principle further:

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

*Id.* cmt. 5.

107. See Goebel, *Professional Qualification*, *supra* note 45, at 506.

108. 98 F.R.D. 442 (D. Del. 1982).

109. *Id.* at 444.

110. See *id.* at 442; see also *Mitts & Merrill, Inc. v. Shred Pax Corp.*, 112 F.R.D. 349, 352 (N.D. Ill. 1986) (extending privilege to communications with a German patent agent); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954 (N.D. Ill. 1982) (awarding privilege to communications with British and Canadian patent agents when such agents "engaged in the substantive lawyering process").

111. See Goebel, *Professional Qualification*, *supra* note 45, at 506.



made by a client to a foreign lawyer should be protected.<sup>112</sup> If the client believed that the lawyer was counseling him on a legal matter, the ALI reasoned, it was not important whether the lawyer was in fact admitted to practice within a particular U.S. jurisdiction or even admitted to practice as an American lawyer.<sup>113</sup>

In Europe, however, a similar rule of attorney-client privilege is not granted to non-EC lawyers who practice European Union law.<sup>114</sup> This exclusion is the result of American and other in-house attorneys typically not being admitted to the bars in the foreign countries in which they practice; thus, they are not subject to national rules of conduct.<sup>115</sup>

In 1982, the European Court of Justice decided *AM&S Europe v. Commission*, a seminal case involving the British subsidiary of an Australian company and the EC Commission in a dispute over the breadth of the attorney-client privilege during an antitrust investigation.<sup>116</sup> The court ruled that the attorney-client privilege was a basic right, taken from “principles and concepts common” to all member countries.<sup>117</sup> The principle is subject to two conditions: (1) that the communication be for the client’s “right of defen[s]e” and (2) that the disclosure be to a lawyer who is independent, meaning one who is not bound to the client by a “relationship of employment” and “entitled to practi[c]e his profession in a Member State.”<sup>118</sup> The attorney-client privilege does not apply to in-house lawyers<sup>119</sup> nor does it extend to lawyers not subject to rules of conduct in any EC countries, thereby excluding American lawyers.<sup>120</sup>

112. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 122, at 378 (Proposed Final Draft No. 1, 1996).

113. See *id.* § 122 cmt. e, at 381–82; see also Ritchenya A. Shepard, *Law of Lawyering*, 84 A.B.A. J. 30 (1994).

114. See Goebel, *Professional Qualification*, *supra* note 45, at 504.

115. See Roorda, *supra* note 4, at 158.

116. Case 155/79, *AM&S Europe Ltd. v. Commission of the European Communities*, 1982 E.C.R. 1575, 2 C.M.L.R. 264 (1982).

117. *Id.* at 1610–11. The court recognized the privilege as stemming from various rationales. Whereas some states focus “principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law,” others justify the privilege “by the more specific requirement . . . that the rights of the defen[s]e must be respected.” *Id.*

118. *Id.*

119. See SPEDDING, *supra* note 87, at 130. Spedding explains:

The exclusion of the in-house or employed lawyer is that of most Civil Law systems in which employment is incompatible with the professional status. The result is that an employed lawyer’s files are not confidential. The Court limited the principle to lawyers in private practice despite the Opinions of two Advocates General, a possible concession offered by the Commission, and the contrary position in England and Wales, as well as possibly the rest of the UK and Ireland.

*Id.*; see also Peter H. Burkard, *Attorney-Client Privilege in the EEC: The Perspective of a Multinational Corporate Counsel*, 20 INT’L LAW. 677 (1986); Daly, *supra* note 73, at 1278–79; Alison M. Hill, Note, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 CASE W. RES. J. INT’L L. 145 (1995).

120. See SPEDDING, *supra* note 87, at 130–31. Spedding elaborates:

The further limitation to an independent lawyer entitled to practice in an EEC country was taken from the scope of named professions in the Directive on Services. The French text of the judgment is clearer, saying that the lawyer must be “inscrit au barreau de l’un des États Membres,” a member of a Bar in a Member State.

The *AM&S* ruling thus severely cripples American and other non-EC lawyers practicing in Europe and seeking to give advice on any EC law, both to EC and non-EC clients.<sup>121</sup> Although the Commission has “informally indicated” that it will respect the attorney-client privilege in its dealings with “reputable” American law firms in Europe, it is not certain the Commission will actually do so.<sup>122</sup> The ABA House of Delegates, apparently recognizing the danger of the *AM&S* ruling, urged the Commission in February 1984 to uphold the attorney-client privilege with respect to communications between EC clients and American lawyers and to similarly extend the privilege to American lawyers working as in-house counsel for EC entities.<sup>123</sup> No action has yet been taken.<sup>124</sup>

Buttressing American fears is a 1984 Commission decision in which John Deere, an American agricultural equipment manufacturer, was issued a substantial fine for violating EC antitrust rules.<sup>125</sup> The Commission used an internal memo of an American in-house lawyer, a document protected by attorney-client privilege in the United States, as evidence of the competition violation.<sup>126</sup> It should be noted, however, that the Commission has not to date attempted to include as evidence a client communication with an outside U.S. counsel.<sup>127</sup>

#### D. Conflicts of Interest

The conflict of interest provisions in the CCBE are much stricter than an American lawyer would anticipate.<sup>128</sup> More specifically, “[a] law-

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*Id.*; see also Burkard, *supra* note 119, at 681–85 (criticizing the *AM&S* decision); Goebel, *Professional Qualification*, *supra* note 45, at 504.

121. See Goebel, *Professional Qualification*, *supra* note 45, at 504.

122. See Roorda, *supra* note 4, at 158.

123. See Goebel, *Professional Qualification*, *supra* note 45, at 504.

124. See SPEDDING, *supra* note 87, at 210 (advocating the negotiation of some form of reciprocal agreement between the EC and the United States to avoid any privilege problems created by the *AM&S* decision).

125. See Decision of December 14, 1984, *Re John Deere*, O.J. 1985 L35/58, [1985] 2 C.M.L.R. 554, noted in 11 EUR. L. REV. 85–86 (1986).

126. See Roorda, *supra* note 4, at 158.

127. See Goebel, *Lawyers in the EC*, *supra* note 10, at 639; see also Daly, *supra* note 73, at 1280. Professor Daly explains that, practically speaking, little changed as a result of the *AM&S* and *John Deere* decisions:

One might well expect . . . the European Commission would have bombarded U.S. companies with subpoena for legal memoranda prepared by in-house counsel. It did not. The Commission recognized that seeking the release of such memoranda would have serious political repercussions. It made a calculated decision that the fall-out was not worth the potential gain. Therefore, it proceeded cautiously. It initially asked the Council of Ministers to negotiate a treaty with the United States providing for a reciprocal recognition of the privilege. When the Council showed no interest, it then effectively shelved the question of the privilege by not issuing subpoenas for memoranda prepared by in-house counsel . . . [T]he Commission’s self-discipline has defused the issue.

*Id.*

128. Rule 1.7 of the Model Rules provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

yer 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 conflict, between the interests of those clients.”<sup>129</sup> Rules similarly forbid representation if a lawyer’s representation of a former client could somehow give an “undue advantage to the new client.”<sup>130</sup> Most importantly, the CCBE has no waiver option; that is, the client cannot waive his right to a conflict-free lawyer, as is the common practice in America.<sup>131</sup> Yet this omission is not so glaring as it first appears. European lawyers interpret the term “conflicts of interest” much more narrowly than their American counterparts; client consent, therefore, is not a “real issue.”<sup>132</sup>

### E. Competence

American lawyers, above all, are required to act competently; the ABA edict to provide competent representation is the first rule espoused

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(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1996); *see also* Terry, *supra* note 11, at 31.

129. CCBE CODE, *supra* note 11, Rule 3.2.1.

130. *Id.* Rule 3.2.3.

131. *See* Terry, *supra* note 11, at 32. Professor Terry posits that the omission of a consent exception [from the CCBE Code] might be interpreted to mean only that the issue has not been discussed or resolved. For example, [one scholar] has indicated her belief that a client may waive certain potential conflicts of interest after proper consultation and therefore that the CCBE Code should contain the same principle.

*Id.*

132. Daly, *supra* note 73, at 1289. Professor Daly reports that the conflicts of interest contemplated in foreign codes of lawyer conduct mostly resemble the sorts of direct adversity in relationships that even clients in the United States cannot generally waive. The absence of a waiver provision in the CCBE Code reflects a sustained confidence in a lawyer’s ability to identify a conflict and a willingness to decline a representation through an exercise of self-discipline.

*Id.*

In addition, Professor Daly explains that the United States has adopted an “autonomy model,” which “defines conflicts broadly, imposes on a lawyer the duty to inform the client fully of the conflict, and leaves the decision on consent or waiver to the client.” *Id.* at 1290. Europe, in contrast, makes use of a paternalistic model, which “leaves the evaluation of a conflict to the lawyer and makes no provision for informing the client or obtaining consent.” *Id.* The paternalistic model is explained, at least in part, by reference to economic analysis:

An economic analysis based on historical and geographical restrictions on practice can also shed light on the difference between the autonomy and paternalism models. Law firms in the civil law countries have tended to be much smaller than in the United States. Until very recently, lawyers in civil law systems were admitted to a particular bar, usually defined in territorial terms (e.g., the bar of Paris, the bar of Dusseldorf, etc.). Rights to practice in other parts of the country were limited. This limitation necessarily constricted a lawyer’s potential client base . . . . A generous interpretation of the concept of conflicts of interest would have added an even greater economic burden.

*Id.*

in the Model Code.<sup>133</sup> Pointedly, “[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”<sup>134</sup> Lawyers practicing domestically encounter competency issues in deciding whether to take cases outside of their particular areas of expertise and practice. The comments to Rule 1.1 suggest that, in assessing competence, lawyers should evaluate their experience, ability to study and learn, and feasibility of referring to or consulting with other lawyers.<sup>135</sup>

International lawyers, however, are held to elevated ethical standards in determining their competence. They are not merely dealing with a different area of the law; in many instances they are working with completely foreign laws and legal systems.

American lawyers are expected to know foreign laws if they are working in foreign jurisdictions. Courts have deemed this knowledge an affirmative duty.<sup>136</sup> In *Degen v. Steinbrink*,<sup>137</sup> the court held that New York lawyers were required to know the laws of New Jersey, a foreign jurisdiction:

When a lawyer undertakes to prepare papers to be filed in a state foreign to his place of practice, it is his duty, if he has not knowledge of the statutes, to inform himself, for like any artisan, by undertaking the work, he represents that he is capable of performing it in a skillful manner.<sup>138</sup>

A more recent case, *In re Roel*,<sup>139</sup> cited *Degen* to buttress the following dictum: “When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter and may not claim that they are not required to know the law of the foreign State.”<sup>140</sup>

Because the definition of competence thus includes knowledge of foreign laws and customs, American lawyers practicing abroad often find it wise and even necessary to refer cases to local, foreign counsel.<sup>141</sup> Further, lawyers serve a different function in the United States than any-

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133. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”).

134. *Id.*

135. See *id.* Rule 1.1 cmt. 1; see also Hillman, *supra* note 46, at 13 n.42 (noting that the comment to Rule 1.1 is of “some interest . . . because it may suggest a standard slightly less rigorous than that outlined in *Degen*”).

136. See Timothy E. Powers, *Ethical Considerations in International Business Transactions*, PROF. LAW., June 1995, at 100–01.

137. 195 N.Y.S. 810 (1922), *aff’d*, 236 N.Y. 669 (1923).

138. *Id.* at 814. The *Degen* rule was subsequently adopted by the Seventh Circuit in *Rekeweg v. Federal Mutual Insurance Co.*, 324 F.2d 150, 152 (7th Cir. 1963).

139. 144 N.E.2d 24 (N.Y. 1957), *appeal dismissed*, 355 U.S. 604 (1958). The New York Court of Appeals held that a Mexican lawyer living in New York and advising New York residents and bar members on Mexican law was practicing law in New York. See *id.* at 26.

140. *Id.* at 28.

141. See Goebel, *Professional Qualification*, *supra* note 45, at 453.

where else in the world, a variant perhaps explained by the fact that Americans lawyers perform services in the United States that nonlawyers do elsewhere.<sup>142</sup> In many foreign countries, the legal profession “is not a single profession, but several—including professions which may bisect, overlap, or entirely end-run our own.”<sup>143</sup> France, for example, historically permitted *avocats* and *avoués* to handle litigation, while *notaires* created corporate charters, wills, and other public documents.<sup>144</sup> *Conseils juridiques*, who were not even required to undergo legal training, gave business planning, structuring, and tax advice.<sup>145</sup> The United Kingdom has a similar division of work and authority: barristers and solicitors belong to “entirely separate professions . . . [Solicitors] have traditionally viewed their professional function rather narrowly, with the result that they do not handle many elements of an international business practice on the U.S. model.”<sup>146</sup> In general, most civil law countries do not recognize a legal distinction between lawyers and notaries, but differences, in fact, exist.<sup>147</sup> Thus, one practitioner’s conclusion is that:

“there’s no such thing” as a “lawyer” in most foreign countries. The American word “lawyer” doesn’t even translate into most foreign languages because it connotes a broader function than any single professional person performs abroad. Therefore the client’s often-heard question “What lawyer do you recommend in Country X?” is usually [the wrong one]. The right question is: “I want to accomplish thus-and-so in Country X. What local professional help can you recommend?”<sup>148</sup>

In sum, case referral is clearly wise,<sup>149</sup> yet ethical obligations are not completed once the lawyers decides to refer the case. Numerous ethical issues are inherent in the very selection of alternate counsel.<sup>150</sup> Specifically, the American lawyer must select a capable professional who will provide competent and excellent legal counsel<sup>151</sup> and, just as importantly,

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142. See Ewell E. Murphy, Jr., *A Guide to Foreign Law Source Materials and Foreign Counsel*, 19 INT’L LAW. 39, 45 (1985).

143. *Id.* at 46.

144. *See id.*

145. *See id.*

146. *Id.*

147. *See id.* Professor Murphy illustrates further:

In Guatemala, for example, lawyers may function as both *abogados* [lawyers] and *notarios* [notaries], and in the Netherlands enterprising attorneys and notaries have formed amalgamated firms, which provide substantially all the services of a large U.S. law firm. In the Netherlands Antilles, the more imaginative notaries have launched into tax planning and business-law advice as well as the traditional documentary functions of a notary.

*Id.*

148. *Id.*

149. Of course, a lawyer must ascertain whether the client’s legal problem involves a particular nation state’s law or whether it includes any EU law components. Choice of counsel could potentially be affected by such considerations.

150. *See* Murphy, *supra* note 142, at 46.

151. *See* Powers, *supra* note 136, at 102 (finding that ideal foreign counsel should “facilitate ongoing participation in the project; listen well to an articulation of the clients’ needs and goals; commu-

will permit the American lawyer to remain involved in the case, thus fulfilling any remaining ethical responsibilities to the client in a supervisory sense.<sup>152</sup>

Returning to American case law, simply referring a client to a foreign lawyer who performs negligently is not enough to find the referring attorney negligent, but an attorney still must use reasonable care.<sup>153</sup> In *Wildermann v. Wachtell*,<sup>154</sup> the court held: "A lawyer should not be held to a stricter rule in foreign matters than the exercise of due care in recommending a foreign attorney. To do so would subject him to hazards which he is not qualified either to anticipate or to prevent."<sup>155</sup> Other cases, however, have held lawyers liable for failing to verify the foreign counsel's competence<sup>156</sup> or failing to provide continuing supervision.<sup>157</sup>

International lawyers are thus confronted with two conflicting ethical obligations, those of zealousness and competence.<sup>158</sup> American lawyers practicing abroad must balance the two duties of zealously advocating for their clients and ensuring that the advocacy is competent;<sup>159</sup> this often includes delegating the case to a foreign lawyer.<sup>160</sup> Zealousness, therefore, is construed differently in the international domain than in a domestic context; it does not solely encompass commitment and dedication to the client's case, as in America, but also when and to whom the lawyer should refer a case and how much ongoing responsibility is necessary.

#### F. *Unauthorized Practice of Law*

The implementation of integrated markets has been the hallmark of European progress during the previous half-century. More specifically, in March 1957 six European countries—France, West Germany, Italy, the Netherlands, Belgium, and Luxembourg—joined together to sign the Treaty of Rome, which, on January 1, 1958, created the EC.<sup>161</sup> Although known primarily for its role as a type of trading entity, whereby the free

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nicate clearly and regularly; and take a creative, thoughtful role in the legal and business planning for the transaction"); see also Lutz, *supra* note 23, at 81–85.

152. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1996) (listing responsibilities of a partner or supervisory lawyer vis-à-vis the firm and other lawyers).

153. See *Wilderman v. Wachtel*, 267 N.Y.S. 840 (N.Y. Sup. Ct. 1933).

154. *Id.*

155. *Id.* at 841–42.

156. See, e.g., *Bluestein v. State Bar*, 529 P.2d 599 (Cal. 1974) (suspending an attorney from the practice of law for six months for permitting a lawyer not licensed in California to give a client legal advice).

157. See *Tormo v. Yormark*, 398 F. Supp. 1159, 1170 (D.N.J. 1985) (holding that lawyers are under a continuing duty to "exercise care in retaining [other attorneys] to ensure that [they are] competent and trustworthy").

158. See Powers, *supra* note 136, at 92.

159. See MODEL RULES OF PROFESSIONAL CONDUCT preamble, Rule 1.3 cmt. 1 (1996).

160. See Powers, *supra* note 136, at 92.

161. See Roger G. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J., 1092, 1094 (1995).

movement of goods is permitted internally and externally, the EC also reaches, among other things, the harmonization of the practice of law.<sup>162</sup>

The treaty had as one of its key objectives the establishment of what is known as the four freedoms: the freedom of movement of goods, capital, services, and persons.<sup>163</sup> Lawyers, moreover, benefit from two additional rights granted in the treaty, rights that comprise the majority of the EC's jurisprudence relating to lawyers. Article 52, which provides for the progressive abolition of restrictions on the freedom of establishment,<sup>164</sup> is generally understood as the "right to enter into a country and reside there beyond a transitory period."<sup>165</sup> Article 59<sup>166</sup> concerns the provision of services in the following situations: (1) a lawyer visiting a client in another Member State; (2) a lawyer receiving a client from another Member State; (3) neither lawyer nor client leaving his country; and (4) a lawyer traveling to another Member State in the service of a client from a third-party State.<sup>167</sup> Both articles, however, are tempered by Article 57, which indicates a need for a communitywide directive to provide for mutual recognition of educational diplomas.<sup>168</sup> Although earmarked to pro-

162. See generally Goebel, *Lawyers in the EC*, *supra* note 10.

163. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573, 588 (1992) [hereinafter EC TREATY]; see also Goebel, *Lawyers in the EC*, *supra* note 10.

164. Article 52 provides in pertinent part:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member-State in the territory of another member-State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any member-State established in the territory of any member-State.

EC TREATY, *supra* note 163, art. 52; see also DERRICK WYATT & ALAN DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC 199* (1987) (defining establishment to connote "permanent integration into the host State's economy," different than the right to provide services, which may involve residence in the host State but falls short of establishment).

165. Todd Michael Saunders, *The EEC and the USA: Will the Gates Be Opened for American Law Firms in 1992?*, 3 TEMP. INT'L & COMP. L.J. 191, 196 (1989); see also LAGUETTE, *supra* note 68, at 238.

166. Article 59 reads in part: "[R]estrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of member-States who are established in a State of the Community other than that of the person for whom the services are intended." EC TREATY, *supra* note 163, art. 59.

167. See Saunders, *supra* note 165, at 201.

168. See Goebel, *Professional Qualification*, *supra* note 45, at 486. Important here is the difference between two relevant forms of legislation, regulations and directives:

Regulations are more like laws, in that they are immediately binding on the entire Community when passed and give rights or impose obligations on individuals and enterprises. Directives are binding instructions to the Member States to take specific legislative or regulatory action to execute the precise goals and substantive framework set out in the directive. Until a Member State acts to implement it, a directive does not usually have the force of law, although in some instances the European Court of Justice (the EEC equivalent of the United States Supreme Court) has held that certain directives do have direct legal effect in Member States and provide immediate sources of rights and/or obligations of individuals and enterprises.

*Id.* at 486 n.123. The official wording of the treaty is as follows:

mote the right of establishment, Article 57 was commonly understood as requiring a system for recognizing diplomas before the right of professional establishment could take root.<sup>169</sup> As a result, little occurred until 1974, when the European Court of Justice decided a pair of groundbreaking cases.<sup>170</sup>

In the first case, *Jean Reyners v. Belgium*,<sup>171</sup> the court held that Article 52—the right of professional establishment—was subject to direct effect, meaning that no additional legislation was necessary to implement it.<sup>172</sup> Implementing a directive regarding the mutual recognition of diplomas was not a prerequisite to the direct effect of Article 52; the “rule on equal treatment” was found effective even in the absence of a directive.<sup>173</sup> The Dutch national who held a Belgian legal diploma and the requisite credentials to become an *avocat* in Brussels could not be prevented from practicing law in Belgium because he was not a Belgian citizen.<sup>174</sup>

In *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*,<sup>175</sup> the court, marshaling the nondiscrimination clause in Article 59, similarly held that the right of professional services had direct effect.<sup>176</sup> The court found that a Dutch legal representative authorized to handle administrative matters in the Netherlands could not be banned from practicing there solely because he moved to Belgium.<sup>177</sup>

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A regulation [enacted by the Council or Commission] shall have general application. It shall be binding in its entirety and directly applicable to all member-States [including its citizens]. A directive shall be binding, as to the result to be achieved, upon each member-State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

EC TREATY, *supra* note 163, art. 189.

169. See Goebel, *Lawyers in the EC*, *supra* note 10, at 569.

170. See *id.* at 569–70 (finding that “little progress” occurred between 1957 and 1975). More specifically:

The Council of Ministers adopted some directives in that period, but they concerned primarily agriculture, corporate, or commercial activities. Although the Commission proposed many draft directives for professions, these languished at the stage of examination by the Council because of perceived serious differences among the Member States as to the proper levels of professional education or training and the scope of professional activities.

*Id.*

171. Case 2/74, *Jean Reyners v. Belgian State*, 1974 E.C.R. 631, [1974] 2 C.M.L.R. 305 (1974).

172. See *id.* at 631 (“The rule on equal treatment with nationals is one of the fundamental legal provisions of the Community. As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all Member States.”); see also Brand, *supra* note 21, at 312; Goebel, *Lawyers in the EC*, *supra* note 10, at 572.

173. *Reyners*, 1974 E.C.R. at 651–52. Additional exams, however, can be required before such an *avocat* can settle, practice, and be licensed and registered. See *Johannes Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 33/74, 1974 E.C.R. 1299, 1306.

174. See Brand, *supra* note 21, at 312.

175. *Van Binsbergen*, 1974 E.C.R. at 1306.

176. See *id.*

177. See *id.*; see also Goebel, *Lawyers in the EC*, *supra* note 10, at 572 (“[T]he Netherlands could not require an otherwise qualified legal representative to be a resident, any more than Belgium could require an *avocat* to be a citizen.”).



International practitioner turned scholar Robert J. Goebel has emphasized the extreme “doctrinal importance” of *Reyners* and *van Binsbergen*:

If the application of the doctrine of direct effect had been rejected by the Court, Articles 52 and 59 in essence would have remained only abstract theoretical provisions, and professionals would have acquired rights only as and when the Council of Ministers might pass directives. Instead, the Court’s holdings meant that every professional within the Community has, by direct effect of these Treaty articles, at least the right to be treated without discrimination by host state authorities.<sup>178</sup>

The two cases led to the March 22, 1977, adoption of a directive on lawyers’ freedom to provide services.<sup>179</sup> A complex listing of choice of law provisions, the directive is a response to particular language in the *van Binsbergen* decision;<sup>180</sup> the court there held that the host state could require a person working across borders to follow “professional rules justified by the general good—in particular rules relating to organization, qualifications, professional ethics, supervision and liability.”<sup>181</sup> The directive also provides that lawyers licensed in their home states may perform the same services in other states.<sup>182</sup> The directive, coupled with the court’s broad interpretation of the Treaty of Rome, supplies lawyers with a strong backdrop for providing legal services in other EC countries. In fact, the European Court itself has broadly construed the directive to strike down Member State protectionist legislation requiring foreign lawyers to collaborate with domestic ones in certain proceedings.<sup>183</sup>

The 1977 Directive on Legal Services should not, in theory, affect the American practitioner; after all, its scope of application extends only to nationals of the Member States.<sup>184</sup> Yet “certain indirect effects” may

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178. Goebel, *Lawyers in the EC*, *supra* note 10, at 572.

179. See Council Directive No. 77/249 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, arts. 59–60, 1977 O.J. (L 78/17), reprinted in Goebel, *Lawyers in the EC*, *supra* note 10, at app.; see also LAGUETTE, *supra* note 68, at 241–48; SPEDDING, *supra* note 87, at 185–200 (discussing further the directive).

180. See SPEDDING, *supra* note 87, at 189–90.

181. *Van Binsbergen*, 1974 E.C.R. at 1309.

182. See SPEDDING, *supra* note 87, at 186–87. Spedding provides the following example:

[A] barrister established in England and Wales may supply a service in [Germany] by pursuing activities reserved there to a *Rechtsanwalt*. The solicitor may avoid two possible monopolies: in [Germany] the giving of legal advice is often reserved to a *Rechtsanwalt* or *Rechtsberater*, and for legal proceedings, to a *Rechtsanwalt*.

*Id.*

183. See Case 427/85, *Commission v. Germany*, 1988 E.C.R. 1123, [1989] 2 C.M.L.R. 677; Case 427/85, *Commission v. France*, 1988 E.C.R. 1123, [1989] 2 C.M.L.R. 677; see also Daly, *supra* note 73, at 1274; Horst Eidenmüller, *Deregulating the Market for Legal Services in the European Community: Freedom of Establishment and Freedom to Provide Services for EC Lawyers in the Federal Republic of Germany*, 53 MOD. L. REV. 604, 604–07 (1990) (discussing the German case).

184. See SPEDDING, *supra* note 87, at 206.

be felt, the result of national implementation in each state.<sup>185</sup> Moreover, the directive has helped “create a more open-minded attitude to non-EEC lawyers, though the [directive] does not directly deal with them.”<sup>186</sup> The American lawyer should thus be cognizant of the state of intra-EC law, both as to how it affects those European nationals she deals with in her business and as to how it can affect her. Otherwise, she is doing her client a substantial disservice.

As the right of freedom of professional movement within the EC does not per se extend to Americans, the individual laws of each foreign country are still crucial for the transnational practitioner to understand.<sup>187</sup> Each foreign country promulgates different requirements one must meet to practice law within its borders, and many nations define the practice of law broadly to exclude foreigners and protect their own citizens from foreign competition.<sup>188</sup> Even the United States, to protect its class of lawyers, broadly defines the lawyer’s role, leaving a very narrow class of activity for nonlawyers, including foreign attorneys.<sup>189</sup> Lawyers practicing in other countries must, therefore, be cognizant of what legal activities they are permitted to engage in and what types of advice they are legally permitted to give. Specifically, Model Rule 5.5 dictates that American lawyers are prohibited from both practicing in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction and assisting another person to engage in the unauthorized practice of law (including assistance through referrals).<sup>190</sup>

What follows is a brief overview of the certification requirements in two representative countries, France and Germany. Geared toward those American lawyers intending to practice abroad on a more permanent basis, these requirements are what Americans must understand and follow to become authorized practitioners in these countries. Notably, national rules in many of the EC countries have been relaxed in the past few years, mirroring the EC’s institutional trend toward augmenting and strengthening the cross-border practice of law.<sup>191</sup>

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185. *Id.* (explaining that the “degree of interface between developments inside and outside the Community” is exemplified by the *AM&S* decision, illustrating the need for “solutions which enable legal practice abroad to proceed smoothly”).

186. *Id.* at 201.

187. See generally SPEDDING, *supra* note 87.

188. See Kelly Charles Crabb, Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1780 (1983) (providing an outdated yet useful starting point for examining the role of the American lawyer abroad).

189. See *id.*

190. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1996). Rule 5.5 explains that a lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

191. See, e.g., Goebel, *Lawyers in the EC*, *supra* note 10, at 561.

France, for example, first made its requirements more restrictive, then substantially liberalized them.<sup>192</sup> Prior to 1971, a large number of legal professionals, including foreigners, provided commercial legal advice and drafted numerous commercial contracts and other documents.<sup>193</sup> These persons were known as *conseil juridique*, or legal advisors.<sup>194</sup> In contrast, the local French *avocats*—or lawyers—were responsible for all courtroom activity and, because they were not interested in providing commercial advice, left that field to the *conseil juridique*.<sup>195</sup> To regulate this flourishing sector of the law, the French government in 1972 passed the *Conseil Juridique* Law, whereby all foreign lawyers entering France after July 1, 1971, were restricted to giving legal advice solely on foreign and/or international law questions unless, on a reciprocity basis, French lawyers could work in the foreign lawyers' individual countries and give legal advice there on somewhat of an unrestricted basis.<sup>196</sup> Lawyers already established in France before the law went into effect maintained their previous status.<sup>197</sup>

To become an official *conseil juridique*, foreign lawyers must fulfill the following requirements: (1) graduate from a recognized law school in their native countries; (2) practice for three years, of which eighteen months must be spent in France working under a registered *conseil juridique*; and (3) demonstrate evidence of general good character.<sup>198</sup> These requirements are relatively easy to fulfill, indicative of France's general willingness to welcome foreign lawyers into its economy.<sup>199</sup> As a result, Paris is one of the leading centers globally of transnational law practice.<sup>200</sup>

That global center is growing even more with the passage of the French law of December 31, 1990, which merged the two discrete legal professions of *avocat* and *conseil juridique*.<sup>201</sup> The law is relevant to foreign lawyers because those already certified as *conseils juridiques* became *avocats*, and foreign lawyers not practicing in France prior to the enactment of the law must apply directly for the *avocat* certification, bypassing the *conseil juridique* position.<sup>202</sup> The new, combined profession now holds a monopoly on providing legal services.<sup>203</sup>

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192. See Goebel, *Professional Qualification*, *supra* note 45, at 464.

193. See *id.*

194. See *id.*

195. See *id.*

196. See Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques (visited Nov. 4, 1999) <<http://www.legifrance.gouv.fr/citoyen/textfon.htm>>.

197. See Goebel, *Professional Qualification*, *supra* note 45, at 465.

198. See *id.* at 466 (citing DECREE OF JULY 13, 1972, arts. 1–4).

199. See *id.*

200. See *id.* at 467 (estimating that in Paris there are over 30 American law firms, at least eight United Kingdom firms, and more than a dozen firms from other countries, in addition to “at least a dozen large French *avocat* firms with sophisticated international legal competence”).

201. See Goebel, *Lawyers in the EC*, *supra* note 10, at 563.

202. See *id.*

203. See *id.*

Germany, in contrast, has historically not opened its borders in similar ways, although, again, its policies are changing.<sup>204</sup> Since 1935, a legal advisor status, the *Rechtsbeistand* (similar to *conseil juridique*) has existed under German law.<sup>205</sup> *Rechtsbeistand* applicants must show proof of legal education in their native countries, professional competence, and good character.<sup>206</sup> Lawyers attaining this status may offer legal advice and engage in general commercial legal work.<sup>207</sup> However, very few Americans or other foreign lawyers have taken advantage of the *Rechtsbeistand* designation, a result perhaps explained by the English fluency of most German lawyers, the fact that many young German lawyers obtained legal training in the United States before other European lawyers, and a more vigorous opposition by the German bar.<sup>208</sup> Consequently, no German city can claim an international legal status similar to that of Paris.<sup>209</sup>

In 1989, Germany revamped its Federal Attorneys Act regulating the practice of law by *Rechtsanwälte* (courtroom lawyers).<sup>210</sup> Qualified EC lawyers may practice their home state's law, EC law, and international law in Germany.<sup>211</sup> Non-EC lawyers, including those from the United States, may similarly practice their own law and more likely EC and international law, provided their nations grant reciprocal rights to German *Rechtsanwälte*.<sup>212</sup>

In conclusion, divergent cultural differences and legal standards combine to make each country's system of ethical rules slightly (or not so slightly) different from the next. Taken together with the numerous ethical differences explained above—differences the uninitiated American lawyer may not recognize—the practice of international law is a veritable ethical minefield for the novice. Some form of special expertise is imperative for the transnational practitioner to work effectively and competently.

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204. See Goebel, *Professional Qualification*, *supra* note 45, at 468.

205. See *id.*

206. See *id.* (referring to the German Statute on Legal Counselling); see also Verordnung zur Ausführung des Rechtsberatungsgesetz of December 13, 1935 § 11(1), 1935 RGBl. I 1481.

207. See *id.*

208. See *id.*

209. See Goebel, *Professional Qualification*, *supra* note 45, at 469 n.61 (noting that a similar dearth of foreign lawyers exists in Denmark, Italy, the Netherlands, Spain, and Sweden, "perhaps due to a somewhat lower volume of international legal affairs and a greater difficulty in finding staff with the requisite linguistic capacity, but [the lack of foreign lawyers] is nonetheless surprising in view of the importance of Amsterdam, Copenhagen, Madrid, Rome, and Stockholm as commercial centers").

210. See Goebel, *Lawyers in the EC*, *supra* note 10, at 562; see also Wolfgang Kuhn, *New Professional Rules for Attorneys in the Federal Republic of Germany: The European Court and the Federal Constitutional Court Shake the Profession*, 14 INT'L LEGAL PRAC. 48 (1989).

211. See Goebel, *Lawyers in the EC*, *supra* note 10, at 562.

212. See *id.* at 563 (finding that "[s]ince January 1990, many German law firms have merged or opened branches in other cities, a wave of foreign law firms have opened offices in Frankfurt, Berlin and other centers, and several German firms have formed joint venture associations with foreign firms").

## IV. RESOLUTION

As the system now stands, the legal profession has “left it to the market to determine who the international practitioners are.”<sup>213</sup> As one international practitioner has explained:

Given the globali[z]ation of the economy and the increase of the temporary legal practice abroad, it may be time for us to examine whether or not the market mechanism should be the exclusive method of ensuring that persons who hold themselves out as competent to practi[c]e international law are in fact competent to do so. Perhaps it is, but I would be more comfortable in conceding that point if we had given it a great deal more study.<sup>214</sup>

Rather than relying upon the inefficient and uncertain market mechanism as a sorting tool, this note proposes that those desiring to practice international law demonstrate their interest and competence through an educational forum. More specifically, both law students and practicing attorneys should be required to obtain some type of international certification validating their proficiency.

A. *Requirements in the Law Schools*

A logical place to begin is the law school, where a three-year course of study, already the subject of much analysis and criticism,<sup>215</sup> is the consummate anchor for prospective international lawyers’ training. A proposed curriculum is as follows:

Students intending to practice transnationally should subscribe to a core curriculum of international courses designed to, first, introduce them to general concepts of international law and culture and the workings of different legal systems and, second, create a sophisticated understanding of the differences among countries and how they impact an American’s international practice. This type of curricular reform should not be difficult. A recent ABA survey indicated that ninety percent of those law schools responding offer five or more international law courses, including almost “forty international law subjects and over twenty different courses on specific country or region legal systems.”<sup>216</sup> Eleven percent offer a concentration in international law.<sup>217</sup> These courses could include studies of specific legal systems, such as civil law,

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213. Bernard L. Greer Jr., *The EEC and the Trend Toward Internationalisation of Legal Services: Some Observations*, 15 INT’L BUS. LAW. 383, 387 (1987).

214. *Id.*

215. See, e.g., Daly, *supra* note 73; Sanchez, *supra* note 7.

216. John A. Barrett, Jr., *International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U. J. INT’L L. & POL’Y 975, 992 (1997) (discussing a study conducted by the International Legal Education Committee of the ABA’s Section on International Law and Practice) [hereinafter Barrett, *International Legal Education*].

217. See *id.* at 993.

socialist law, and Islamic law,<sup>218</sup> international business law, public international law,<sup>219</sup> and courses uniquely tailored to particular interests, such as international copyright law, international tax law, and international sales.<sup>220</sup>

This idea is not radical nor new. In fact:

[i]n Europe, it has been proposed that a new category of lawyer be created, a “European Lawyer”—one whose educational formation includes a core curriculum of subjects relevant to EEC and multinational matters. If properly articulated, refined, and expanded to include lawyers from North America and elsewhere, such an approach could, even if only employed on a voluntary, unofficial basis, assist in providing benchmarks for evaluating the competence and experience of lawyers involved in transnational practice.<sup>221</sup>

218. See Barrett, *International Legal Education*, *supra* note 216, at 983–85 (setting forth the benefits of studying comparative law).

219. Public international law includes human rights law and courses studying international treaties and agreements. *See id.* at 985–88.

220. No U.S. law school requires students to take a course in international law. *See* Patrick M. McFadden, *Provincialism in U.S. Courts*, 81 CORNELL L. REV. 4, 64 (1995). Contrast this with law schools in Puerto Rico, Quebec, and Europe, almost all of which require a course in international law for their students. *See id.* At the turn of the century, a quarter of U.S. law schools required such courses as well. *See id.*

The experience at Saint Louis University serves as a useful model. *See* Isaak Dore, *The International Law Program at Saint Louis University*, 46 J. LEGAL EDUC. 336 (1996). At Saint Louis University, a specialization in international law is offered to J.D. students. *See id.* at 338. The program, requiring 12 hours of credit, includes required classes in public international law, international trade, comparative law, and European Union law. *See id.* Students must also fulfill a writing requirement and attend foreign language programs where native speakers from different countries introduce important legal vocabulary in their respective languages. *See id.* at 338–39. Other courses offered as part of the program include international human rights, international environmental law, multinational corporate transactions, international business transactions, international taxation, international banking, international commercial settlement, comparative criminal justice systems, comparative constitutional law, the U.S. Constitution and foreign affairs, and courses treating NAFTA and the World Trade Organization. *See id.* at 338. Professor Dore, co-director of the Center for International and Comparative Law at Saint Louis University, explained that the program’s goals are to “ensure that the lawyer of tomorrow makes informed decisions . . . . These courses have broad thematic crossovers, designed to inculcate the sense that tomorrow’s lawyers will live in a one-world community rather than within separate and distinct sovereignties.” *Id.* at 338.

221. Greer, *supra* note 213, at 387. Professor Clark similarly has proposed creating a “truly global law school” in the United States. *See* Clark, *supra* note 2, at 261. Professor Clark argues that the United States is the perfect location for such a school:

[J]ust as Italy was the center of world commerce in the 12th century, providing an ideal situs for the development of learned law within newly founded universities as well as for the creation of international commercial law within the guild system, the United States today is the world’s leading nation in international economic transactions.

*Id.* Further, the United States “is [an ideal location because it is] a multicultural nation in the sense that its people share and reflect most of the world’s ethnicities and religions.” *Id.* at 263. The United States also boasts the world’s most numerous and diverse system of higher education, and instruction would be in English, “the modern world’s equivalent to the university Latin of the 12th century.” *Id.* at 261–66.

Such a school would need to structure itself differently from the existing U.S. paradigm by (1) attracting more foreign law students; (2) attracting more foreign law professors; and (3) rethinking its curriculum to reorganize the traditional three-year program, add new courses and seminars, and possibly incorporate a fourth year of study into the J.D. program, where most of the comparative and international law study would take place. *See id.* at 271–72.

In Maastricht, a 1991 conference of more than 250 participants considered the European Lawyer proposal in detail, where some emphasized the need for a universal “European” legal education to precede any substantive uniformity of European law.<sup>222</sup>

In addition to the creation of a “core curriculum,” international law issues should be folded into the legal curriculum in other, less obvious areas, providing additional exposure. For example, Professor Daly advocates what she terms the “globalization of the professional responsibility curriculum.”<sup>223</sup> Because the professional responsibility courses study the role of lawyers in society, it is relatively easy to include cross-border practice materials exploring foreign institutions and their correspondent ethical rules and dilemmas.<sup>224</sup> Further, aspects of transnational law should be integrated into the domestic core courses many, if not all, students take; “international, comparative, and transnational legal study should not be compartmentalized and taught separately.”<sup>225</sup> Although this proposal is primarily geared toward those students who fail to take “pure” international law courses, it would, at the same time, expose those interested in international law to even more material on the subject.<sup>226</sup> Both sets of students would learn the extent to which international law is implicated in domestic legal transactions, possibly provoking or augmenting curiosity and interest in transnational issues.

Although some debate the wisdom of fusing the disciplines together,<sup>227</sup> many schools are nonetheless choosing to “view their work in

222. See Peter Goldsmith, *Globalization: The European Experience*, 46 J. LEGAL EDUC. 317, 321 (1996).

223. Daly, *supra* note 73, at 1252.

224. See *generally id.* (providing an in-depth explanation of suggested topics for discussion, such as the CCBE Code of Conduct, the structure of foreign bars, the role of the European Court of Justice, and attorney-client privilege).

225. Adelle Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 69 (1998) (“Thus, for example, ‘labor law’ should not simply be the study of U.S. or Canadian labor law but should at its core be comparative, evaluating how other legal systems address similar matters, and considering regional or international norms that may relate to particular questions.”).

226. See Barrett, *International Legal Education*, *supra* note 216, at 995–96. Although only 26 law schools responded to the portion of the ABA survey dealing with the domestic curriculum, the data was significant enough for Professor Barrett to conclude that “the current state of affairs shows that international components in domestic law courses are not adequately widespread so as to meaningfully educate those students who fail to take an international law course during law school.” *Id.* at 996.

More specifically:

[O]nly one school indicated that most of its faculty include[d] such a component, and one other school indicated that it had applied for funding to develop such a component. Of the remaining institutions, only one indicated that more than ten domestic law courses have international context, ten schools stated there were between six and ten such courses, six universities listed between three and five such courses, and nine schools listed only one or two courses.”

*Id.* at 995–96.

227. Extensive debate has contrasted the “policy interest of achieving full and thorough treatment of a subject matter against the risk of marginalization in a separate ‘international’ or ‘comparative’ law course.” Blackett, *supra* note 225, at 69. In other words, some believe that this piecemeal-type approach to international law can leave students with an incomplete understanding of the international material. See, e.g., Harold J. Berman, *Special Feature: The State of International Legal Education in the United States*, 29 HARV. INT'L L.J. 240, 240–41 (1988). *But see* Barrett, *U.S. Law Schools*, *supra* note 1,

traditionally domestic areas through a global lens."<sup>228</sup> Further, such an approach is enthusiastically—and rightfully—supported by the International Law Section of the American Bar Association.<sup>229</sup>

Students serious about the practice of international law should, moreover, endeavor to refine language skills, although the utility of foreign language facility is widely debated.<sup>230</sup> One professor has argued that foreign law courses should be taught in their domestic languages, as this

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at 857 (“Although it is clear that a day or two of international law in torts class hardly makes one an expert, this criticism fails to take into account the fact that without this minimalist beginning, the vast majority of students will continue to graduate without any exposure to international law.”).

Relatedly, comparative approaches might not be desirable in some areas. One critic has argued that at times:

particular subject matter is not in practice a significantly “globalized” area of law . . . . While it might occasionally be pedagogically valuable to refer, for example, to a Japanese legal concept that is analogous to a particular concept in U.S. securities law, and to explore the similarities and differences in their meanings, the utility of attempting systematically to do more within the confines of most standard three or four credit hour classes in most subjects is hardly clear. Too much content might undermine the goal of assisting students to gain enough exposure to an area of law to become able to manipulate—and identify other—central concepts in a sophisticated manner.

Blackett, *supra* note 225, at 70.

Further, the countries chosen as comparative models are often the same few nations: European Union countries, Japan, or Mexico, to cite a few familiar examples. *See id.* at 70–71. Perhaps a conscious effort should be made to employ a “somewhat more eclectic but rigorous approach to the choice of country of study,” thereby including more unfamiliar, but equally instructive, countries as paradigms of analysis. *Id.* at 71.

Lastly, faculty resistance must be overcome:

Most faculty members at any given law school are comfortable with the scope and coverage of their course. This approach not only would require them to learn a new area with which they may have no training or experience, but also may seem to many of them like a tangential matter for the course to spend time on.

Barrett, *U.S. Law Schools*, *supra* note 1, at 857.

228. John Edward Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329, 331 (1996) (explaining that “virtually all the NYU faculty have come to incorporate global perspectives into the fabric of their research and teaching”).

229. *See* Jay M. Vogelson, *A Practitioner Looks at Globalization*, 46 J. LEGAL EDUC. 315, 315 (1996). Vogelson, former chairperson of the ABA’s Section of International Law and Practice and recent chairperson of the ABA’s Standing Committee on World Order Under Law, has commented that the International Law Section “would like to see in American law schools not just a greater emphasis on teaching international law, but on teaching international aspects of every subject.” *Id.*

230. Not all scholars agree that foreign language study is useful. *See, e.g.*, James R. Maxeiner, *International Legal Careers: Paths and Directions*, 25 SYRACUSE J. INT’L L. & COM. 21, 35–36 (1998) (“While fluent knowledge of a foreign language is immensely valuable intellectually, a cost/benefit analysis might not place it first in one’s list of things to do to get involved in international legal practice . . . . Foreign language ability can hardly reasonably be considered a key to an international legal career.”).

Professor Maxeiner emphasizes, however, the importance of foreign language skills to international lawyers generally:

Anyone who really wants to be an international lawyer should know at least one foreign language. There are many benefits to such knowledge. Some of these are commercial, such as the immediate rapport it provides with business associates who speak that language. Others are cultural, such as the empathy it provides in relating to the difficulties non-English speakers face in understanding our country and its culture. Moreover, there is a specifically legal benefit to knowing a foreign language, which makes foreign language knowledge practically essential intellectually. Without knowledge of a foreign language, it is difficult if not impossible to overcome the great gulf in legal thinking between the two systems of the civil and the common law. . . . If one wants to know a civil law system from the inside—to know how a civil lawyer thinks—one *must* know at least one foreign language.

*Id.* at 36–37 (emphasis added).



is the only way to understand the unique ways in which law, language, and culture are interrelated:

The legal profession and tradition [are] particularly language sensitive. Without language there would not be laws or lawyers. The business of lawyers is to transact or litigate through words. Competency in the profession, therefore, requires expertise in legal discourse. Legal discourse consists of knowledge of legal terms, semantics, grammar, and legal language's "performative function," all of which are culturally defined . . . . Like all other languages, legal language is culturally bound . . . . Societal values and norms are expressed through the performative function of legal language, and the meaning of a legal statement is related to the social and cultural context in which it is formulated. Proper choice of a legal term and its appropriate use in discourse is culturally structured.<sup>231</sup>

Teaching foreign law courses in the relevant foreign languages would, undoubtedly, represent a sea change in legal education. Only one law school has to date offered a course in foreign law in its domestic language.<sup>232</sup> Yet the results, which include a greater understanding of culture and language, would be immense and as such, this note strongly recommends such courses for those intending to practice international law and work within other legal systems and cultures.<sup>233</sup>

The experience of Professor Vivian Curran at the University of Pittsburgh School of Law is instructive.<sup>234</sup> She offers a full-year course, French for Lawyers, that is designed to:

familiarize students with language in a legal context . . . [,] to provide a knowledge of French sufficient to permit an American lawyer to communicate effectively with French-speaking clients[,] and to understand references to the French legal system and to the European Community likely to arise in the course of an international law practice in the United States or an American law practice conducted in France.<sup>235</sup>

The course teaches vocabulary, simplified grammar,<sup>236</sup> and word usage, all oriented toward the law, by engaging students in vocabulary les-

231. Sanchez, *supra* note 7, at 668.

232. St. Mary's University in San Antonio, Texas, recently offered a Mexican law course taught in Spanish by a Mexican law professor. *See id.* at 638 n.16 (citation omitted).

233. A similar proposal has already been integrated across the ocean. Twenty-one European universities offer approximately 48 degree programs that combine the study of law with a language (and some programs even incorporate the study of the law of the other country as well). *See* Goldsmith, *supra* note 222, at 319.

234. *See generally* Vivian Curran, *Developing and Teaching a Foreign-Language Course for Law Students*, 43 J. LEGAL EDUC. 598 (1993).

235. *Id.* at 598.

236. Professor Curran limited grammatical instruction "to the minimum necessary for effective communication." *Id.* at 600. She did, however, include two grammar structures that many a French major has struggled with—the subjunctive and the *passé simple*:

I felt it necessary to include the subjunctive, despite the undeniable difficulties it poses for English speakers, because it is an essential and fundamental part of the French language . . . . The *passé simple* is often excluded even from standard French textbooks because it is a literary tense,

sons, readings, in-class conversation, and written compositions.<sup>237</sup> Professor Curran authored her own textbook for the course, and each chapter begins with a short dialogue, which she describes as “readily comprehensible . . . even for students who have not studied French previously.”<sup>238</sup> Vocabulary lists follow each dialogue, complete with English translations of the French terms and expressions.<sup>239</sup> These lists then form the basis for class exercises and discussions, using the newly learned vocabulary to discuss current events and other legal topics.<sup>240</sup>

In creating conversation topics for the course, Professor Curran includes those subjects that reference French culture, such as current political events, French history, literature, and even the French emphasis on politeness.<sup>241</sup> She recognizes that “[b]ecause language is inextricably linked to culture, culture should be a part of a language course. Law provides an ideal context for teaching about culture and society.”<sup>242</sup> For

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virtually never used in spoken French. I included it in my last chapter because it is so frequently used in legal documents. I also included it because it is an elegant and beautiful form, firmly entrenched in French tradition.

*Id.* at 600 n.3.

237. *See id.* at 598.

238. *Id.* The following is excerpted from the first chapter of Professor Curran’s book:

Une Question de culpabilité

L’avocat de défense, Marie Duval, parle au client.

*Maître Duval*: Êtes-vous coupable?

*Monsieur Martin*: Non, Maître Duval. Au contraire! Je suis innocent!

*Maître Duval*: Vous êtes vraiment innocent?

*Monsieur Martin*: Mais oui, Maître! C’est Catherine Lafargue qui est coupable.

[The English translation, adjacent to the French dialogue on the page:]

A Question of guilt

The defense attorney, Marie Duval, speaks to the client.

*Attorney Duval*: Are you guilty?

*Mr. Martin*: No, Attorney Duval! On the contrary! I am innocent!

*Attorney Duval*: Are you really innocent?

*Mr. Martin*: But yes, Attorney! It is Catherine Lafargue who is guilty.

*Id.* at 599. Professor Curran characterizes the exercise as follows:

Through in-class repetition of my spoken words and phrases, the students learn these short dialogues by heart. Memorization and repetition teach them correct grammatical structures as well as idiomatic expressions, and familiarize them with appropriate forms of address . . . . A vocabulary list follows each dialogue, giving the English translations of the French terms and, where appropriate, explanations. Later on, as more complicated, often idiomatic, structures appear in the dialogues, the vocabulary lists give the English translation of entire expressions, exactly as they appear in the dialogues, so that students do not have to struggle to piece together expressions whose logic is not apparent and, one suspects, may be unfathomable to all but the most accomplished etymologists and philologists. The vocabulary lists following each dialogue forms the basis for in-class exercises and conversation.

*Id.*

239. *See id.* at 599.

240. *See id.* at 599–600.

241. *See id.* at 602.

242. *Id.* Professor Curran thus recognizes the cultural utility and significance of language:

A new language is far more than a mechanism for transmitting or receiving thoughts. Language emanates from a culture and, in turn, influences those who speak it. Words acquire meaning through their sounds and their evocative connotations. In idiomatic expressions, they can represent concepts vastly different from a literal translation. A concept with a particular resonance in French society may generate multiple words, each with different shades of meaning. The nuances may be untranslatable into the language of a profoundly different culture.

*Id.* at 601. *See generally* MICHAEL RIFFATERRE, *ESSAIS DE STYLISTIQUE STRUCTURALE* (1971) (dis-

testing purposes, mock *Jeopardy* games substitute for quizzes on each chapter, testing students on vocabulary, grammar, history, French government structure, and literature.<sup>243</sup> A final examination is given at the end of each semester, encompassing vocabulary, grammar, and composition skills.<sup>244</sup> No course credit is given; students instead receive a diploma-like certificate of completion evidencing satisfactory performance in the course.<sup>245</sup>

Professor Curran's course, or others similar in content and purpose, would inculcate understanding of other countries' legal systems, languages, and, at the same time, cultures. Such learning is invaluable to the student desiring to practice international law. In fact, Roberta Cooper Ramo, past president of the American Bar Association, strongly believes that lawyers must demonstrate language facility and that such fluency should be accorded some influence in the law school admissions process:

First and foremost: we Americans are shockingly unilingual. And even if English comes close to being a universal language of law and commerce, we cannot be truly fluent in another culture without some fluency in other languages. One of the places where American lawyers are behind is that we do not have enough people with legal skills who are fluent in the languages they need. How do we fix that? It's easier with the carrot than with the stick. If it is important to us as a profession to prepare people for this new world, what impact would it make if in law school admissions we gave some advantage to candidates fluent in another language? Suppose the best schools in the United States said that among the things they will do in evaluating applicants is find out if they speak a foreign language and give some preference to those who do. If law schools do this, students who were interested in getting into the good law schools would begin to pay a great deal of attention, in high school and in college, to obtaining fluency in a second language.<sup>246</sup>

Closely related to courses teaching language and culture are the study abroad programs offered by many law schools. Professor Daly views the proliferation of programs and participants in recent years as evidence that American law students are "keenly interested in the study of foreign law."<sup>247</sup> More specifically, more than ninety schools sponsor summer abroad programs, and over 2900 students annually enroll in

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cussing the complexity and difficulty inherent in constructing word meaning and analyzing the structure and style of the French language).

243. See Curran, *supra* note 234, at 604.

244. See *id.*

245. See *id.* Further, "[s]tudent evaluations gave French for Lawyers a 4.6 rating out of a maximum score of 5. In another, unofficial course evaluation sponsored by the Student Bar Association, French for Lawyers received one of the highest ratings of any course in the law school." *Id.* at 601 n.4. A similar German course was offered during the 1993-94 school year. See *id.* at 598 n.1.

246. Roberta Cooper Ramo, *A Practitioner Looks at Globalization pt. 1*, 46 J. LEGAL EDUC. 313, 313-14 (1996).

247. Daly, *supra* note 73, at 1245.

them.<sup>248</sup> Those students interested in international law should take advantage of these invaluable opportunities; perhaps, some form of overseas study should even be a mandatory piece of the curriculum. After all, classroom learning is limited; a real appreciation for and understanding of other peoples, languages, cultures, and the legal systems they reflect and shape is best learned by first-hand, repeated exposure to those traditions.

At the conclusion of such a sustained program of study, students should take an exam to obtain international certification, which would then authorize them to practice law transnationally. The exam can be likened to the patent bar exam already in place for those lawyers interested in practicing patent law. In that case, a separate certification is required to ensure that patent practitioners are qualified.<sup>249</sup> Prospective international practitioners should be tested in a similar way: the exam would test on European Union law, for example, and also ensure that would-be international attorneys know and understand the ethical (and, in theory, linguistic and cultural) differences among countries. Including international law on the bar exam has already been proposed by some but has not, to date, been well received.<sup>250</sup> Fashioning an entirely separate certification procedure for prospective international practitioners is the more feasible option, as it reaches those who intend to do the work, ignores those who do not, and, most importantly, provides a reliable method to certify competence.

### B. *Practicing Attorneys*

Of course, not all international lawyers foresee their career paths in law school and do not or cannot take advantage of some of the above-prescribed opportunities. Certification at this level, however, is still possible and, in fact, this notes proposes, should also be mandatory. Instead of situating the educational process for practicing lawyers at the law school, continuing legal education classes would provide a more contemporary forum for those practitioners working in international law to obtain the requisite education and, in addition, could serve as refresher or supplemental courses for those who studied international law in law school.

Such certification courses should first introduce lawyers to the importance of bridging the cultural gap—that attorneys must provide cul-

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248. See *id.*; see also *Prepare for Take-off*, STUDENT LAW., Jan. 1998, at 25–66 (describing a plethora of study abroad opportunities).

249. See Mark J. Henry, *State Courts Hearing Patent Cases: A Cry for Help to the Federal Circuit*, 101 DICK. L. REV. 41, 49 (1996).

250. See, e.g., McFadden, *supra* note 220, at 64 (“[T]he Section of International Law and Practice of the American Bar Association has recently recommended (this time unsuccessfully) that the multi-state or individual state bar examinations include international law questions. If such an effort ever succeeds, curricular changes probably will follow.”); see also Barrett, *U.S. Law Schools*, *supra* note 1, at 856.

tural, social, and even political expertise to their clients in addition to the traditional legal services. Some of this knowledge can be taught, but as most cultural understanding comes from experience and immersion, much of this portion of the course would focus instead on how lawyers can direct clients to this information.

For example, lawyers should learn how to choose foreign counsel.<sup>251</sup> To select proficient local counsel, American lawyers could look to non-lawyers, such as accountants or notaries, as resources.<sup>252</sup> Alternatively, they can ask another American or foreign lawyer for advice.<sup>253</sup> Foreign offices of other American law firms could be another reliable source.<sup>254</sup> Other printed sources could be recommended as well:<sup>255</sup>

The *Russell Law List*, a “selective” list, recommending one firm per city;<sup>256</sup>

*Martindale-Hubbell*, which, for countries where ethically permissible, publishes “biographical details, bank references, and, most helpfully, specimen clients” of lawyers;<sup>257</sup>

*The International Bar*, a section of *The American Bar* that contains names, addresses, and specialties of lawyers; it screens lawyers but does not rate them;<sup>258</sup>

*The Bar Register*, similar to *The International Bar* but contains representative clients;<sup>259</sup>

*The International Law List*, published in London, contains biographical information, and lawyers are screened but not rated.<sup>260</sup>

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251. See *supra* note 141 and accompanying text.

252. See Powers, *supra* note 136, at 103.

253. See *id.*

254. See *id.* at 104; cf. Hillman, *supra* note 46, at 19 (warning against regarding these firms as a “universal solution to the problem of finding effective foreign legal assistance,” as they may only be helpful in recommending counsel in major cities and not in other regional areas and may be expensive).

255. See Murphy, *supra* note 142, at 46–47.

256. *Id.* at 46.

257. *Id.* at 47.

258. See *id.*

259. See *id.*

260. See *id.* The best approach is to:

[L]ook at *Martindale* first; cross-check with any listed “specimen clients” you have access to; consider it quite a plus if a likely choice is recommended by *Russell*; look to *The International Bar* and other available directories for corroborative details on most recent addresses, etc.; then compare your tentative choice with the local-counsel roster of a U.S. multinational experienced in the area, or run it by an experienced international lawyer. Beware of out-of-date recommendations. People die; senility strikes; political “ins” become “outs,” etc.

*Id.*

But see Hillman, *supra* note 46, at 18. Professor Hillman believes such directories are largely ineffective:

[D]irectories, however, provide very limited information and often do not include many local attorneys competent to handle matters for foreign clients. It is necessary, therefore, to go beyond published lists and seek the comments of individuals who have utilized legal counsel in the foreign jurisdiction. Lawyers associated with banks, multinational corporations, and law firms with significant international practices, for example, can often provide valuable information based upon past experiences in the country.

In any case, American lawyers should ensure that their selection is qualified to practice in the foreign jurisdiction, speaks the requisite languages, and has the required capabilities (telephones, fax machines, computers, support personnel) to communicate with the referring lawyers regularly and conduct business efficiently and zealously.<sup>261</sup> Prior training in an American law school would also be helpful, as the foreign attorney would better understand the American legal system and legal culture.<sup>262</sup> Moreover, American lawyers, pursuant to the Model Code,<sup>263</sup> must ascertain that no conflicts of interests exist, a potentially difficult task in jurisdictions where a limited number of attorneys handle international work or where transactions involve numerous and/or related parties.<sup>264</sup>

The courses should also instruct lawyers on differences between the civil and common law systems, preferably taught by both American and foreign instructors accustomed to working within the civil law system. Foremost is the fact that the two systems approach legal problems differently; American lawyers must be able to understand how their civil law counterparts deal with clients, courts, and fellow attorneys. American lawyers must also know, for example, that the definition of incompatible occupations is understood differently in the two systems. Rules relating to contingent fee agreements are likewise significantly different, as are those regulating attorney-client privilege and conflicts of interest.

Closely related are communication and language, additional key topics. Although perhaps unrealistic to require working attorneys to take enough courses in foreign language sufficient to understand sophisticated social, commercial, and legal nuances, a basic understanding of language—and the difficulties inherent in foreign ones—is necessary to work with people grounded in different cultures, ways of thought, and traditions.

Further, a substantial portion of the certification instruction should focus on the European Union and its growth in the previous half-century. The classes should analyze the Treaty of Rome, Community directives, and important decisions of the European Court of Justice and study the impact of those developments on cross-border practice. Lawyers intending to work with and in specific countries should tailor their course of

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*Id.*

261. See Powers, *supra* note 136, at 90; see also Hillman, *supra* note 46, at 22.

262. See Hillman, *supra* note 46, at 21 (explaining that many foreign lawyers have attended graduate law programs in American law schools and received the following degrees: Master of Comparative Law, Master of Laws, and Doctor of Laws).

263. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1996) (setting forth the general rule that lawyers shall not represent a client if that representation would be directly adverse to another client, unless the lawyer “reasonably believes” that the dual representation will not adversely affect either client, and each client agrees).

264. See Powers, *supra* note 136, at 90; see also Murphy, *supra* note 142, at 48 (listing eight “common sense reminders” for lawyers dealing with foreign counsel).

study to learn not only the ethical and substantive laws of a particular nation but also the specific rules regulating their practice there.

For those practitioners already established internationally, that is, those having garnered knowledge and expertise through years of experience, a formal certification process is not necessary. In such cases, a simple rule should be instituted whereby those lawyers who have worked internationally for five or more years do not need to be certified to qualify as authorized practitioners. They will have already “earned” their certification.

## V. CONCLUSION

As the world grows smaller and smaller, legal relations become correspondingly larger and more intricately interwoven. As a necessary corollary, American lawyers will find themselves working transnationally—either providing services for existing domestic clients as they expand abroad or affirmatively searching out new clients in foreign countries.

Lawyers engaged in such a global practice must understand the supplementary ethical issues involved—more specifically, that working in foreign countries brings with it foreign laws and rules and, additionally, foreign cultures, languages, expectations, and rules of conduct. To ensure that lawyers recognize and prepare for this diversity, they should be required to prove their competence via a formalized certification process. After all, the Preamble to the ABA Model Rules at base envisions lawyers as playing a “vital role in the preservation of society.”<sup>265</sup> Only by understanding that society—a society defined by its multicultural, global components—can lawyers not only preserve it but also better it at the same time.

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265. MODEL RULES OF PROFESSIONAL CONDUCT preamble.

