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## Code of Conduct for the UPC?

November 28<sup>th</sup>, 2014,  
EPLAW Annual Congress,  
Brussels

by

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## Overview

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- I. Legal framework
- II. Issues identified
- III. Actions required

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# I. Legal Framework

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- General rules:
  - National rules, e.g. in Germany:
    - The Federal Lawyers' Act (BRAO, legislation)
    - Rules of Professional Practice (BORA, bar autonomy)
  - European rules:
    - CCBE in general: Charter of Core Principles of the European Legal Profession
    - CCBE for cross-border activities: Code of Conduct for European Lawyers
      - require adoption on national level (bar autonomy)
- UPC specific rules:
  - R 284
  - R 290.2, 291

# I. Legal Framework (c'td)

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- R 284: ... not to misrepresent facts or cases
- R290.2:
 

"Representatives who appear before the Court shall strictly comply with any code of conduct adopted for such representatives by the Administrative Committee."
- R291:
 

„1. If the Court considers that the conduct of a party's representative towards the Court, towards any judge of the Court or towards any member of the staff of the Registry is incompatible with the dignity of the Court or with the requirements of the proper administration of justice, or that such representative uses his rights for purposes other than those for which they were granted, or that such representative is otherwise in breach of any code of conduct adopted pursuant to Rule 290.2 it shall so inform the person concerned. On the same grounds, the Court may at any time, after having given the person concerned an opportunity to be heard, exclude that person from the proceedings by way of order. That order shall have immediate effect."

## I. Legal Framework (c'td)

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- **CCBE on Dignity, Trust and Personal Integrity:**
  - **Core Principle (d) – the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer:**

“To be trusted by ... the courts and the state, the lawyer must be shown to be worthy of that trust. ...; it does mean that he or she must not engage in disgraceful conduct, whether in legal practice ..., of a sort likely to dishonour the profession. Disgraceful conduct may lead to sanctions including, in the most serious cases, expulsion from the profession.” (also addressed in 1.2.1 CoC)
  - **CCBE code of conduct - 2. GENERAL PRINCIPLES - 2.1. - 2.2. Trust and Personal Integrity**

“Relationships of trust can only exist if a lawyer’s personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations. ...”

## I. Legal Framework (c'td)

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- **Sanctions - e.g. BRAO § 114**

“(1) Sanctions that may be imposed by a Lawyers' Disciplinary Court are

  1. a warning,
  2. a caution,
  3. a fine of up to twenty-five thousand euro,
  4. a ban on acting as representative and counsel in certain fields of law for a period of between one and five years,
  5. exclusion from the legal profession.

(2) A caution and a fine may be imposed in conjunction.”

## I. Legal Framework (c'td)

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- **CCBE CoC on Independence:**

“2.1.1. The many duties to which a lawyer is subject require the lawyer’s absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. ...”

## I. Legal Framework (c'td)

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- **CCBE CoC on RELATIONS WITH THE COURTS**

**“4.1. Rules of Conduct in Court**

A lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal.

**4.2. Fair Conduct of Proceedings**

A lawyer must always have due regard for the fair conduct of proceedings.

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## I. Legal Framework (c'td)

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- **CCBE CoC on RELATIONS WITH THE COURTS (c'td)**

...

### 4.3. Demeanour in Court

A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person.

### 4.4. False or Misleading Information

A lawyer shall never knowingly give false or misleading information to the court."

## I. Legal Framework (c'td)

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- **Proposed consequences on RoP:**
  - R 284: ... not to misrepresent facts or cases  
→ *Corresponds to 4.4 CoC CCBE and may systematically better be included in UPC CoC under R 290.2.*
  - R 290.2: "Representatives who appear before the Court shall strictly comply with any code of conduct adopted for such representatives by the Administrative Committee."  
→ *UPC CoC should be enforceable by national bar associations under 4.1, 1.2.1 CoC CCBE in connection with national rules.*

## I. Legal Framework (c'td)

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- R291:

„1. If the Court considers that the conduct of a party's representative towards the Court, towards any judge of the Court or towards any member of the staff of the Registry is incompatible with the dignity of the Court or with the requirements of the proper administration of justice, or that such representative uses his rights for purposes other than those for which they were granted, or that such representative is otherwise in breach of any code of conduct adopted pursuant to Rule 290.2 it shall so inform the person concerned. On the same grounds, the Court may at any time,

...

after having given the person concerned an opportunity to be heard, exclude that person from the proceedings by way of order. That order shall have immediate effect.

inform his or hers respective bar association.

## II. Issues identified by EPLAW WG

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- The EPLAW WG CoC was formed by:

Sabine Agé, Christof Augenstein, Eric de Gryse, Klaus Haft, Rainer Hilli, Myles Jelf, James Marshall, David Por, Wouter Pors, Thomas Schachl, József Tólas, Bruno Vandermeulen, Richard Willoughby, Alex Wilson

## II. Issues identified by EPLAW WG

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- **Conflicts and protection of confidential information:**

- Definition of legal conflicts
- Infection of firms following lateral hires
- Decision about disputes regarding conflicts
- Ethical walls
- Protective orders
- Attorney-eyes-only information
- Lawyer-to-lawyer communication

→ *Issues probably to be resolved on CCBE and/or national level, even though a UPC specific mechanism might be desirable.*

## II. Issues identified by EPLAW WG

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- **Duties to the court:**

- Contacts with judges
- Truthful presentation of facts
- Efficiency (“not to knowingly waste the Court’s time”)

→ *Issues to be resolved in UPC CoC*

## II. Issues identified by EPLAW WG

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- **Experts and witnesses:**

- Contacts and coaching
- Payments (for time, not for lies, of course)
- Lawyers as witnesses
- Instructing experts

→ *Issues to be addressed in UPC CoC or even better in RoP?*

## II. Issues identified by EPLAW WG

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- **Miscellaneous:**

- Pre-action conduct
- Contact to party
- Contingency fees
- Record keeping
- Accounting
- Avoiding discriminatory behavior

→ *Issues – if at all - to be resolved on CCBE and/or national level.  
Pre-action conduct question of material law.*



## II. Actions required

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- Modify R 291.1
- Draft UPC CoC → EPLAW WG happy to assist (see next slides prepared by subgroup of EPLAW CoC WG including József Tálas, Thomas Schachl, Richard Willoughby and David Por)
- Harmonize national rules on identified topics on CCBE level → EPLAW WG happy to assist
- National bars and representatives other than lawyers through their professional organisations should adopt CCBE CoC

## II. Actions required (c'td)

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- **E.g. Duties to the Court:**

**Clause 1. A representative shall perform such practice that are lawful, honest and respectful of courts.**

1.1. The representatives (lawyers and patent attorneys) shall not knowingly or recklessly mislead the court or offer or rely on false evidence. //OR// The representatives (lawyers and patent attorneys) shall not knowingly or recklessly mislead the court or offer or rely on false evidence. If a representative becomes aware that he or she has inadvertently misled the court, or a witness has lied in evidence, the representative shall seek the client's consent to inform the Court as appropriate and in the absence of consent shall cease to represent the client.

1.2. The representatives shall not disclose any document that is subject to privilege.

1.3. The representatives are prohibited to actively and knowingly mislead the Court in legal issue. //OR// No provision on misleading in legal issues. Please note that our subgroup has no agreement on this issue. We suggest to let the Advisory Committee know our divergent views.

## II. Actions required (c'td)

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**Clause 2. A representative shall act with integrity and professionalism, while maintaining her or his responsibility to ensure civil conduct.**

- 2.1. The representatives shall have respect to the court and towards any member of the staff of the Court and the Registry.
- 2.2. Subject to right of appeal, the representatives shall respect the procedural orders of the Court.
- 2.3. The representatives should not abuse the court process.
- 2.4. The representatives shall exercise their rights in good faith.
- 2.5. The representatives shall be reasonably accommodating and flexible regarding scheduling and routine matters.
- 2.6. The representatives shall be honest and truthful with opposing party's representatives.
- 2.7. The representatives shall be dignified and courteous towards members of the Court, staff of the registry or representatives of the opposing party.

## II. Actions required (c'td)

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2.8. Subject to ex parte procedures and scheduling of the given procedures the representatives shall not contact a UPC judge about a specific case without the prior consent of the representative of the opposite party. //OR// Save to the extent necessary for ex parte procedures, the representatives shall not contact a UPC judge about a specific case without the prior notice of the representative of the opposite party.

**Clause 3.** The representatives shall educate clients about the limits of the law and the representatives' professional obligations, including the overriding obligation to the Court. Please note that our subgroup has no agreement on this issue. We suggest to let the Advisory Committee know our divergent views.

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Thank you!

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