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The Challenges of Developing Cross-Cultural Legal Ethics Education, Professional Development, and Guidance for the Legal Professions

Philip Genty
Columbia Law School, pgenty@law.columbia.edu

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Philip M. Genty*

Introduction

The broad goal of this paper is to describe the need, and provide a framework, for engaging in cross-cultural conversations among lawyers, law teachers, and others, who are using legal ethics as a vehicle for improving the legal professions and the delivery of legal services. All legal cultures struggle with the question of how to educate students and lawyers to be ethical professionals and how to regulate the legal profession effectively. The purpose of the cross-cultural conversations discussed in this paper would be to develop principles of legal ethics education, professional development, and regulation of the legal professions that can be applied across cultural contexts.

The paper is *not* primarily concerned with the ethics of transnational practice, an issue that has been analyzed very well by others.[1] While the current U.S. ethical rules have relatively little to say about transnational practice,[2] the Council of Bars and Law Societies of Europe (hereafter "CCBE") has dealt

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* Everett B. Birch Innovative Teaching Clinical Professor in Professional Responsibility, Columbia Law School. I want to thank my research assistant Amanda Hungerford, Columbia '10, for her wonderful work on this project. A version of this paper was presented at the 4th International Legal Ethics Conference, "Legal Ethics in Times of Turbulence," Stanford Law School, July 2010.

1. *See, e.g.,* Maya Goldstein Bolocan, Editor, *Professional Legal Ethics: A Comparative Perspective,* ABA Central European and Eurasian Law Initiative, Legislative and Research Program (2002), at 92-101; Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution,* 13 GEO. J. LEGAL ETHICS 677 (Summer 2000); Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code, Part I: An Analysis of the CCBE Code of Conduct,* 7 GEO. J. LEGAL ETHICS 1 (1993); and Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code, Part II: Applying the CCBE Code of Conduct,* 7 GEO. J. LEGAL ETHICS 345 (1993). *See also* Rachel Barish, *Professional Responsibility for International Human Rights Lawyers: A Proposed Paradigm* (2007) (unpublished paper on file with the author).

2. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5—Disciplinary Authority: Choice of Law, Comment 7: "The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise."

with this in a sustained and comprehensive manner. The CCBE has promulgated the Code of Conduct for European Lawyers and the Charter of Core Principles of the European Legal Profession. The Code of Conduct was first promulgated in 1988, while the Charter was adopted much more recently, in 2006.[3] As of 2008, forty-one countries had signed on to the CCBE Charter and Code of Conduct.[4] A review of national codes of legal ethics reveals the influence of the CCBE approach. There is a good deal of uniformity among these, and the CCBE Charter and Code of Conduct are apparently the models for many of the recently enacted or amended Codes.[5]

Another source of guidance for transnational practice is the International Bar Association, International Code of Ethics.[6] This is a very short document, framed in general terms. The International Bar Association is currently at work on a set of comments to accompany the Code of Ethics. When it has been completed the commentary will flesh out the Code principles in detail.[7]

A challenge arising from globalized law practice is that the legal profession is, in fact, many different professions. For example, in European countries the legal professions are divided by specialty area (advocate/barrister, notary, prosecutor, judge, professor, etc.), and students typically decide upon a professional track

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3. Council of Bars and Law Societies of Europe, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, 2008 Edition, at 1 (*available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1249308118.pdf).

4. The countries are: Albania, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Former Yugoslav Republic of Macedonia (hereafter "Macedonia"), France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom. Council of Bars and Law Societies of Europe, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, 2008 Edition, Commentary on Article 1.4—Field of Application Ratione Personae *supra* note 3 at 21-22.

5. *See, e.g.*, Maya Goldstein Bolocan, Editor, *Professional Legal Ethics: A Comparative Perspective,* ABA Central European and Eurasian Law Initiative, Legislative and Research Program (2002), at 9 (noting that the CCBE Code is "meant to contribute to the 'progressive harmonization' of lawyers' codes of conduct of countries of the European Union and European Economic Area.") (citing CCBE Code Article 1.3.2). For this paper ethics codes of the following countries (in addition to the CCBE materials and the U.S. Model Rules of Professional Conduct) were reviewed: Albania, Armenia, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Israel, Italy, Latvia, Macedonia, Malta, Moldova, Poland, Scotland, Slovenia, Sweden, Ukraine. These will be analyzed in detail elsewhere in this paper. Among the striking similarities are the ordering of sections (like the CCBE Code, most European ethics codes begin with "Independence") and the wording of key sections like Confidentiality and Conflict of Interest.

6. *Available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=A9AB05AA-8B69-4BF2-B52C-97E1CF774A1B.

7. Conversation with Jonathan Goldsmith, Secretary General, CCBE, July 16, 2010, 4th International Legal Ethics Conference, "Legal Ethics in Times of Turbulence," Stanford Law School.

during law school and take courses that will prepare them for that specialty.[8] In addition, ethical codes often preclude a lawyer from working simultaneously in "incompatible activities," e.g. as both an advocate and a notary because of a perceived conflict between those professional roles.[9] In the United States, although there are no such formal specialty areas, students likewise begin to specialize informally during law school. Some focus on transactional matters, some on commercial litigation involving representation of entities, some on government work, some on civil public interest (e.g. housing, benefits, family law, civil rights, environmental law), some on criminal law, etc. The CCBE Code, in listing the signatory countries, indicates that the Code is applicable only to *advocates* (or the equivalent title within each country).[10] This appears to be true of the national codes as well. For simplicity, the focus of this paper will therefore be on "advocates" or their equivalent, unless otherwise indicated.

This paper seeks to find a language and framework for addressing ethical issues of common concern, even if (and maybe especially if) they lead to different local solutions. The starting point for this is an examination of existing codes of legal ethics, because these codes are central to any analysis of ethical issues. They are the common language used by the legal professions of all countries, and they are concrete and public expressions of the principles that govern and guide the legal professions.

However, such an examination must go beyond merely describing and comparing these codes, to an analysis of the purposes the codes are designed to serve and the extent to which they actually achieve those purposes. As described more fully below, the international literature on codes of public administration suggests that professional codes should reflect the most significant and typical problems that arise within the profession and the core values of the profession.[11] In addition,

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8. *See, e.g.,* Richard J. Wilson, 18th International Congress on Comparative Law, Washington, D.C., July 2010, General Report: The Role of Practice in Legal Education, at 10-14; Maya Goldstein Bolocan, Editor, *Professional Legal Ethics: A Comparative Perspective,* ABA Central European and Eurasian Law Initiative, Legislative and Research Program (2002), at 4; Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code, Part I: An Analysis of the CCBE Code of Conduct,* 7 GEO. J. LEGAL ETHICS 1, 10-11 n.33 (1993).

9. *See, e.g.,* Maya Goldstein Bolocan, Editor, *Professional Legal Ethics: A Comparative Perspective,* ABA Central European and Eurasian Law Initiative, Legislative and Research Program (2002), at 45-47.

10. Council of Bars and Law Societies of Europe, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, 2008 Edition, Commentary on Article 1.4—Field of Application Ratione Personae, *supra* note 3 at 21-22.

11. *See* Alan Lawton (Hull University, UK and VU University, Amsterdam), Michael Macaulay (Teesside University, UK), Jolanta Palidauskaite (Kaunas University of Technology, Lithuania), "Towards a comparative methodology for public service ethics," paper presented at EGPA Conference, Malta 2-5th September 2009, PSG VII: "Ethics and Integrity of Governance, *available at* http://www.egpa2009.com/documents/psg7/Lawton-Macaulay.pdf. The paper is discussed in Section II, *infra.*

codes serve three distinct purposes: they inspire, they guide, and they regulate the profession.[12] While codes may do all three of these things, it is important to distinguish among these purposes in assessing the efficacy of code provisions.

To this end, this paper suggests that practitioners, scholars, teachers, and policymakers should engage in a four-step approach:

1. identify the most common and/or important gaps and problems that need to be addressed through a system of legal ethics;
2. define the core ethical principles and values within the society and legal professions;
3. analyze and, if necessary, revise existing ethical codes to ensure that they address these problems and reflect these core principles and values, through a combination of inspiration, guidance, and regulation; and
4. using the codes as the centerpiece, design a system of ethical education and professional development—or improve existing systems—to prepare the legal professions within each society to recognize and deal effectively with these ethical issues.

To illustrate these ideas more concretely, the paper will use the particular focus of public interest advocacy and the related issue of access to legal services. This context is often overlooked in discussions of legal ethics and regulation of the legal profession; such discussions typically focus on private practice and emphasize issues relating to fees, advertising and solicitation, competition for business, etc. The literature on ethics in the public interest context is therefore underdeveloped, and it is hoped that this paper can make a useful contribution.

Section I of the paper reviews some of the work that has been done in comparative legal ethics. The section also includes observations about the similarities and differences among national codes of legal ethics. Section II discusses research from public administration scholars who have examined professional codes applicable to government employees. These scholars have developed approaches to identifying important ethical problems and core ethical values and principles, and these approaches could be adapted to the legal professions. Section III uses the public interest advocacy and access to legal services context to illustrate how the approach to public administration ethics described in Section II could be adapted to the field of legal ethics. Two sets of issues that are important to public interest advocates will be examined in a comparative context: the allocation of decision-making responsibility between lawyers and clients and related issues of client counseling; and methods of stretching scarce legal resources to provide more people with access to these services, including "unbundling" of legal services and *pro bono* assistance. The paper ends with some brief concluding reflections.

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12. *See* Jolanta Palidauskaite, *Codes of Ethics in Transitional Democracies, A Comparative Perspective,* 8 PUBLIC INTEGRITY 35 (Winter 2005-2006), discussed in Section II, *infra.*

I. Comparative Approaches to Ethical Regulation of the Legal Professions

An obvious challenge in taking a cross-cultural approach to legal ethics is that each society operates with its own particular set of ethical principles. Unlike substantive law, which, at least to some extent, can be examined and compared in an objective, theoretical manner, an examination of professional legal ethics is inherently subjective and contextual, because the legal professions and the practice of law are necessarily defined in large part by the specific culture of which they are a product.

Commentators have noted this in their analysis of differences between the U.S. common law and European civil law approaches to legal ethics.[13] One general observation is that the U.S. rules are much more "legalistic," detailed, and specific than their civil law counterparts, which tend to be framed in terms of general standards or norms.[14] Mary Daly described this distinction between "rules" and "standards": Rules are "commands that constrict a decisionmaker's discretion. They reflect a choice among competing values by a policymaker. . . ."[15] Standards are "general principles that allow the decisionmaker greater discretion in applying designated values."[16]

A second observed difference is in the duty of professional independence. Whereas in the U.S., professional independence is seen as enabling an attorney to represent a client without being unduly influenced by third parties, public opinion, or other possible sources of interference with the exercise of independent professional judgment,[17] in civil law systems this independence is even from *one's own client.* For example, one group of commentators has suggested that independence from the client as well as the court and other advocates is a cornerstone of French

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13. *See, e.g.,* JAMES MOLITERNO & GEORGE HARRIS, Global ISSUES IN LEGAL ETHICS (2007) (discussing the ethical codes of the U.S. and Europe, as well as some Asian countries). I have also offered some observations about differences in education and practice between the U.S. common law system and European civil law systems. *See* Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Education,* 15 CLINICAL L. REV. 131 (2008).

14. *See, e.g.,* Felicity Nagorcka, Michael Stanton, Michael Wilson, *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice,* 29 MELB. U.L. REV. 448, 474 (2005); Maya Goldstein Bolocan, Editor, *Professional Legal Ethics: A Comparative Perspective,* ABA Central European and Eurasian Law Initiative, Legislative and Research Program (2002), at 9; Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution,* 13 GEO. J. LEGAL ETHICS 677, 689 (Summer 2000); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers,* 32 VAND. J. TRANSNAT'L L. 1117, 1123 (1999).

15. Daly, *supra,* note 14, at 1123.

16. *Id.*

17. *See, e.g.,* MODEL RULES OF PROF'L CONDUCT, R. 1.7, 1.8.

legal ethics.[18] This independence has several implications. First, French attorneys are free to decline a case and do not have to follow the client's directions if they decide to accept the case.[19] Second, confidentiality is the right of the lawyer not the client.[20] Finally, the determination of whether a conflict of interest exists is entirely the attorney's, and client consent to waive a conflict is neither solicited nor honored.[21]

Another commentator has offered this description of the differences in approach to professional independence between the civil law and U.S. common law systems:

> European civil law countries generally embrace an ideology of professional independence and autonomy from the client that is alien to, and stands in contrast with, the U.S. lawyer's primary commitment to the latter. An example of this different approach can be found in the rule, common to many European civil law systems, requiring confidentiality to cover communications between lawyers.[22]

A third difference is that the ABA Model Rules of Professional Conduct are much more detailed than most of the European codes in their treatment of the scope and dynamics of the attorney-client relationship and the attorney's counseling role, issues of particular importance to public interest advocates. Most of the European codes include provisions concerning duties of diligence and communication that are equivalent to ABA Model Rules 1.3 (diligence) and 1.4 (communication). However, as discussed more fully in Section III, *infra,* with the exceptions of Estonia, Scotland, and Ukraine,[23] European codes lack provisions similar to ABA Model Rules 1.2 (distinguishing between goals and means of representation, allocating decision-making responsibility between the attorney and the client, and determining the scope of representation), 1.14 (regarding representation of clients with diminished capacity), and 2.1 (describing the lawyer's role as counselor and advisor to the client). The Model Rules also include detailed comments explaining and expanding upon the text of the Rules.

A final difference is that the European codes, unlike the ABA Model Rules, do not provide any guidance to advocates about how to resolve inherent tensions

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18. Nagorcka et al, *supra* note 14, at 465.

19. *Id.* at 465-466.

20. *Id.*

21. *Id.* at 472. *See also* Maya Goldstein Bolocan, Editor, *Professional Legal Ethics: A Comparative Perspective,* ABA Central European and Eurasian Law Initiative, Legislative and Research Program (2002), at 36-45 (describing approach to conflicts of interest in civil law jurisdictions generally).

22. Maya Goldstein Bolocan, Editor, *Professional Legal Ethics: A Comparative Perspective,* Central ABA European and Eurasian Law Initiative, Legislative and Research Program (2002), at 11.

23. *See* discussion of these codes in Section III, *infra.*

among code provisions. The most obvious example of this in the ABA Model Rules is the treatment of the tension between the duties of confidentiality and candor. As Monroe Freedman has noted, it is sometimes not possible for a lawyer to promise both complete confidentiality to the client and complete honesty to the tribunal. Professor Freedman has described this as an impossible "trilemma": "to know everything possible, and to keep it in confidence, but to divulge it to the court if candor to the court required it."[24]

ABA Model Rule 3.3 resolves this tension by providing that the lawyer's duty of candor to the tribunal trumps the duty of confidentiality to the client: an attorney might be required to disclose client confidences to the tribunal if the attorney knows that the client intends to provide or has provided false testimony or evidence.[25] However, for a public interest lawyer, the clarity of this resolution comes at a high price by arguably undermining the attorney's ability to gain the often fragile trust of a vulnerable and legally unsophisticated client. Finding a way to explain the requirements of Rule 3.3 fully and clearly to a client while maintaining the client's trust is a difficult balancing act, for which the ABA Model Rules do not really provide any help.

The European codes do not have any equivalent to this explicit recognition in ABA Model Rule 3.3 of the tension between the duties of confidentiality and candor. However, it may be that the potential tension between the duties of confidentiality and candor is simply less of a concern in Europe than in the U.S. As noted below, European codes generally have only limited exceptions to an otherwise absolute duty of confidentiality, and attorneys typically do not have an affirmative duty to vouch for the truthfulness of their clients, so the duty of candor is arguably less demanding than in the U.S.

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24. Monroe H. Freedman, *Getting Honest About Client Perjury,* 21 GEO. J. LEGAL ETHICS 133, 137 (Winter 2008). For an earlier exposition of these ideas, *see* Monroe Freedman, *The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 MICH. L. REV. 1469 (1966).

25. MODEL RULES OF PROF'L CONDUCT R. 3.3. Rule 3.3 provides in pertinent part:

(a) A lawyer shall not knowingly:

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply **even if compliance requires disclosure of information otherwise protected by Rule 1.6.**

(emphasis added)

Some additional, more specific differences between many of the European codes and the ABA Model Rules include the following characteristics of the European codes:

- a greater emphasis on civility, typically including restrictions on criticism of adversaries and sometimes judges as well
- prohibitions against engaging in "incompatible" legal professions
- the duty to accept appointments to Bar Associations in the absence of a compelling basis for not doing so
- duties that extend beyond the professional role as an attorney into the private sphere
- a duty to try to settle cases at the outset and to attempt to avoid litigation if possible, presumably reflecting a goal of avoiding unnecessary use of legal resources
- a duty to teach postgraduate trainees about their ethical duties (in addition to a duty to supervise subordinates, which is also found in the ABA Model Rules[26])

There are also many similarities between the U.S. and civil law approaches to ethical codes.[27] Like the ABA Model Rules, almost all of the civil law codes cover the following topics:

- competence
- conflicts of interests in concurrent representation and with respect to former clients (although as noted above, there is typically no provision for client consents to waive conflicts)
- confidentiality (although unlike the U.S. Model Rules,[28] these codes are typically framed quite generally with few exceptions beyond client consent and use in fee and malpractice disputes; some include commission of crime and/or general "as required by law" language; some include a duty of confidentiality to an opponent, even as against the client)
- a duty of candor, typically including a knowledge standard and applying to courts and others (however, one difference is that most codes do not include a duty to investigate or vouch for the truth/merits of a client's case[29])
- a no contact rule, i.e. a prohibition against contacting a represented person without the presence or permission of that person's attorney
- provisions concerning permissive and mandatory withdrawal

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26. *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 and 5.3.

27. As noted, the Israel Code of Legal Ethics was also reviewed. Israel is, strictly speaking, more of a common law than civil law jurisdiction.

28. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6.

29. *Compare* MODEL RULES OF PROF'L CONDUCT R. 3.1.

II. Illustrative Frameworks for Analyzing Core Values and Principles

While an analysis of the national codes of legal ethics cited in the preceding sections is useful in outlining the formal ethical requirements for the legal professions of these countries,[30] the codes themselves tell us little about whether they serve the needs of the legal professions and the public. To do this, one must first step back and reflect upon the reasons these codes have been developed.

Several public administration scholars examining professional codes governing public servants have provided insights that are useful to this analysis of lawyers' codes of ethics. Jolanta Palidauskaite has provided an example of a methodology for analyzing professional codes to get at their underlying values.[31] Professor Palidauskaite examined public service codes from Estonia, Bulgaria, Latvia, Czech Republic, Macedonia, Poland, Albania, Slovakia, Romania, and Lithuania. After conducting a close textual analysis of the purpose, content, structure, principles, and sanctions imbedded in each of the codes, she divided them into four categories: those designed to guide conduct, those designed both to inspire and to guide conduct, those designed to guide and regulate conduct, and those that balance among inspiration, guidance and regulation.[32] She concluded that the codes indicated that the countries differ in important ways "in how they react to, solve, and try to prevent problems in the field of public administration ethics."[33]

Professor Palidauskaite's breakdown into the goals of inspiration, guidance, and regulation, or some combination thereof, is an extremely useful insight. It is too easy to lump these goals together and fail to distinguish among them; it is important instead to be explicit about what we expect each provision of an ethical code to accomplish. Some provisions are necessarily broad and inspirational, e.g. a duty to "safeguard the good reputation of courts and authorities . . . [and] to strengthen the public confidence [in] their activity of the profession."[34] Some provide necessary guidance to lawyers who would otherwise be unsure about how to discharge their ethical duties, e.g. a list of circumstances in which disclosure of confidential information is permitted. Finally, some serve to regulate and discipline the profession, e.g. prohibitions against incompetent representation. In designing an ethical code that will be rational, comprehensible, and practical, and that can be used effectively to educate lawyers about their ethical duties, it is therefore important to bear these distinctions in mind.

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30. As noted, the CCBE and European codes apply only to "advocates." Different professional codes apply to other sectors of the legal profession.

31. Jolanta Palidauskaite, *Codes of Ethics in Transitional Democracies, A Comparative Perspective,* 8 PUBLIC INTEGRITY 35 (Winter 2005-2006).

32. *Id.* at 36-37.

33. *Id.* at 37.

34. Code of Professional Conduct of the Bar Association of Slovenia, passed at the Lawyer' Assembly of the Bar Association of Slovenia, 7 December 2001, §18. *Available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/code_slovenia_enpdf1_1188552980.pdf.

James S. Bowman makes a distinction similar to Professor Palidauskaite's. He contrasts rules that govern professional regulation and discipline, which he calls "codes of conduct," with "ethical codes." In describing the differences he is highly critical of the former:

> Rule-based conduct codes are most often found in statutes or executive orders. . . . Attempting to convert the realm of ethics into the realm of law, this coercive, quick-fix strategy usually reduces ethics to legalism by focusing on both the lowest common denominator and penalties for deviations. The strategy does little to promote a philosophy of excellence or to engender a sense of personal responsibility. . . . In contrast, codes of ethics demand more than simple compliance; they mandate the exercise of judgment and acceptance of responsibility for decisions rendered—the real work of ethics. Acknowledging the ambiguities and complexities of public service, ethics codes offer interpretative frameworks to clarify decision-making dilemmas.[35]

Thus, according to Bowman, the codes that govern regulation and discipline of the profession are less valuable than those that guide professionals through the ethical dilemmas they face in their work.

Professor Palidauskaite also conducted a study of public service ethics jointly with two colleagues, Alan Lawton and Michael Macaulay.[36] The study compared the U.K. and Lithuania and sought to examine and compare the policies underlying the ethical codes for the public service professions within each country. They broke the analysis into the following ethical policy categories:

1. Policy push refers to the factors or critical incidents that might provide the reasons for putting in place an ethical framework. . . .
2. Policy issues refers to those that are addressed by the introduction of the ethical framework and may include conflicts of interest, corruption and fraud, standards of behaviour and croneyism. In comparative studies, a key issue is the extent to which countries share similar problems.
3. Policy goals are what the policy is trying to achieve, whether it be the punishment of individual transgressions or the elimination of systemic corruption. . . .

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35. James S. Bowman, *Towards a Professional Ethos: From Regulatory to Reflective Codes,* INTERNATIONAL REVIEW OF ADMINISTRATIVE SCIENCES 66, no. 4:673, 680 (2001).

36. Alan Lawton (Hull University, UK and VU University, Amsterdam), Michael Macaulay (Teesside University, UK) and Jolanta Palidauskaite (Kaunas University of Technology, Lithuania), "Towards a comparative methodology for public service ethics," paper presented at EGPA Conference, Malta 2-5th September 2009, PSG VII: "Ethics and Integrity of Governance, *available at* http://www.egpa2009.com/documents/psg7/Lawton-Macaulay.pdf.

4. Policy objects refers to the individuals or institutions to whom, or what, the policy is to be applied. . . .
5. Policy instruments refers to the tools that are used to achieve the policy goals and will include laws and regulations, codes of conduct, anti-corruption agencies, training etc.
6. Policy implementation will depend upon leadership and the role of key individuals such as ethics officers, resources, capacity and capability. . . .
7. Policy styles will reflect the extent of central direction and local discretion; unitary or federal systems of government. . . .[37]

They then developed a "taxonomy of ethical regulation," which charted these policy categories as shown in the table on the next page.[38]

This "taxonomy" approach could easily be adapted for analyzing legal codes of ethics. The first three categories in the authors' taxonomy relate to the underlying ethical problems a code is intended to remedy and the core values underlying the code; the fourth and fifth categories relate to the professionals to whom the code is addressed and the specific contents of the codes and accompanying legislative and regulatory materials; and the final two categories relate to the means for implementing and disseminating the codes.

Drawing upon the work of these public administration scholars, this paper proposes a cross-cultural "ethical conversation" in which ethical goals and values are analyzed and strategies for implementation, dissemination, and education are developed. As discussed in the introduction, the "conversation" envisioned here would involve the following steps:

Stepping away from the ethical codes,

- identify the most common and/or important gaps and problems that need to be addressed through a system of legal ethics; and
- define the core ethical principles and values within the society and legal professions.

Looking back at the existing ethical codes,

- analyze and, if necessary, revise the codes to ensure that they address these problems and reflect these core principles and values, through a combination of inspiration, guidance, and regulation.

Moving forward,

- using the codes as the centerpiece, design a system of ethical education and professional development—or improve existing systems—to prepare the legal professions within each society to recognize and deal effectively with these ethical issues.

37. *Id.* at 5-7.
38. *Id.*

A Taxonomy of Ethical Regulation

Policy Push	Policy Issues	Policy goals	Policy objects	Policy Instruments	Policy Implementation	Policy Styles
• critical incidents such as high profile corruption case • media pressure • citizen pressure • International law/ agencies	• corruption • conflicts of interest • discrimination • nepotism	• punish individuals • stamp out widespread corruption • as a corrective to unethical practices	• MPs • Police • Judges • Lobbyists	• laws • protocols • code of conduct • anti-corruption agency	• leadership • ethics officer • training • well-trained staff	• top-down • local variations

The next section provides an example of how this might be done and concludes with a summary legal ethics "taxonomy" chart modeled on that of Lawton, Macaulay, and Palidauskaite, above.

III. Engaging in a Cross-Cultural Ethical Conversation: An Illustration

How would such a conversation unfold? Imagine a group of like-minded ethical problem solvers from many different countries attending an international conference. They have been organized by subject matter to help focus discussion. One such group consists of advocates, scholars, teachers, and other legal professionals (possibly including judges) who have a particular concern about public interest advocacy and access to legal services. The steps they would take are described below.

A. Defining Important Ethical Problems and Core Values

For the first and second steps, the participants would engage in collective brainstorming about ethical challenges and core values. The participants might first agree that their societies share the following challenges:

- lack of access to legal services for low income populations is a serious problem within all of the represented societies
- public interest clients are vulnerable and legally unsophisticated, and some have diminished capacities because of mental disabilities
- power imbalances between lawyers and clients result from these and other factors
- a lack of available alternative representation for the clients puts a special moral burden on the public interest advocates to choose between taking on as many clients as possible—creating caseload pressures and making competent representation more difficult—or turning away needy clients
- many clients have needs that go beyond the strictly legal, i.e. a need for interdisciplinary assistance

Next, the participants would identify shared values and principles. Among these might be the following:

- clients who have legal needs should have full access to legal services
- maximization of client trust is important to effective provision of legal services
- clients should have autonomy to define goals and make informed decisions about their representation
- the quality of legal resources available to economically disadvantaged clients should be comparable to that of the resources available to clients with money
- achievement of law reform and social change is an important long-term goal for public interest advocates

As part of this second step the participants might note some of the tensions inherent in these lists. For example, the goal of providing broad access to legal services likely conflicts with the goal to provide first-class legal representation, because in order to achieve the former goal, advocates may have to take on too many clients to make achievement of the second goal possible. Another possible tension is that achievement of law reform and social change may be a goal of the *advocate* but not of the client. Therefore, this goal may be at odds with the goal of giving clients maximum autonomy.

This initial brainstorming would also reveal important variations among the societies represented. The countries might have different sets of problems or core values, or, even if the problems and values were similar, the participants might prioritize among them differently. For example, representatives of a country whose legal system is seen as corrupt would set a high priority on ethical principles that deal with honesty, transparency, avoiding conflicts of interest, etc., and might treat client autonomy issues as a lower priority.

B. Comparing and Analyzing Ethical Codes to Determine Whether They Reflect and Address the Problems and Values Identified by the Conference Participants

The next, and probably more complicated step, would be to discuss and analyze existing ethical code provisions in light of the problems and values that have been identified. The goals would be, first, to determine whether code provisions already exist that address the problems and embody the values, and, if not, to discuss changes to the ethical codes that would do this. As discussed above, the U.S. ABA Model Rules of Professional Conduct tend to be much more detailed than their European counterparts, and this level of detail can be extremely useful. However, the codes of Belgium, Croatia, Estonia, Scotland, and Ukraine also have provisions that are helpful in addressing issues relating to public interest advocacy and access to legal services.

In analyzing the codes it is important to keep in mind Professor Palidauskaite's distinctions among the goals of inspiration, guidance, and regulation. The provisions that are probably of most value to issues relating to public interest advocacy and access to legal services are those that offer *guidance.* Some of the provisions discussed below also have more of an inspirational character. Provisions that regulate (and discipline) are probably less important, with the exception of those that relate to competence of representation.

To illustrate the methodology that might be used to analyze code provisions relating to public interest advocacy and access to legal services, two specific issues will be examined in a comparative context. The lists of common problems and core values that were generated in the previous section might be broken down broadly into two categories: 1) those concerning the allocation of decision-making between attorneys and clients, and the related client counseling issues; and 2) those concerning the need to develop methods of stretching scarce legal resources to provide more people with access to these services, including limited scope ("unbundled") legal services, and *pro bono* assistance.

The following items from the list would be in the former category:

Allocation of decision-making and client counseling

Problems

- public interest clients are vulnerable and legally unsophisticated, and some have diminished capacities because of mental disabilities
- power imbalances between lawyers and clients result from these and other factors
- many clients have needs that go beyond the strictly legal, i.e. a need for interdisciplinary assistance

Values

- maximization of client trust is important to effective provision of legal services
- clients should have autonomy to define goals and make informed decisions about their representation

The second category would contain the following items:

Distribution of and access to legal resources

Problems

- lack of access to legal services for low income populations is a serious problem within all of the represented societies
- a lack of available alternative representation for the clients puts a special moral burden on the public interest advocates to choose between taking on as many clients as possible—creating caseload pressures and making competent representation more difficult—or turning away needy clients
- achievement of law reform and social change is an important long-term goal for public interest advocates

Values

- clients who have legal needs should have full access to legal services
- the quality of legal resources available to economically disadvantaged clients should be comparable to that of the resources available to clients with money

With this breakdown in mind, the codes of the countries participating in this hypothetical ethics conference are examined in sections 1 and 2 below.

1. *National code provisions dealing with allocation of decision-making and client counseling*

Among the provisions that are most useful to the allocation of decision-making and related counseling issues are Rules 1.2, 1.14, and 2.1 of the ABA Model Rules of Professional Conduct. These provide clients, including those who have diminished capacity, with a significant amount of autonomy in important decisions about their cases. They also provide guidance to lawyers about counseling their clients and recognize that such counseling may sometimes go beyond purely legal matters and require the assistance of professionals in other disciplines.

ABA Model Rule 1.2[39] provides the client with significant control over the representation by giving the client authority to choose the *objectives* of the representation. The Rule tempers this, however, by giving the attorney greater power to choose the *means* to achieve those objectives, in consultation with the client.

ABA Model Rule 1.14 addresses a challenge common to public interest lawyers—how to represent clients whose capacity is diminished due to mental impairment, minority, or another factor. Rule 1.14 provides that an attorney with such a client should nonetheless represent that client as the lawyer would any other client, "as far as reasonably possible." Only when that is not possible is the attorney permitted to substitute judgment for the client or take protective action.[40] The comments to Rule 1.14 provide additional guidance.[41]

Finally, ABA Model Rule 2.1 is also helpful, because it gives the attorney significant guidance and leeway in counseling and advising a client by providing that an attorney may refer not only to law but also to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.[42] This Rule and its accompanying comments are especially helpful to

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39. MODEL RULES OF PROF'L CONDUCT R. 1.2:

Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

. . . [subsections b, c, and d omitted]

40. MODEL RULES OF PROF'L CONDUCT R. 1.14:

Client with Diminished Capacity

a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

41. MODEL RULES OF PROF'L CONDUCT R. 1.14, Comments.

42. MODEL RULES OF PROF'L CONDUCT R. 2.1:

Advisor

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

public interest lawyers whose clients may have a number of nonlegal problems requiring the lawyer to seek assistance and advice from colleagues in other disciplines. Comment 4 to Rule 2.1 provides the following guidance:

> Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.[43]

Among the European codes, those of Estonia, Scotland, and Ukraine are also instructive on issues relating to attorney-client relationships. Article 8 of the Code of Conduct of the Estonian Bar Association[44] describes the allocation of decision-making responsibility between the attorney and the client and other aspects of the attorney-client relationship in terms similar to those in ABA Model Rule 1.2. Article 8 gives the client significant autonomy in the lawyer-client relationship by requiring that an advocate must generally respect a client's wishes when the advocate chooses the "means and methods" of the representation. Article 8 states:

> **Article 8. The Client's Interests**
>
> 1) The advocate must always act in the best interest of his clients and must put those interests before his own interests or those of third parties, including the interests of fellow members of the legal profession. Subject to due observance of all rules of law and professional conduct, the advocate shall use all means and methods for the benefit of his client such that the personal honour, honesty and integrity of the advocate are beyond doubt.
> 2) In carrying out the instructions of his client, the advocate shall use only those means and methods consistent with law which enable him to better protect his client's interests and act pursuant to the provision of law, his expertise and experience as well as his conscience. Unless it is contrary to law, the rules of professional conduct or to the interests of his client, the advocate shall take into consideration the wishes of his client when choosing the means and methods of representation or protection. If in the contract for legal assistance the client has limited the advocate's right to

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other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

43. MODEL RULES OF PROF'L CONDUCT R. 2.1, Comment, Scope of Advice, 4.

44. Code of Conduct of the Estonian Bar Association, Adopted on 8 April 1999 by the General Meeting of the Estonian Bar Association, *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Estonia_CODE_OF_C1_1251980836.pdf.

use certain means or methods of protection or representation, such limitation shall be binding upon the advocate. (05.05.2005)

3) The advocate may carry out only such instructions of the client which do not contravene the law or harm the advocate's personal honour, honesty and dignity. If a client's wishes are contrary to the actual interests of the client, law or to the personal honesty, honour or integrity of the advocate, the advocate shall explain to the client his position and all possible consequences of the client's demands which are unreasonable or inconsistent with law. If the client refuses to desist from making demands, the advocate shall have the right to terminate the contract for legal assistance with the client.

In addition, Article 14—Rendering Legal Services, provides: "An attorney shall explain to the client the opportunities and prerequisites for reaching a solution expected by the client. The client will decide on the commencement of proceedings."[45] Article 14 also contains provisions to guide the attorney in advising and counseling the client.[46]

The Code of Conduct for Scottish Solicitors[47] also distinguishes between objectives and means of the representation, but it appears to give primary decision-making authority to the solicitor rather than the client. The Scottish Code requires that solicitors discuss with their clients the objectives of the representation and the means by which the objectives will be pursued. The Scottish Code also explicitly requires that solicitors counsel their clients clearly and effectively. The Scottish Code states in pertinent part:

5. Provision of a professional service

(a) Solicitors must act on the basis of their clients' proper instructions. . .

. . .

Solicitors [are required] to discuss with and advise their clients on the objectives of the work carried out on behalf of the clients and the means by which the objectives are to be pursued. . . . With the agreement of the client a solicitor may restrict the objectives and the steps to be taken consistent with the provisions of an adequate professional service. . . .

. . .

(e) Solicitors shall communicate effectively with their clients and others

45. *Id.*, Art. 14(2)

46. *Id.*, Art. 14.

47. Codes of Conduct, Code of Conduct for Scottish Solicitors and Code of Conduct for Criminal Work, The Law Society of Scotland, June 2002. *Available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/code_scotland__advoc1_1188552824.pdf.

. . .

Solicitors are required to try to ensure that their communications with their clients and others on behalf of their clients are effective. This includes providing clients with relevant information regarding the matter in hand and the actions taken on their behalf.

Solicitors shall advise their clients of any significant development in relation to their case or transaction and explain matters to the extent reasonably necessary to permit informed decisions by clients. . . . Information should be clear and comprehensive and where necessary or appropriate confirmed in writing. . . .[48]

Finally, the Rules of Advocate's Ethics of Ukraine[49] have useful provisions concerning the advocate's counseling role and the representation of clients with diminished capacity. With respect to the advocate's counseling role, Article 21 requires an advocate to counsel a client thoroughly and accurately about the work that will be required to achieve the client's goals and the likelihood of being able to achieve them, and to update this information for the client if the situation changes:

Article 21 Informing the Client about the Legal Grounds for the Case

1) If upon complying with the requirements set forth in Article 20 of these Rules, an advocate develops the opinion that there are actual and legal grounds for the performance of the given assignment, he must state it impartially and objectively to the client, informing him at least in general outline what time and what amount of work will be needed for the performance of the given assignment and what will be the legal consequences of achieving the legal results desired by the client for the essential interests of the client.

2) If legal grounds for performing the assignment do exist, but so does an unfavorable practice of applying respective provisions of the law (from the viewpoint of the hypothetical result desired by the client), an advocate shall be bound to inform the client.

3) If an advocate becomes convinced that there are no actual and legal grounds for performing an assignment, he shall be bound to inform the client about it and agree with him on a change in the substance of the assignment and adjust it to that hypothetical result which might be achieved in conformity with legislation in force, or else refuse to accept the assignment.

4) An advocate must inform the client about the possible result of performance of the assignment, based on the law and practice of its application.

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48. *Id.* §§5(a) and 5(e).

49. Ukraine, Rules of Advocate's Ethics, Approved by the Supreme Qualifying Commission of the Bar, October 1-2, 1999. *Available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Ukraine_CoC_ENpdf1_1215155864.pdf.

> Furthermore, he must not give assurances and guarantees to the client as to the actual outcome of performance of the assignment, directly or indirectly facilitate shaping his groundless hopes, as well as directly or indirectly create in the client the impression that the advocate can have an influence on such an outcome by other means apart from the diligent performance by him of his professional duties.[50]

With respect to representation of clients with diminished capacity, the philosophy behind Article 46 of the Ukrainian Rules is similar to that of Rule 1.14 of the ABA Model Rules in requiring that attorneys, to the extent possible, handle the representation of such clients as they would any other client:

> **Article 46 Ethical Aspects of Advocate's Relations with Incapable (Partially Capable) Clients**
>
> 1) Client's incapability (limited or partial capability) or his actually limited capability to evaluate adequately the reality shall not be the reason justifying the non-performance (improper performance) of advocate's responsibilities with regard to this client.
> 2) If owing to age, psychological illness and other objective reasons the client has a reduced ability to make well-considered decisions related to the substance of the assignment, an advocate must nonetheless use his best efforts to maintain with him normal relations which meet the requirements of these Rules.
> 3) If a client by legally established procedure has been recognized as incapable (partially capable) and a guardian (custodian) has been appointed to him or the client is a minor and his interests accordingly are represented by a legal representative (guardian, custodian) who knowingly to the advocate acts to the detriment of the legitimate interests of the minor (ward), an advocate must:
>
>   1. refuse to accept (or, accordingly, continue performing) the assignment which might entail infringement upon the interests of the minor (ward);
>   2. take all measures accessible to him for the protection of the legitimate interests of the client;
>   3. inform the authorities for guardianship of the said actions of the guardian (custodian) of the incapable (partially incapable) client or legal representatives (guardians) of the minor.[51]

Collectively, these provisions are useful to public interest advocates in important respects. They provide examples of ways in which ethical codes may give vulnerable clients, including clients with diminished capacity, an important degree

50. *Id.* Art. 21.
51. *Id.* Art. 46.

of autonomy in decisions about their cases. They also provide guidance to lawyers about client counseling, including going beyond purely legal considerations and drawing upon the expertise of colleagues from other disciplines.

2. *National code provisions dealing with increased access to legal resources*

The ethics codes from the countries participating in this ethics conference also have helpful provisions concerning increased access to scarce legal resources. These include limited scope "unbundled" legal services and *pro bono* assistance. ABA Model Rule 1.2 addresses the former issue. The rule permits an attorney to limit the scope of representation.[52] The Scottish Solicitor's Code has a similar provision.[53] The ability to limit the scope of representation allows for the possibility of less than full representation as a way of stretching scarce legal resources to reach more people. Examples of this might be limiting assistance to providing advice-only, or drafting legal papers for the client without taking on full representation.

Although the ABA Model Rules also explicitly address the issue of *pro bono* legal assistance, the relevant code provision is merely inspirational. Rule 6.1 of the ABA Model Rules states, "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."[54] Lest there be any doubt about the purely inspirational quality of this rule, Comment 12 states, "The responsibility set forth in this Rule is not intended to be enforced through disciplinary process."[55]

In contrast, several of the European codes have much more robust provisions about *pro bono* legal work. Croatia makes this a compulsory duty of the legal professions[56]:

> **III. Free Legal Assistance to Deprived Persons and Victims of the War for the Homeland**
>
> **35.** Free legal assistance to deprived persons and victims of the war for the homeland is the honourable duty of every attorney and it must be carried out as conscientiously and diligently as for any other clients.

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52. MODEL RULES OF PROF'L CONDUCT R. 1.2:

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

53. Codes of Conduct, Code of Conduct for Scottish Solicitors and Code of Conduct for Criminal Work, The Law Society of Scotland, June 2002. *Available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/code_scotland__advoc1_1188552824.pdf.

Section 5(a) states: "With the agreement of the client a solicitor may restrict the objectives and the steps to be taken consistent with the provisions of an adequate professional service."

54. MODEL RULES OF PROF'L CONDUCT R. 6.1.

55. *Id.*, Comment 12.

56. The Attorneys' Code of Ethics, passed at the Assembly of the Croatian Bar Association, 18 February 1995, amended 12 June 1999. *Available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/The_Attorneysdoc1_121_1251980891.pdf.

36. An attorney shall accept representation of deprived persons and victims of the war for the homeland in civil and criminal cases when assigned by an authorized body of the Association.

37. An attorney shall have the obligation to render free legal assistance to deprived persons and victims of the war for the homeland in legal matters in which these persons are enforcing their rights related to their positions when the Association entrusts such legal assistance to him or her in accordance with its enactments.

The Ukrainian code also contains mandatory *pro bono* provisions:[57]

Article 51 Ethical Aspects of Legal Aid to Poor Citizens

(1) An advocate must always take into consideration in his professional activities that the advocate's profession is not only a source of his profits but also is of significant social importance and is one of the major guarantees of the proper protection of rights and freedoms of citizens, and requires dedication to the objectives of this profession, generosity and humanity from its representatives. Therefore, an advocate should provide partially paid or free legal aid in cases prescribed by law.

(2) An advocate's unjustified refusal or evasion of rendering free legal aid in cases directly provided for by the law is inadmissible. Such refusal shall be considered as justified only in cases [of serious physical condition, lack of competence to handle the case, or concerns about conflict of interest or confidentiality]. . . .

The Slovenian code, like the ABA Model Rules, is of a more inspirational character. That code states: "Representation and pleading for socially weak clients shall be [a] usual and honourable task of lawyers. . . . The lawyer shall perform this task with special understanding."[58]

Belgium provides for an interesting combination of unbundled legal services and *pro bono* assistance. The Belgian Judicial Code defines two levels of services. The first ("first-line legal aid") is a limited, "unbundled" array of services: "practical information, legal information, a first line legal opinion, or a referral to a specialized authority or organization." The second ("second line legal aid") is a more full-service model, which includes "a detailed legal opinion, aid whether or not in the context of legal proceedings, or aid in a lawsuit, including represen-

57. Ukraine, Rules of Advocate's Ethics, Approved by the Supreme Qualifying Commission of the Bar, October 1-2, 1999, Article 51. *Available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Ukraine_CoC_ENpdf1_1215155864.pdf.

58. Code of Professional Conduct of the Bar Association of Slovenia, passed at the Lawyer' Assembly of the Bar Association of Slovenia, 7 December 2001, §42. *Available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/code_slovenia_enpdf1_1188552980.pdf.

tation. . . ."[59] The Bar Association compiles "first-line" and "second-line" lists of volunteer attorneys. Attorneys specify their preferred field of law and must already be competent in that field or must agree to undergo training provided by the relevant bar associations.[60]

Participants in a cross-cultural discussion would therefore compare and draw upon each other's code provisions. They would evaluate the existing codes to determine whether they adequately address the important ethical problems and reflect the core ethical values. To the extent that the codes are found lacking, the participants would develop recommendations for changes to the codes to improve their ability to inspire, guide, and regulate the legal professions. The participants might also use some of the code provisions as models for possible adoption in their own countries, or they might collaborate on a draft of uniform code provisions that reflect the group's shared concerns and goals.[61]

C. Using Ethical Codes to Develop Programs of Ethical Education and Professional Development

After analyzing and comparing ethical codes—and possibly making recommendations for changes to the codes—the codes would be used as the centerpiece of enhanced systems of legal education and professional development to help the legal professions of the participant countries deal effectively with ethical issues. This is an ambitious undertaking that needs to be implemented on many different levels.

It needs to begin in the law schools, of course, ideally by requiring that all students take a class in legal ethics.[62] Designing an effective and engaging model of ethics education can be difficult. Deborah Rhode, among others, has discussed the troubled history of professional responsibility education in the United States.[63]

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59. Belgium, Judicial Code, VOLUME IIIBIS, FIRST- AND SECOND-LINE LEGAL AID, Section I GENERAL PROVISION, Article 508/1, subd. 1 and 2. *Available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/en_belgiquepdf1_1190362409.pdf.

60. *Id.* SECTION III FIRST-LINE LEGAL AID, Article 508/5 §1, and SECTION IV PARTLY OR TOTALLY FREE SECOND-LINE LEGAL AID, Article 508/7.

61. The CCBE is currently discussing the development of such a uniform code for use in its signatory countries. Panel presentation, Jonathan Goldsmith, Secretary General, CCBE, July 16, 2010, 4th International Legal Ethics Conference, "Legal Ethics in Times of Turbulence," Stanford Law School.

62. Such a required course is rarely part of the curriculum in civil law countries. *See* Richard J. Wilson, 18th International Congress on Comparative Law, Washington, D.C., July 2010, General Report: The Role of Practice in Legal Education, at 25.

63. Deborah L. Rhode, *Ethics by the Pervasive Method,* 42 J. LEGAL EDUC. 31 (1992). Rhode quotes one 1991 description of professional responsibility education: "The 'dog of the law school [curriculum]—hard to teach, disappointing to take, and often presented to vacant seats or vacant minds.'" This still appears to be a widely held perception among both faculty and students. *See* Sara L. Bagg & Alice Woolley, *Ethics Teaching in Law School,* LEGAL EDUCATION ABSTRACTS, Vol. 6, No. 40: September 28, 2009.

However, the task becomes harder still when the various categories of professional specialties into which students will be entering are taken into account.[64] For example, European law students who intend to become judges may find materials involving ethical issues facing advocates to be of limited relevance and utility. Similarly, in the U.S. a student who intends to become a transactional lawyer may find litigation examples unhelpful, and students who intend to enter public interest practice may feel that the cases in the course text that focus on the corporate context have no bearing on the types of situations they will face in practice.

How, then, should we educate our students? If we want to reach students, must we adopt a balkanized—and expensive—curriculum consisting entirely of highly specialized contextual courses in which students who are pursuing different tracks never meet or engage with one another in serious ethical discussions? Or are there core principles that can be taught across professional contexts? These are questions that need to be addressed directly in thinking about law school curricula.

Postgraduate professional development and continuing legal education is a second phase of a program of ethical education. In the U.S. there is an extensive system of mandated continuing legal education, although anecdotal evidence suggests that its effectiveness varies widely. Within European civil law countries, it has been suggested that "issues of practice . . . are best designed and taught by the bar or bench during the separate period of apprenticeship, as it is the bar or bench that is best equipped to teach these skills."[65] To this end, one potentially attractive source of focused and effective postgraduate ethics education is the academies that exist within many countries to train incoming members of the profession, e.g. judges. Another approach is to require law offices to provide their own training. As noted above, many European codes do this explicitly by mandating that lawyers provide ethical training to the junior lawyers whom they supervise.[66]

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64. *See* Richard J. Wilson, 18th International Congress on Comparative Law, Washington, D.C., July 2010, General Report: The Role of Practice in Legal Education, at 10-14.

65. *See* Richard J. Wilson, 18th International Congress on Comparative Law, Washington, D.C., July 2010, General Report: The Role of Practice in Legal Education, at 14 (citing responses from national reports received in response to a survey Professor Wilson conducted as part of his role as national reporter for the Congress). *See also id.* at 43 (citing comment from England making similar point about post-academic stages of training).

66. *See, e.g,* The Attorneys' Code of Ethics, passed at the Assembly of the Croatian Bar Association, 18 February 1995, amended 12 June 1999, §126, *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/The_Attorneysdoc1_121_1251980891.pdf; Former Yugoslav Republic of Macedonia, Code on Professional Ethics of Lawyers, Associates and Lawyer's Apprentices of the Macedonian Bar Association, Article VI LAWYERS' RELATION TO THE LAWYER'S APPRENTICES AND VICE VERSA, §28, *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Code_of_ethics_20061_1237990282.pdf; Code of Professional Conduct of the Bar Association of Slovenia, passed at the Lawyer' Assembly of the Bar Association of Slovenia, 7 December 2001, §33, *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/code_slovenia_enpdf1_1188552980.pdf.

Macedonia provides an intriguing example of codified continuing legal education requirements. The Macedonian code takes an interdisciplinary approach by requiring ongoing education that goes beyond the purely legal:[67]

> The lawyer is obliged to improve his expert and general knowledge permanently. For that purpose: he should follow and research regulations and expert literature (particularly in the area of his specialty); follow cultural, scientific and political achievements and occurrences, and according to his possibilities should actively participate and collaborate with professional and expert organizations, newsletters and with other social activities.
>
> The lawyer is obliged to convey his knowledge unselfishly to other lawyers, and especially to the associates and lawyer apprentices.

The Macedonian code adds the following inspirational language: "Through continuous expert edification and raising the personal and moral reputation, the lawyer fulfils his professional duties and qualifies him[self] for successful performance of the traditional function for defense of the freedom, independence, civil rights, humanity, human dignity and the legal rights."[68]

Finally, the bar associations can provide invaluable support to the profession through "ethics hotlines" and published, easily accessible, formal opinions that examine code provisions in the context of actual cases and provide a much more nuanced level of ethical guidance than is possible through the study of the code provisions in isolation. Within the U.S., bar associations provide helpful answers to some of the important ethical challenges that arise in the public interest context.[69] This is a role that bar associations in all countries should embrace.

D. Summarizing the Conversation: Developing a "Taxonomy" for Legal Ethics

Having identified problems and core values, analyzed existing ethical codes, and developed recommendations for ethics education and professional develop-

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67. Former Yugoslav Republic of Macedonia, Code on Professional Ethics of Lawyers, Associates and Lawyer's Apprentices of the Macedonian Bar Association, Article V, EXPERT EDIFICATION, PROTECTION AND RAISING OF THE PERSONAL AND MORAL REPUTATION, §22, *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Code_of_ethics_20061_1237990282.pdf.

68. *Id.* at §24.

69. *See, e.g.*, New York County Lawyers' Association Committee on Professional Ethics, Opinion 742 (April 16, 2010) (interpreting ABA Model Rule 1.2, which allows lawyers to limit the scope of representation, and discussing whether public interest lawyers may "ghost-write" pleadings for *pro se* clients as a form of "unbundled" legal services to increase the number of clients they are able to assist); ABA Standing Comm. on Ethics and Professional Responsibility: Formal Opinion 06-441 (May 13, 2006), *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation.*

ment, participants in a cross-cultural discussion might use the approach employed by Alan Lawton, Michael Macaulay, and Jolanta Palidauskaite in the context of public service ethics.[70] As discussed in Section II, *supra,* they compiled a chart of policy needs, goals, and responses. A similar chart might be compiled for comparative legal ethics. An example of a chart that attempts to summarize the conversation described above is on the next page.

Conclusion

This paper describes a framework for undertaking a project of international collaboration to improve legal ethics education, professional development, and guidance for the legal professions. While ethics codes have been widely promulgated, the discussion of the problems, goals, and values that underlie these codes—and the extent to which the codes reflect these—have been largely neglected. The international legal community is teeming with scholars, teachers, practitioners, and other professionals who are well-equipped to take on this task and eager to do so.

A first step in this effort would be to organize, at least on a virtual level, the kind of "cross-cultural conversation" described in this paper. It should be organized by subject matter/specialty area and profession so that materials could be easily compiled and discussions focused on the issues of greatest mutual importance and relevance to the participants. The example provided here is a conversation among legal professionals who have an interest and expertise in public interest advocacy and a desire to expand the availability of legal resources for individuals who would not otherwise have access to these services. However, this framework could readily be adapted to any group of legal professionals with common experiences and concerns.

It is not necessary to the success of this "cross-cultural conversation" that the participants reach consensus. As discussed earlier, issues relating to the ethics of lawyering and the legal professions are inherently contextual and tied to specific national legal cultures. Despite this, there is inherent value in bringing together legal professionals who have a common practice area and a shared goal of improving the ethical standards within their respective countries. Those of us who have engaged in such international collaborations have always found them to be profound learning experiences and important opportunities for collegial community-building. In short, the act of convening, and engaging in, a serious, reflective, international conversation about ethical issues has the potential to be immensely beneficial to the participants and, ultimately, to their legal professions and civil societies.

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70. Alan Lawton (Hull University, UK and VU University, Amsterdam), Michael Macaulay (Teesside University, UK), Jolanta Palidauskaite (Kaunas University of Technology, Lithuania), "Towards a comparative methodology for public service ethics," paper presented at EGPA Conference, Malta 2-5th September 2009, PSG VII: "Ethics and Integrity of Governance, *available at* http://www.egpa2009.com/documents/psg7/Lawton-Macaulay.pdf. *See* discussion in Section II, *supra.*

"Taxonomy"—Ethical Issues Involved in Public Interest Advocacy and Increasing Access to Legal Services

Problems/challenges to be addressed	Core values	Key code provisions and profession(s) covered by relevant code(s)	Recommendations for disseminating code and principles through ethical education and professional development
lack of access to legal services for low income populations is a serious problem within all of the represented societies public interest clients are vulnerable and legally unsophisticated, and some have diminished capacities because of mental disabilities power imbalances between lawyers and clients result from these and other factors a lack of available alternative representation for the clients puts a special moral burden on the public interest advocates to choose between taking on as many clients as possible—creating caseload pressures and making competent representation more difficult—or turning away needy clients many clients have needs that go beyond the strictly legal, i.e. a need for interdisciplinary assistance	clients who have legal needs should have full access to legal services maximization of client trust is important to effective provision of legal services clients should have autonomy to define goals and make informed decisions about their representation the quality of legal resources available to economically disadvantaged clients should be comparable to that of the resources available to clients with money achievement of law reform and social change is an important long-term goal for public interest advocates	(All except Scotland apply to "advocates" or the equivalent; Scotland applies to solicitors) U.S. ABA Model Rules 1.2, 1.14, 2.1, 6.1 Belgium, Judicial Code, Volume IIIBIS Croatia, Attorneys' Code of Ethics, §§35-37, 126 Estonia Code of Conduct, Arts. 8,14 Macedonia, Code on Professional Ethics of Lawyers, etc. §§22, 28 Scotland, Code of Conduct for Scottish Solicitors, §5 Slovenia, Code of Prof. Conduct, §§18,33,42 Ukraine, Rules of Advocate's Ethics, Art. 21, 46, 51	Required law school courses in legal ethics (U.S.) Post-graduate education, possibly through professional associations, e.g. judicial training academies Mandatory continuing legal education (U.S., Macedonia) Ethical training of junior lawyers by supervising lawyers (Croatia, Macedonia, Slovenia) Guidance and leadership from bar associations (ethics hotlines, written ethics advisory opinions, etc.) (U.S.)