# 9

# PROFESSIONAL ETHICS, WHAT FOR ...?

*by Ramon Mullerat (†), OBE*[1]

**Abstract:** Due to their special characteristics, function and influence in society, liberal professions are subject to ethical rules stricter than those applied to citizens in general. Professionals are continuously riddled by difficult ethical problems. And, although the basic ethical principles for professionals can be identified, it is difficult to give general solutions to the very varied challenges or at least guidelines on how to handle them.

Special significance has ethics for lawyers due to the public function that lawyers contribute to society. Legal ethics, their adoption and enforcement constitute an important element to secure lawyers' indepen-

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dence. However, as the world has evolved to a particular economically-driven pace, some of the traditional principles are strained and the legal profession suffers because of this. However, lawyers must promote the respect for legal ethics in order for them to serve their calling and contribute to improve peace and justice, that way the world may become a better place.

**Keywords:** *Liberal Professions, Professional Ethics, Legal Ethics*.

*I hold every man a debtor to his profession*
*Francis Bacon*[2]

## FIRST. FOREWORD

Some years ago, I was invited to speak at a university. There was a drawing on the bulletin board depicting a black-suited businessman rummaging through papers in his brief-case and saying to himself "where on earth have I left my ethics?" The purpose of this article is to succinctly describe professional and legal ethics.

Ethics is about guiding human conduct. Gandhi was boarding a train with a number of followers, when his shoe fell from his foot and disappeared in the gap between the train and platform. Unable to retrieve it, he took off his other shoe and threw it down by the first. Responding to the puzzlement of his fellow travelers, Gandhi explained that a poor person who finds a single shoe is no better off -what's really helpful is finding a pair.

[2] Francis Bacon, *The elements of the common law in England*, 1567, preface.

## SECOND. LIBERAL PROFESSIONS[3]

### HUMAN OCCUPATIONS

Using the terminology introduced by Cicero,[4] human activities are divided into *operae illiberales* (manual labour) and *operae liberales* (intellectual work). Social evolution, while not entirely eliminating this division, has done away with a great number of characteristics that marked the boundary between the two types of activities.

### LIBERAL PROFESSIONS

Within the *operae liberales* there is a further division between those occupations termed "dependent" (whereby the person carrying out the activity is subordinate to him who gives the orders and pays the salary) and those which are "free" (where the activity is provided without dependence). The latter are the object of the "liberal professions".[5]

Ulpian, the roman jurist, considered; rhetoricians, grammarians, geometricians, physicians, wise-women, *beaux art* professors, librarians, notaries, lawyers and nurse-maids as "liberal professionals" (*liberalia studia*).

Although no generally accepted definition of the term exists, a "profession" is a human occupation requiring specialized knowledge and often long and intensive academic preparation (Merriam-Webster). Etymologically, "profess" comes from *pro-fateor* "to affirm one's belief in" and "profession", a "vow binding itself to a religious order".[6] That is why

[3] In this chapter and the following, I follow my book *International corporate social responsibility. The role of corporations in the economic order of the 21st century*, Wolters Kluwer, 2010, pp. 339 and ss. i "Professionalism in Europe. How the values of the profession are transmitted in Europe". ABA Annual Meeting, Section of Legal Education and Admissions, *Comparative approaches to teaching and learning professionalism*, Toronto, 30 July-3 August 1998.

[4] Marcus Tullius Cicero, *De officiis*, I, 42.

[5] Antonio Fernández Serrano, *La abogacía en España y en el mundo*, 1955, vol. I, pp. 43-44.

[6] Ulpian, D. 1 *De justitia et jure*, pr. and par. 1: "*Cuius merito nos sacerdotes appellet, justitiam namque collimus, et boni et aequi notitiam profitemur* ...". Everett C. Hughes, *Professions*, from *Daedalus*, 92, 1963, pp. 655-68. John C. Merrill, *The imperative of freedom*, 1974, pp. 133-42.

some believe that professionals have a kind of apostolic calling comparable to priesthood.[7]

Liberal professions are linked with the idea of public service. The great scholar and dean of Harvard Law School, Roscoe Pound,[8] coined an oft-cited definition of professionalism. "The term –he said- refers to a group ... practicing a learned art as a *common calling to the spirit of public service* –no less a public service because it may incidentally be a means of livelihood".[9]

## CHARACTERISTICS OF LIBERAL PROFESSIONS

Professionalism is often used to set apart a profession from trade or occupation by way of attributes such as advanced educational and licensing requirements, regulation by government or by the profession itself and a stated commitment to public service for which financial remuneration is incidental. According to the European Secretariat of the Liberal Professions (SEPLIS) (1996), liberal professions are characterized by *competence*, on demanding assistance of high quality; *public interest*, on being directed towards the satisfaction of the essential needs of the citizens; *provision of individual service,* adapted to the needs of the client; *relationship of trust*, from which the duty of respecting client confidentiality; *independence*, which implies the absence of any element of duress or restriction; and *professional ethics* with stringent ethical rules and high standards in the provision of services.[10]

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[7] Piero Calamandrei, *Elogio dei guidici scritto da un avvocato*, 1935, VIII: "not only judges but also lawyers carry out an 'apostolic role' and for lawyers the greatest comfort is their conscience and feeling of serving the interests of justice".

[8] Roscoe Pound, *The lawyer from antiquity to modern times*, 1953.

[9] Robert W. Gordon, "Corporate law practice as a public calling", *Maryland Law Review*, 49:255, p. 13.

[10] Peter Strahlendorf, "Professional Ethics" Ryerson University School of Occupational and Public Health, Session no. 714 cites C. A. Brincat & V. S. Wilke, *Morality and the professional life: Values at work*. Prentice Hall Inc., 2000, who consider that a profession possesses the following elements: group identity, shared education, training (requirements for admission), special, uncommon knowledge, knowledge used in the service of others, involves individual judgment, some autonomy in decision making, adherence to certain values and penalties for substandard performance.

According to a Report on Professionalism of the American Bar Association (ABA) in 1986,[11] a profession is an occupation where members have special privileges, such as exclusive licensing, that are justified by the following assumptions: a) the profession receives important privileges from the state; b) its practice requires substantial intellectual training and the use of complex judgments; c) since clients cannot adequately evaluate the quality of the service, they must trust those they consult; d) the clients' trust presumes that the practitioner's self-interest is overbalanced by the devotion to serving both the client's interest and the public good; e) the occupation is self-regulating –that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their clients' trust and transcend their own self-interest.[12]

## SUPERLATIVE FUNCTION OF LIBERAL PROFESSIONS

Liberal professions play an exceptional role within the communities where they act and enjoy a special status in society due to their education and functions *nemine discrepante*.

According to the English sociologist Roger Cotterrell,[13] professions occupy an important position in the picture of modern society typically presented by the theories of social integration and unification. Cotterrell cites Durkheim[14] for whom professions are carriers of occupational morality –an essential regulatory structure which can bridge the gap between state created laws and the actual conditions of social life. Thus, for Durkheim, a viable system of normative regulations to guarantee and express organic solidarity requires the extension of systems of professional ethics

[11] American Bar Association, Commission on Professionalism, *In the spirit of public service. A blueprint for the rekindling of lawyers' professionalism*, 112 FRD 243.261, 1986.

[12] From a legal profession perspective, my dear and recently deceased friend, Jerome Shestack, President of the ABA, *Promoting professionalism*, 1988, foreword, summarized into six the components of professionalism: a) ethics and integrity and professional standards; b) competent service to clients while maintaining independent judgment; c) continuing education; d) civility; e) obligations to the rule of law and the justice system; and f) *pro bono publico service*.

[13] Roger Cotterrell, *The sociology of law*, 1992, pp. 87-89.

[14] E. Durkheim, *The division of labour in society*, 1984, cited by Roger Cotterrell, *op. cit.*, pp. 87-89.

to cover all other spheres of life. For Parsons[15] also, the position occupied by professions in society is unique in history. Why should professionalism be of such central importance in these conceptions of society as a functionally integrated system? he asks. The essential reason is that, as David Miller pointed out, the self-image of professions –their proclaimed ideal of public service and professional responsibility matches the connection of modern society organized in terms of organic solidarity, functional differentiation and reintegration.[16] Professionalism stresses functional specialization, expertise and selection by merit.[17]

In functional analysis, the professional ideal of public service, even if it may become tarnished, is no sham. It is the price paid for professional autonomy, for the fact that the profession is entrusted with independent guardianship of an important part of society's cultural tradition and allowed effectively to monopolize this knowledge as the basis of special expertise.[18]

## THIRD. ETHICS AND PROFESSIONAL ETHICS

*Ethics is the indispensable interface between my desire to be happy and yours.*
*Dalai Lama*[19]

### ETHICS

Ethics – what declares what is good or right for human beings[20] – is as old as mankind. Most Greek mythological heroes enhance virtue and

[15] T. Parsons, *The profession and social structure*, 1939, p. 34, cited by Roger Cotterrell, *op. cit.*, pp. 87-89.

[16] Ramon Mullerat, "Las reglas deontológicas de la profesión de abogado: Elemento de integración", *IBA-CCBE Conference*, Sevilla, November 1994.

[17] David Miller, *Social justice*, 1975, p. 345, cited by Roger Cotterrell, *op. cit.*, 1992, pp. 87-89.

[18] Roger Cotterrell, *op. cit.*, pp. 87-89.

[19] The Dalai Lama, cited by Kamran Mofid, *Business ethics, CSR and globalization for the common good*, 2003.

[20] W.M. Hoffman, R.E. Frederick, M.S. Schwartz (editors), *Business ethics – Readings and cases in corporate morality*, 2001, 4th. ed., pp. 156-160.

ethics that can be related to positive traits in society today. The myth of Perseus shows that he acts within the social and ethical boundaries of ancient times that are similar to the values of modern society. In our day, there is a renaissance of ethics as a reaction to an unethical modern world. As one North-American general[21] bemoaned in 1948, "the world has achieved brilliance without wisdom, power without conscience. Ours is a world of nuclear giants and ethical infants".

Ethics is often compared with morals and law although no clear-cut distinction exists between them.[22] Even if many believe that morals and ethics amount to the same thing and use them interchangeably, there are differences between morality and ethics. Morality consists of what persons ought to do in order to conform to society's norms of behaviour,[23] whereas ethics concerns the philosophical reasons for and against the aspects of morality stipulated by society.[24] Morals are the very subjective senses of right and wrong in the minds of individual members of a community and distinctive in being fundamentally incommunicable, while ethics are norms of action and exemplification within a community.[25]

On the other hand, ethics and law are rules to regulate human conduct.[26] The main difference is that law is legally coercible, while ethics is not. That is why the Institute for Global Ethics has defined ethics as "the obedience to the unenforceable".[27] Both concepts are not separated or even concentric circles, but tangent circles. Common spaces exist where both overlap. Think, for instance, of lawyers' duty of confidentiality, which imposes the obligation not to reveal the information received from

[21] Omar Bradley, speech on Armistice Day 1948, in *Collective writings*, 1967, vol. I, p. 589.

[22] Geoffrey Hazard, "Law, moral and ethics", *Faculty scholarship series*, paper 2372, 1995.

[23] P. Devlin, "The enforcement of morals", argues that one of the essential elements of a society is a shred morality.

[24] Andrew Crane and Dirk Matten, "Business ethics" in *From A to Z of CSR*, 2007, p. 54.

[25] Geoffrey Hazard, *op. cit.*, p. 458.

[26] Dworkin argues that once one accepts that law consists of other standards as well as rules, one cannot maintain a distinction between what the law is and what, morally speaking, the law ought to be.

[27] Lord Macmillan, *Law and other things*, Cambridge at the University Press, 1938, p. 46.

clients.[28] It is one of the utmost legal ethical rules and at the same time a legal duty (even criminally sanctioned) by many national laws. It has been considered[29] that the law represents the minimum acceptable standards of behaviour. Ethics is said to begin where law ends.

There are no different ethics but different applications of the same ethics. In his practical philosophical ethics classification, included in *Ética*,[30] his recent book, professor Norbert Bilbeny distinguishes between ethics *applied to the biosphere ("bioethics", "ecoethics", "gene-ethics", etc.), the technosphere ("technology ethics", "science ethics", "communications ethics") and the socio-sphere ("info ethics", "business ethics", "professional ethics", "intercultural ethics")*.

## PROFESSIONAL ETHICS

Professionals are capable of making judgments, applying their skills and reaching informed decisions in situations that the general public cannot, because they have not received the relevant training and sometimes licensing.

Due to the fundamental function they provide to society, professionals enjoy certain privileges –such as confidentiality– which are not enjoyed by citizens in general. As a corresponding item of such privileges, professionals are subject to restrictive ethical duties which do not apply to the generality of citizens. *Ad astra per aspera*.

Professional ethics are regulated by rules or standards, which are often compiled in codes of conduct or ethics[31] that help professionals to choose what to do when faced with a problem that raises moral issues.

*Ab antiquo* influential codes of ethics exist such as Moses' Ten Commandments, Lao-Tzu's Tao Te Ching, the Hippocrates' Oath, Confucius'

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[28] ABA, *Model Rules of Professional Conduct*, 2007 ed., Rule 1, 6 (a): "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, ...". Code of Conduct for Lawyers in the European Union (CCBE Code), art. 2.3.1.

[29] Andrew Crane and Dirk Matten, "Business ethics" in *From A to Z of CSR*, 2007, p. 54.

[30] Norbert Bilbeny, *Ética*, Ariel, 2012, pp. 28 and ss.

[31] The codes are often national codes but there is a trend to adopt global codes. Ramon Mullerat, "Is a global code of ethics attainable?", *International Bar News*, June 2004, p. 33.

Analects, Jesus of Nazareth's Beatitudes, St. Benedict's Rules and many others. Through history, modern professions have developed codes of ethical conduct such as legal ethics, medical ethics, engineering ethics, education ethics, research ethics, journalism ethics, communication ethics, political ethics, business ethics, and so on,[32] each code concentrating on each profession's specificity. There are even associations, such as the Association for Practical and Professional Ethics, committed to encouraging high quality interdisciplinary scholarship and teaching practical and professional ethics.

A central issue concerning ethics is the relativism-absolutism dilemma. Moral relativism is ultimately futile and nihilistic. Moral absolutism is not a tenable position either, as it leads to inflexibility and a harshness that creates its own injustices. On the other hand, "objectivity" in professional ethics means that there are principles and values outside oneself that members of the community share and can discuss, and that individuals will be measured against.[33]

## MAIN ETHICAL DUTIES OF PROFESSIONALS

Professional ethical duties vary from one profession to another and even within the same profession.[34] However, there are generally accepted ethical principles that are relevant to all the professional spectrum such as honesty, integrity, confidentiality, respectfulness and obedience to the law.

Obviously one can be unethical without behaving illegally. Professional ethics covers far more issues than the law does. The great American judge Earl Warren[35] said that "in civilized life, law floats in a sea of ethics". Many of the issues are embedded in messy and complex factual situations, so ethical issues tend to be harder to identify than legal ones. We should have more sympathy when someone says they

[32] I have just read (La Vanguardia, 21-10-11) whether "museum ethics" allows the sale of works of art to pay maintenance costs.

[33] Peter Strahlendorf, "Professional Ethics", Ryerson University School of Occupational and Public Health, Session 714.

[34] I.e. the special ethical rules applying to government or corporate lawyers deviating from the general legal ethical rules.

[35] Earl Warren, Chief Justice, U.S. Supreme Court, Address at the Jewish Theological Seminary of America Annual Awards Dinner, 11 November 1962.

are confused or ignorant or thoughtless about a moral issue, as opposed to a legal problem.[36]

Among all ethical duties applying to professionals the notion of loyalty and its practical consequence of avoiding conflicts of interest stands out.[37] All occupations experience conflicting situations: politics, government, business, etc., but liberal professions even more notably, insofar as a fundamental element in the professional-client relationship is trust. To the extent a profession is successful at serving its preferred moral ideal, it provides alternatives to self-interest (the typical motive in an ordinary market)[38] since professionals must place their clients' interests before their own personal affairs.

Primary elements in the professional-client relationship are then loyalty and trust, which are the two sides of the same coin. Inasmuch as professionals' loyalty is an essential factor of the professional activity, clients trust the professional in that he will contribute with all his or her efforts to the relevant service without the interference of other aims and preoccupations.

In conflicts of interest for professionals, McDonald[39] distinguishes three components. *First*, there is a private or personal interest, often this is a financial interest or another sort of interest, say, to provide a special benefit to a relative. *Second*, the problem arises when this private interest comes into conflict with the second feature –the professional's obligation to clients, employees or others, which is supposed to trump personal interests. *Third*, conflicts of interest intrude into the ability of professional responsibilities by interfering with professionals to be objective and independent.

## FOURTH. LEGAL ETHICS IN PARTICULAR

*Vir bonus, disceptandi peritus,*
*qui non solum scientia et omni facultate dicendi perfectus, sed moribus*
*Quintilian (definition of a lawyer)*[40]

[36] Peter Strahlendorf, "Professional Ethics".

[37] Ramon Mullerat, "Conflicts of interest: Serving two masters", in *Teaching Ethics*, Center for Business and Public Sector Ethics, 2011.

[38] M. Davis and A. Kork, ed., *Conflict of interest in the professions*, 2001.

[39] M. McDonald, *Ethics and conflict of interests*, Centre for Applied Ethics, 2001.

[40] Quintilian, *Institut. Orat.*, proem. book I, book II, chap. 16 and book XII, chap. 4.

## THE FUNDAMENTAL ETHICAL DUTIES FOR LAWYERS

The lawyer is an essential piece of the administration of justice.[41] He has a public character, just as the judge has.[42] As it has been said, lawyers and judges are equally ministers of the temple of justice[43,44] (*co-ministre de la justice,* co-officer to the court). As a service for the public good ("the higher calling of the profession"), lawyers have the obligation to become involved in the overriding concerns of society. The activities of the legal profession, Parsons[45] thinks, are one of the very important mechanisms by which a relative balance of stability is maintained in a dynamic and precariously balanced society.

Because of their central function, lawyers are subject to strict professional ethical requirements: dignity, integrity, independence, disinterestedness, diligence, confidentiality, etc.[46] As Yasmin Walji[47] accurately noted, the legal profession is highly regulated by professional conduct codes, which identify the duties of the lawyer to the clients, the courts and, to a lesser degree, non-clients, for example, acting in the client's best interest, the duty of confidentiality and the duty to act fairly.

In my view, lawyers' ethical duties may be summarized in three main mega-principles: independence, confidentiality and loyalty (avoidance of

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[41] Canon 12 ABA Code: "it should be not forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade". Piero Calamandrei, *op. cit*., XXIX: "*giudici e avvocati sono ugualmente organi de la giustizia*". Mucius Scevola, *Comentarios al Codigo Civil*, XXIV, 1 "*no puede limitarse el concepto de abogado al de un mero auxiliar técnico de la parte y del interés privado de esta, sino que en él debe verse, sobre todo, un verdadero colaborador del órgano jurisprudencial de administrar justicia*".

[42] Piero Clamandrei, op. cit., XXIX: "*l'avvocatura risponde ... a un interesse essenzialmente publico*".

[43] Crampton J., *Regina v. O'Connell*, 1844, cited by R.E Megarry, *Miscellany at Law*, 1955, p. 50: "This court in which we sit is a temple of justice; and the advocate at the Bar as well as the judge at the Bench, are equally ministers in that temple".

[44] In the US the term "lawyer" has a broad sense comprising lawyers and judges. A fifth of the ABA are judges.

[45] T. Parsons, *A sociologist looks at the legal profession*, 1954, 384, cited by Roger Cotterrell, *op. cit*., pp. 87-89.

[46] This is the oath that Parisian lawyers must take: "*je jure comme avocat d'exercer mes fonctions Avec dignité, conscience, indépendance, probité et humanité*".

[47] Y. Walji, "The challenge of good corporate citizenship and the role of the business lawyer", *New Academy Review*, 2, no. 1, 2003.

conflicts of interest). The other duties[48] are mere derivations from the three.

Referring to professions in general and to the legal profession in particular, Justice O'Connor of the US Federal Supreme Court,[49] declared that: "one distinguishing feature of any profession, ..., is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony.... Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they uniquely wield in a political system like ours".

## *INDEPENDENCE*[50]

*Solo la dove gli avvocati sono independenti,*
*i giudici possono essere imparziali*[51]

Independence is the quintessence of the legal profession. There is no free society and no free person without competent and independent lawyers. Without independent lawyers, there could not be impartial judges.

Lawyers has have the duty and the right to be independent. As Robert Martin, the founder of the *Union Internationale des Avocats,* stated,[52]

[48] The Code of Conduct of the Council of Bars and Law Societies of the European Union (CCBE) lists *inter alia* duties on advertising, fees, competence, relationships with clients, courts and other lawyers.

[49] Sandra Day O'Connor, *Shapero v. Kentucky Bar Association*.

[50] Ramon Mullerat, "Guarantees for the Independence of Russian Lawyers", Institute for European Policy Round Table, Katholic Universiteit Leuven, 3 June 1996.

[51] Piero Calamandrei, *op. cit*., XXIII.

[52] Robert Martin, "L'indépéndence de la Justice", opening speech of the UIA Congress, 1979.

independence is the lawyer's force, duty and entire *raison d'être*. All codes of ethics for the legal profession recognise this principle. I.e., the Code of Conduct of the Council of the Bars and Law Society of the European Union ("CCBE Code")[53,54] (2.1.1) proclaims: "The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties".

As the International Bar Association declared: "the preservation of an independent legal profession is vital and indispensable for guaranteeing human rights, access to justice, the rule of law and a free and democratic society".[55]

Independence is not a simple attribute of justice; it is the constitutional characteristic of the judicial function and the fundamental axis of the mission assigned to participants in the judicial process (judges, lawyers). We should clarify, however, that while judges must be independent and impartial, lawyers must also be independent but not impartial, because they are advocates of a party (*ex parte )* to whom they have a duty of zeal and loyalty within the bounds of the law. A lawyer who was impartial would be displacing the judge's function and would be a bad lawyer.

To the extent that lawyers must avoid any impairment of their independence, governments must ensure that lawyers are able to perform all

[53] The CCBE Code was originally adopted at the Plenary Session on 28 October 1988, and subsequently amended at the Plenary Sessions on 28 November 1998 and 6 December 2002.

[54] See also Règlement Intérieur Ordre des Avocats à la Cour de Paris" (art. 1.3): "*La profession d'avocat est une profession libérale et indépendante... L'essence de la profession à titre libéral, ... la dignité, la conscience, l'indépendance, ... sont d'impérieux devoirs pour l'avocat et constituent ensemble les Principes Essentiels de la profession d'avocat*". Guide to the Professional Conduct of Solicitors of the Law Society of England and Wales (Practice Rule 1): "A solicitor shall not do anything in the course of practicing as a solicitor ... which compromises or impairs... any of the following: the solicitor's independence or integrity"; Spanish Lawyers General Statute (arts. 8 and 42): "*La abogacía es una profesión libre e independiente ...", "El abogado, en cumplimiento de su misión, actuará con toda libertad e independencia...*".

[55] IBA Resolution on deregulating the legal profession, adopted 1998.

of their professional functions without intimidation, harassment or improper interference.

Although perfect independence is an ideal that can never be fully reached, like the Danaids' leaking water jars that could never be totally filled, independence is the basic ethical duty of the lawyer. Most of his other ethical duties consist on derivations of the independence principle. In the same manner as God's ten commandments are summarized in two principles, the specific lawyer's ethical rules can be reduced to only one: the principle of independence, such as: a) the right to accept or refuse instructions from any client; b) the prohibition of contingency fees (*pactum de quota litis*); c) lawyers masters of argument; d) prohibition of subordination of lawyers to non-lawyers; e) conflict of interest (see below); f) incompatible occupations, etc.[56,57]

## *CONFIDENTIALITY*

Trust and confidentiality are essential foundations of human nature. In his book *La société de la confiance,* Alain Peyrefitte, former *garde des sceaux* in France, explains how the strongest social link is the one which supports itself on reciprocal trust (*confiance )*.

There is a universal duty to keep confidential communications that we receive and any breach of such duty violates one of the basic principles of law: *alterum non laedere*.[58]

Professions and particularly the three learned professions: priesthood, law and medicine impose a strong duty of confidentiality. Professionals are characterised not only by their special education and ethical rules but also by the trust relationship with clients.

Thus, confidentiality is one of the core values of the legal profession. According to this principle, lawyers cannot reveal what their clients have

[56] ABA Commission on Evaluation of the Rules of Professional Conduct "Ethics 2000", Public Hearing: Atlanta, August 5, 1999, Testimony of Ramon Mullerat "Proposal for a broadening of the concept of lawyers' independence in the Model Rules of Professional Conduct".

[57] "Background working. Ramon Mullerat, president of the Council of the Bars and Law Societies of the European Community, on the eve of the IGC in Turin", *The Law Society Gazette,* 27 March 1996.

[58] Ulpian (Digest, 1, 1, 10, 1): the *tria jura praecepta: honeste vivere, alterum non leadere* and *suum cuique tribuere*.

entrusted them in confidence for the defence of their rights.[59] The CCBE Code (art. 2.3.1) heralds that confidentiality is the "primary and fundamental right and duty of the lawyer". The rationale for this duty rests upon the belief that by guaranteeing clients confidentiality, lawyers can represent them adequately. A lawyer cannot defend his client properly if he does not know the whole story and clients do not reveal the whole story to their lawyer unless they are certain that he will keep it confidential.

In spite that confidentiality is being endorsed in the ethical standards regulating the legal profession everywhere, there are significant differences between legal traditions. In the civil law tradition, confidentiality ("professional secret") is a single and solid concept, while in the common law systems this principle 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" as an ethical standard for the profession. In addition, in civil law traditions professional secrecy is absolute (it cannot be revealed even with the client's consent), while in common law systems, the confidential information belongs to the client and therefore the lawyer can reveal it with the client's consent.[24]

## *CONFLICTS OF INTEREST*

*The question of conflicts of interest may well be the most controversial current issue in the legal profession*
*Working Group for the revision of the CCBE Code, Final Report, February 1998*

One of the fundamental ethical duties of lawyers is loyalty to the client, which translates into the obligation to avoid conflicts of interest. Geoffrey Hazard, the Director of the prestigious American Law Institute, recognised that "dealing with conflicts of interest is inherent in a lawyer's life".

### Notion of lawyer's conflicts of interest

A conflict of interests exists if the interest of any other person or entity interferes with a lawyer's ability to provide objective representation

[59] Ramon Mullerat, "Confidentiality: The primary and fundamental right and duty of the lawyer", The Jean Monnet Chair University of Miami, Florida, February 2005.

to his or her client.[60] A lawyer has a conflict when he cannot give loyal service to a client because of obligations to others or due to his own personal interests.[61] Conflicts may affect any of the two basic functions of a lawyer: representation in court and advisory role, the former being generally easier to detect. The principle of loyalty differs in litigation and in legal advice. Professors Hazard and Dondi[62] accurately say that the ultimate rationale for loyalty to the client in litigation is that it verifies the rectitude and proficiency of the judge. The ultimate rationale in office counselling is that a client has a right to manage his affairs with minimum entanglement with the law.

The rules on conflicts of interest –as Hans-Jurgen Hellwig[63] accurately put it- should be seen in the context of the legal definition and public perception of a lawyer in any given jurisdiction. In the civil law tradition, a lawyer, with regard not only to his court work but also to his legal advice, is considered an instrument in the administration of justice and an officer of the legal system. The clients' consent to representation of conflicting interests is therefore irrelevant. In common law countries, a lawyer has no such position, or has it only with regard to court work and not when advising a client out of court. In those countries conflict rules are primarily derived from the lawyer's contractual duties vis-à-vis his client and accordingly, the clients may, in many instances, waive the conflict. Therefore, Hellwig said, there will be no significant harmonization of conflict rules unless there is harmonization of the underlying definition of the lawyer's role in a democratic society that follows the rule of law.

## Types of conflicts of interest

There are four types of lawyers' conflicts of interest:

1. Conflicts between the lawyer's personal interests and the interests of the client (concurrent representation) (e.g. the lawyer wishes to

[60] K. Painter and A. Sayless, "Informed consent and legal malpractice", *For the defence*, May 2009, pp. 22-79.

[61] Geoffrey Hazard and Angelo Dandy, *Legal ethics. A comparative study*, 2004, p. 179.

[62] George Hazard and Angelo Dondi, *op. cit.*, pp. 170-171.

[63] Hans-Jurgen Hellwig, "Independence, conflicts and secrecy", *European Lawyer*, April 2001.

enter into business transactions with the client, or receive a gift from the client), which are based on the duty of loyalty to the client.
2. Conflicts between the interests of two or more clients that the lawyer is concurrently representing (concurrent representation). Largely a problem in litigation matters, it now arises more and more in non-litigation situations. They are based on the duty of loyalty.
3. Conflicts between the lawyer's duties to a present client and the lawyer's continuing duties to a former client (successive representation), which are based on the duty of confidentiality.
4. Conflicts between the client's interests and those of third parties to whom the lawyer owes obligations, for instance, when a third party pays the lawyer's fee (e.g. a lawyer paid by the insurer but representing the insured), which are also based on the duty of loyalty.

The CCBE Code (3.2) contains a general principle prohibiting concurrent conflicts (3.2.1 and 3.2.2) and successive conflicts (3.2.3) and the imputation principle (3.2.4) The English Solicitor's Code of Conduct (amended March 2009) (3.01) provides that: 1. Conflict is defined as a conflict between the duties to act in the best interests of two or more different clients, or between your interests and those of a client. The ABA Model Rules (1.7) define concurring conflicts as a prohibition of a lawyer representing one client in a manner "directly adverse to another client" or under circumstances causing the lawyer's representation of the client to "be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer".[64]

Although the duty of loyalty and the consequential duty to avoid conflicts are essential in the professional relationship, some believe that traditional legal analysis has led to legal rules that are too severe and inept to deal with the problems that arise in a modern sophisticated commercial society. Chester, Rowley and Harrison[65] i.e. say that the old rules were premised on the notion that lawyers would likely practice by themselves or in small firms in which lawyers were intimately involved in the practice, collaborating closely and sharing common knowledge and experience. They sustain that, while that model still dominates the

[64] English Solicitor's Code of Conduct (amended in March 2009), 3.01: 1.
[65] Chester, Rowley and Harrison, *op cit.,* p. 35.

profession –the majority of lawyers work in small firms– the market for legal services has resulted in large, economically powerful and professionally sophisticated firms and those ethical rules, which may present few problems for solo practitioners, fit uncomfortably into the larger legal landscape.[66,67]

## Client's consent

In some jurisdictions, mainly common law jurisdictions,[68] conflicts of interest can be waived by the protected client, whose interests the prohibition intends to keep safe, through "client's consent". The possibility to invalidate the conflict with the client's consent has been traditionally admitted in the US whose Canons of Professional Ethics (6) provided that "it is unprofessional to represent conflicting interests, except by express consent of all concerned given after full disclosure of the facts" and the current Model Rules that the client's consent may neutralize the conflict of concurrent clients (1.7[b][4]. The Model Rules (1.7[b][4]), i.e., requires for a valid waiver "informed consent"[69,70] to be "confirmed in writing", as a means to ensure security.[71]

But even in jurisdictions where it is possible to waive conflicts, there are situations in which consent of both clients is not sufficient for a lawyer to represent conflicting interests (the "non-consentable conflict"). In general, in litigation, the conflict of interest as a bar for the lawyer's intervention cannot be waived in any circumstance since a lawyer cannot act both for the criminal and the victim even if both parties would consent. Some litigations, however (i.e. divorces agreed by the parties) may present a different picture.

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[66] Chester, Rowley and Harrison, *op. cit.*, p. 36.

[67] Hollander and Salzedo, *op.cit.* pp. ll and 33.

[68] For example, Law Society of Scotland, Code of Conduct 2008, para. 6, 1. *Canada Davis & Co. et al. v. 3463920 Canadian Inc. et al,* 1 June 2007.

[69] ABA Model Rules, 1.7, Comments [18] and [19].

[70] *Clark Boyce v. Moriat* (1994), l.A.C. 428 at 435: "Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other".

[71] K. Painter and A. Sayless, *op. cit.*, p. 24.

**Imputation and screening (Chinese walls)**

In collective law firms, the "principle of imputation" provides that conflictual circumstances attributable to one partner are attributable to all the lawyers of the firm (the musqueteer rule "one for all, all for me") because ethical rules consider a law firm as a single lawyer. Therefore, the injunction not to represent conflicting interests applies equally to law partners representing different clients who have interests conflicting with one another. The ABA Model Rules (1.10 Comment [2]) provides that "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client"[72] and the CCBE Code (3.2.4) that "where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above (conflicts of interest) shall apply to the association and all its members".

In order to restrict the impact of "imputation", Chinese walls ("isolation", "insulation" or "screening") were invented in professional firms.[73] These consist in the separation of information regarding a particular matter from the rest of the information in a professional firm through insulation measures to prevent its free flow throughout the firm. This technique intends to allow professionals within the same firm to advise two or several clients with antagonistic interests with the aim to protect client confidentiality, so that the firm can handle conflicting clients. The insulation measures are the "wall".[74]

Presently there are different approaches with regard to screening:

a. *Liberal approach (UK)*. The UK allows Chinese walls rather generously. Rule 3 of the Solicitors' Code of Conduct (amended in 2009) sets out provisions for dealing with conflicts of interests. Rules 3.01 to 3.03 deal with conflicts generally. Rules 3.04 to 3.06 contemplate conflicts in particular high risk situations. The amended Code regulates written informed consent (3.02), the exceptions to the general prohibition (3.02), the possibility to act for two bidders with the parties' written consent (3.02[2]), special situations like accepting gifts (3.04), appointments leading to conflicts (3.05), ADRs (3.06), etc. Finally, the Code contemplates conflicts with

[72] ABA Model Rules, 1.8, Comment [20].

[73] "Chinese walls" came into wide use after the 1929 stock market crash, to describe an investment firm's internal efforts to isolate compromising information.

[74] Geoffrey Hazard and Angelo Dondi, *op. cit.*, p. 185.

sophisticated clients (3.01, 34, 35) and allows "information barriers" (Chinese walls) (3.01.6, 41-45).[75]

b. *Moderate approach (US)*. The screening process was introduced in the Modern Rules in 1987 for lawyers' moving situations created when government officials (and in 2002 when judges) moved from their positions to private practice. A new situation of screening was admitted by the Model Rules in 2009[76] when one lawyer moves from one firm to another firm. The amended Rule 1.10(a)(2) allows the other members of the firm to accept matters, provided that the disqualified lawyer is "timely screened" and written notice is given to any affected former client.

c. *Conservative-restrictive approach (EU)*. The CCBE Code contains a general principle prohibiting concurrent conflicts (3.2.1 and 3.2.2) and successive conflicts (3.2.3) and recognises the imputation principle (3.2.4) without any reference to client's consent or screening, whose silence must be interpreted as an implicit prohibition (*argumentum ex silentio*). As the CCBE Working Group to review the CCBE Code in 1996 recognised "the rules of conflicts of interest are of fundamental importance to the trust of the public in the legal profession. Great care must therefore be exercised when looking for ways of coping with the development of the legal profession when writing the rules concerning the conflict of interest".

## SOME CURRENT ETHICAL CHALLENGES FOR LAWYERS[77]

*It is fabulous to be a lawyer today*
*because we will have to reinvent the rules*
*of practice and lifestyle.*
*Tom Peters*[78]

[75] See Ed Nally, "Proposed change for legal services in England & Wales" in Keith Clark, *op. cit.*

[76] ABA Model Rules, 1.10 amended 20 July 2009, *http://abajournal.com/109 revised. PDF.*

[77] Ramon Mullerat, The future of the legal profession after the economic crisis 2008-20?? A perspective of the USA, 2009.

[78] Tom Peters, *op. cit.*

In this chapter I have summarized the three main ethical duties for lawyers. However, as a consequence of the tremendous evolution of our world, legal ethics today present special challenges as *signa temporum*.

It is difficult, nonetheless, to make general assertions to cover all six million lawyers in the world including mega-firms with thousands of lawyers and solo practitioners. It is like discussing about trade trends comprising large department stores and street peddlers.

In general, there is a common perception of a decline in ethical values and loss of professional soul and that the spirit of public service is not what once was.[79] The following are some of the factors:

1. *Commercialization*. In one of his novels, John Grisham[80] makes his protagonist exclaim "all students enter law school with a certain amount of idealism and desire to serve the public, but after three years of brutal competition we care for nothing but the right job with the right firm where we can make partner in seven years and earn big bucks".

   A major difficulty of the legal profession today is that it is gradually losing its professionalism to become a business.[81] To the extent that the AAA Commission on Professionalism issued a report (1986) asking "Has our profession abandoned principle for profit, professionalism for commercialism?".

   Many law firms today are run as a business, with professional managers, marketing departments and business consultants.[82] Especially after Thatcherism and Reaganism too many firms are obsessed with economic bottom lines, fee collection, billable hours

[79] Deborah Rhode, *In the interest of justice. Reforming the legal profession*, 2000, pp. 7 and 13.

[80] John Grisham, *The Rainmaker*, 1995. John Grisham, an author of legal novels, in most of his 22 books (The Firm 1991, The Chamber 1994, The Rainmaker 1995, The Partner 1997, The Street Lawyer 1998, The King of Torts 2003, and particularly The Associate 2009) criticizes the strained conditions in which young lawyers must live and work to advance in the profession.

[81] ABA Mid-Year Meeting Ethics 2000, Public Hearing San Diego, 15 February 2001 Oral testimony of Ramon Mullerat, O.B.E.

[82] Robert A. Stein, "The future of the legal profession", lecture based on the Keynote Address at the Minnesota Law Review, vol. 90 banquet, Minneapolis, 6 April 2006.

and making lives of lawyers particularly excruciating.[83] The internal professional language has largely switched to business language. There is a growing public perception that too many lawyers lack integrity and are too greedy.[84] Lawyers must remember that whatever Midas touched turned into gold until the food he lifted to his lips became a lump of metal.

2. *Fiercer competition*.[85] The increasing commercialisation brings about aggressive competition. The profession is coming a long way from the stereotypical lawyer to become a business person juggling with the demands of an increasingly competitive practice.[86] Competition between law firms, competition between lawyers within firms. Law firms' success is valued predominantly by economic results, overvaluing profits per partner, firms' brands prevailing over lawyers' professionalism, forcing early retirements. Excessive competition entails new methods of client-contracting: i.e. ferocious advertising, tender processes.
3. *Outsourcing*. Outsourcing is becoming a common practice in the legal profession. Today's law firm secretaries will be tomorrow's concierge of services –law firms have numerous outsourcing relationships, and the concierge will make sure that the work assigned is getting done somewhere.

   Many legal tasks are "de-lawyered" and delegated to, internal or external non-lawyers. Law firms are sending more work to outside legal vendors.[87] "Delawyering" has special connotations for law firms particularly regarding confidentiality and other ethical duties.
4. *Technology*. The administration of justice and the practice of law are intensely transformed by IT: from access information and

[83] That is what the protagonist (a new lawyer in a the large New York firm)'s girl friend (John Grisham's *The Associate*, 2009, p. 363, says to him: "Look around, Kyle, very few [new lawyers] stay more than three years. The smart ones are gone after two. The crazy ones make a career out of it".

[84] Deborah Rhode, *op. cit.*, p. 3: "About three-fifths of Americans describe attorneys as greedy ... Only one-fifth of those surveyed by the American Bar Association (ABA) felt that lawyers could be described as 'honest and ethical'".

[85] Michael Short, Hildebrandt International, "Law firm management: Battling a perfect storm".

[86] Joy Harcup, *op. cit.*

[87] Debra Cassens Weiss, "New Career Path for US Lawyers: Outsourcing Firms", *ABA Journal*, 10 December 2009.

conduct of legal research, to electronic hearings and court filings and ubiquitous emails. Technological advances are fundamentally altering the way legal services are delivered. Infrastructure product and service positioning are the main technology scenarios for law firms. Computers cannot replace judges but they might end up restraining their functions.

Richard Susskind, a Scottish professor who assisted Lord Woolf in the preparation of the UK new civil procedure law[88] said: "I envisage in the world to come that much of the lawyer's work will shift from being advisory in nature to becoming, in large part, a form of information service ... Much of today's conventional legal work will be systematized, routinized, and proceduralized". He predicted that lawyers will not be called lawyers any longer, but "legal information engineers".[89]

5. *Access to justice and commoditization of legal services*. Conventional legal advisers are becoming less prominent in society. Two forces are acting: a pervasive uptake of IT and a market pull towards commoditization. Traditional legal practice has been like a costume-made suit –it is crafted to an individual client's needs. But gradually standard legal tasks are performed by software or in a lower cost manner –and become commodities like off-the rack suits.[90] There is a pressure to facilitate access to justice through limiting litigation costs and increasing ADR.[91] A considerable deal of lawyers' production (i. e. contracts, wills) are being commoditized.

   Today, clients require from lawyers benchmarking, quality, control, lessons learned, values added and best practices and lawyers are gradually more consumer-oriented.
6. *Compensation*. Fees based on time (billable hours) are disappearing and replaced by fees by project or success fees. Contingency fees, so extended in the US, are progressively adopted in other parts of

[88] Richard Susskind, *The future of law*, 1999.

[89] Richard Susskind, *Transforming the law*, 2000.

[90] Richard Susskind, *The end of lawyers*, cited by Debra Cassens Weis, "As law firms respond to crisis, 21% of Law Students Regret Choice. *ABA Journal*, 9 December 2009.

[91] In a survey mentioned by *The Wall Street Journal* (April 5-6, 2008), 82% of surveyed Americans preferred to resolve their business disputes through arbitration to avoid time and costs. In another survey of the ABA mentioned in the same editorial, 78% of attorneys believed that arbitration saves time and 56% economic costs.

the world. Partners locked-step compensation is disappearing and replaced by "you eat what you kill" and other systems based on performance.

Every time more lawyers are expected to share risks with clients (full or partial success fees, remuneration in form of equity, etc.).

7. *Diverse ethical regulatory approaches.*[92] Even if the fundamental ethical principles remain the same everywhere, three different ethical regulatory approaches co-exist:
   - *The most liberal (England, Australia, Canada):* allowing outside non-lawyer investment in firms; multidisciplinary practices; differentiation between the sophisticated repeat corporate clients versus the individual; representation of conflicting clients in same bid, screening, etc.[93]
   - *At the middle (USA)*: allowing some informed waiver of conflicts by clients; permissibility of screening conflicts of interest (but only for moving lawyers),[94] increased liberalization of multijurisdictional practices, but retention of client protection oriented restriction, and relaxation of attorney-client privilege (i.e. Patriot Act, SOX).
   - *At the opposite end (Continental Europe):* strict rules in attorney-client privilege and conflicts of interest (no client's consent, no screening), advertising, etc.
8. *Erosion of main ethical principles*
   - *Independence*. During the communist era, lawyers in many countries were considered as civil servants and dependent from the government. At present constraining pressures on the independence exist. Lawyers in some countries (even sometimes in developed countries) do not have sufficient means of existence and finding more difficult to respect ethical principles. In developed countries many lawyers are subject to great pressures to

[92] Anthony Davis, "Regulation of the legal profession in the US and the future of the global law practice or why (and how) the New Regulatory System Being Put in Place in London May Lead to Changes in US Regulation ..."

[93] Many of these changes are a consequence of the recommendations made by David Climenti's report requested by Lord Falconer, the justice responsible of the UK government, and of the pressure from the Office of Fair Trading to open up the market and break down the profession's perceived monopoly status.

[94] Amendment Model Rules, Rule 1.9.

satisfy clients' short-term desires and to reach economic results[95] which deprive them from the necessary independence.

- *Confidentiality* is especially suffering from several attacks such as: a) the ECJ decision in the AM&S case 1982 depriving confidentiality from in-house counsel; b) the Patriot Act allowing the monitoring of conversations between attorneys and suspects of terrorism; c) the Gatekeeper initiative; d) the EU Directives on money laundering; e) the Sarbanes-Oxley Act and SEC Regulations, particularly the "noisy withdrawal"; f) the offer of lenient sentences to corporations waiving attorney-client privilege.[96]

  Reform promoters propose questions whether the duty of confidentiality adequately balances the needs of the client and the legal system, against those of third parties and the general public interest. They assert that confidentiality undervalues the administration of justice, and maintain that a) it is the legal profession, not clients or society, which primarily benefits from confidentiality; b) lawyers must keep information with too few exceptions; lawyers cannot reveal information when they know of defective products or toxic water, which can cause serious harm, the imprisonment of innocents, financial ruin, etc.; c) clients can use confidentiality as a "device for cover-our", for instance by handing over incriminating documents to lawyers; d) some lawyers encourage clients to fabricate facts outlining the law asking them to commit themselves to a version of the facts. They conclude that the benefits of confidentiality do not overweight the disadvantages.

  However, if society invites citizens to communicate to lawyers all relevant facts as needed for the administration of justice, and then the same society requires lawyers to report to the authori-

[95] Especially in large law firms hourly demands are high. Sometimes lawyers have to bill near 2.000 hours per year and 60 hours per week.

[96] ABA Task Force on Attorney-Client Privilege, Mission Statement: "Among recent actions of the federal government affecting the privilege that the Task Force should consider are the U.S. Sentencing Commission's proposed amendments to the federal sentencing guidelines for corporations and other entities. These amendments include as a new factor in determining whether the entity has fully cooperated, and hence is entitled to leniency, whether the entity and its employees waive attorney–client privilege and work product protections".

ties, the justice system becomes perverted. If this fundamental principle of the administration of justice is diluted, the legal profession suffers, and justice too.

- *Conflicts*

  There is a proliferation of conflicts due to several factors and mainly:

  – *Increased litigation*. With the increase of the level of life, citizens' awareness of rights grows and so does litigation for professional breaches, including lawyer's failures.[97]
  – *Size of firms*. Conflicts have become more abundant with growth of size and technification of law firms[98] making them introduce sophisticated conflicts checking systems.[99] [100]
  – *Mobility of lawyers*. If lawyers would work in 1 or 2 firms for their entire career, now, they change firms as often as 4 or 5 times. This has increased conflicts since a lawyer who moves to a new firm contaminates with his conflicts the rest of the lawyers in his new firm.[101]
  – *Lawyers acting in dual roles*. Conflicts of interest arise in situations where lawyers act in dual roles; as where a lawyer simultaneously represents an entity client and serves on its board of directors or trustees. Such a dual role is fraught with potential perils, in the likelihood that a law-

[97] M. Graven, "To the best of one's ability: a guide to effective lawyering", *Georgetown Journal of Legal Ethics*, 2001. In the 1970's, malpractice claims against lawyers in the US were so rare that malpractice insurance coverage was generally unavailable. Today, more than 70% of lawyers have malpractice insurance and 10% face malpractice suits.

[98] See Richard Susskind, *The future of law*, 1996, *Transforming the laws*, 2000, and *The end of lawyers*, 2009.

[99] A well known early case in US law is *Westinghouse Elec. Corp v. Kerr&'McGe Corp., 580 F2d 13111 ( 7th Cir. 1978* cited by Hazard and Dondi, *op. cit*, p. 185.

[100] R.S.G. Chester, J.W. Rowley and Brett Harrison, "Conflict of interest, Chinese walls and the changing business of law", *B.L.I.*, issue 2, International Bar Association, 2000, p. 35: "the pressures facing the legal profession worldwide challenge old rules and long-standing patterns of behaviour. In a world in which law firms grow in size, power and revenue and as other professions converge into areas previously reserved to the legal profession, it is not surprising that ethical rules face reassessment".

[101] Sean M. SeLegue, "Ethical walls find acceptance in Ninth Circuit", Rogers Joseph O'Donnell *&'* Phillips *Professional Liability News*, issue 8, March 2002.

yer may be disqualified from representing the company in litigation.[102]

- *Small jurisdictions and specialised sectors*. In small jurisdictions, with a small number of firms dealing with commercial clients, it is not uncommon for a firm to be instructed by two clients seeking a bid for the same project. Something comparable happens in larger jurisdictions when the number of specialized firms in some sectors (i.e. finance) is small.

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[102] R. E. Flamm, "Conflicts of interest. Self study & self assessment test". Martha Edwards, "Is the City solicitor in conflicts of interest?", *Telegraph Journal*, 7 January 2009.