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For a global code of ethics

By Ramon M. Mullerat

I am a lawyer born in Barcelona and working in Spain. My eldest son is a surgeon working in Singapore. His daughter is at secondary education school in England. While returning from a visit with her father, my granddaughter's plans were inescapably impacted by events in, of all places, Iceland — with its volcanic eruption and massive ash cloud now circling the globe.

This set of worldwide circumstances rekindled my thoughts about our global interconnectivity — both in terms of our human relationships and in our professional relationships.

Businesses and corporations, through their transactions and interactions (there are 70,000 transnational corporations with some 700,000 subsidiaries and countless millions of suppliers), have woven a tightly knit tapestry of commercial connections. As a result, businessmen and businesswomen now must operate, travel and communicate globally and around the clock.

Lawyers may not be the most nomadic of professionals, but many of us communicate and travel extensively, following and emulating our clients. The very nature of our business is to react and respond — so, as the world goes, so follows the law.

Once a social or economic event arises, it doesn't take long for the law and the lawyers to show up looking to regulate it. Christopher Columbus discovered America and, very soon thereafter, the Laws on the Indies were drafted.

But in the face of this ever-expanding legal universe, our profession has been challenged to sustain an objective, consistent world view — a “global code of

conduct.” Now, with more than 5 million lawyers working around the world, (1.2 million in the U.S., 800,000 in the EU, 600,000 both in India and Brazil, 500,000 in the Arab world), the practice of law has never seen a greater need.

Along with judges, lawyers of the world are co-ministers of justice and are subject to the same strict legal and ethical

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principles and obligations: independence, dignity, confidentiality, loyalty and the avoidance of conflicts of interest.

Ethics and professionalism are inherent to law and lawyers' lives. As Chief Justice Earl Warren once said, “In civilized life, law floats in a sea of ethics.” Jerome Shestack, a former ABA president, expressed matters similarly: “Dedication to professional goals is one way in which we enhance our calling.”

However, those principles vary manifestly in each jurisdiction and particularly between the common law and the civil law traditions.

For example, the concepts of attorney-client privilege, confidentiality and work product are consolidated in the European civil law countries into a single tenet (secret professional, secreto profesional). In common law tradition, the attorney-client privilege is “owned,” and thus can be waived by, the client.

However, in Europe, the secreto profesional belongs to society and cannot be waived. In Europe, in-house counsel do not enjoy this privilege at all (European Court of Justice AM&S case) because of their purported lack of independence from the client.

Similar barriers to commonality exist in

the area of loyalty. Screening (“Chinese walls”) of lawyers has been recently admitted in the ABA Model Rules, though limited to cases of lawyers switching firms.

In the United Kingdom, however, screening has been more generously accepted by the new rules after the Clementi Report; and in most European countries, strict conflict rules that ban screening prevail. Lawyers who serve clients across these jurisdictions are subject to different and even contradictory rules.

In today's globalized world, where trade, investments, finance, tourism and even crime operate in a seamless sphere, lawyers need to be able to operate similarly.

The present international structure basically constituted by the CCBE (Council of Bars and Law Societies of Europe) Code of Conduct, the IBA (International Bar Association) International Code of Ethics, and the ABA Model Rules, along with a myriad of national and local codes with different rules, is unsatisfactory.

The existence of divergent ethical rules confuses clients, limits cross-border practice, exacerbates unnecessary competition, and hampers the normal provision of legal services.

The IBA, CCBE, ABA and UIA (Union Internationale des Avocats) understand this and some of them are considering inserting the topic of harmonization into their agendas. However, any such global code of conduct must not be merely a handful of ethical aspirations but rather a code with rules of universal application that resolve most ethical issues and supersede the existing codes.

The task is immense. Contributing factors include:

1. An unequal world, where more than 70 percent of the population has never heard a dial tone, presents a vast diversity of culture.
2. Divergent existing laws. While some fields are relatively easy to harmonize (intellectual property, arbitration, insolvency); others are quite difficult to integrate (procedure, succession, family).
3. Organizational differences. There are

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Ramon M. Mullerat is a commercial arbitration attorney with KPMG in Barcelona, Spain. He is a member of the London Court of International Arbitration. He is also an adjunct professor at The John Marshall Law School. He served as president of the Council of Bars and Law Societies of Europe (CCBE) in 1996. He can be reached at rmullerat@kpmg.es.

still substantial differences in jurisdictions and bars.

4. Ethical conflicts: the aforementioned differences in confidentiality, loyalty, etc.

5. Differences in approach. Drafting ethical rules can follow the short principle-aspiration approach followed by the civil law traditions or the more detailed approach preferred by common law drafters. The regulation of conflicts of interest in the CCBE Code, for example, takes 12 lines, while the ABA Model Rules devote 250 lines (not including comments) to conflicts.

In practical terms, it is probably unrealistic to suggest an immediate adoption of a single comprehensive and universal code. But steps can be taken to reduce the Herculean to the feasible. It is a question of time and struggle.

In the first step, we should try to universally deal with and agree on the basic principles, one-by-one, if necessary, starting with the easy ones to encourage the effort; for example, our approach to advertising or the treatment of correspondence between lawyers. Steps to add further details to the first principles

would follow.

The global village needs a single code that governs and unites all lawyers for the common benefit of the legal profession, the public interest, and the society we serve. It may take several lifetimes. As Roman jurists once said, "Certus an, sed incertus quando" ("It is certain that it will happen, but uncertain when").

So let's start working. Antonio Machado, the great Spanish poet, once said, "Se hace camino al andar" ("The way is made by walking"). He would have made a great lawyer.