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# Conflicts of Interest: The Dutch Position

Floris Banner, Esq.\*

This contribution discusses briefly the way in which the Dutch Bar deals with conflicts of interest. It concentrates on the situation in the Netherlands as opposed to that in Europe. Why the distinction? Because Europe is a conglomerate of independent states (nations). Each separate state has its own laws and, as far as the national Bar is concerned, its own Code of Conduct. However, as far as the European legal profession is involved, there is an organization in which all EU-national bar associations are assembled, the Council of Bars and Law Societies of Europe (“CCBE”).<sup>1</sup> The CCBE has established its own Code of Conduct for all European Lawyers.<sup>2</sup> Of course, there are no “European lawyers,” there are only Dutch, French, English, etc. lawyers who, because of the location of their nation of residence are also working in Europe. So why, then, this CCBE Code?

Because of the questions which arise when a lawyer from nation A transacts business in nation B and runs into a complaint or simply runs into an ethical question.<sup>3</sup> The CCBE Code, similar to Private International Law, fills in the gaps to avoid a conflict of laws between nations.<sup>4</sup> This means that a lawyer registered in a member state of the CCBE has to observe two different sets of Rules of Conduct when engaging in international practice. A Dutch lawyer in international

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1. The Council of Bars and Law Societies of Europe, *Introduction*, <http://www.ccbe.org/index.php?id=2&L=0>.

2. The Council of Bars and Law Societies of Europe, *CCBE Code of Conduct*, <http://www.ccbe.org/index.php?id=32&L=0>.

3. The Council of Bars and Law Societies of Europe, *Objectives*, <http://www.ccbe.org/index.php?id=16&L=0>.

4. *Id.*

practice, should be aware of both the National Code, the Gedragsregels (“Rules of Conduct”), and the CCBE Code.<sup>5</sup>

A few comments on the legal basis of the Dutch situation. The legal, in the sense of provided in the law, basis of all Dutch disciplinary law is Article 46 of the *Advocatenwet*, also known as, the Lawyers Act of 1952.<sup>6</sup> Article 46 requires a lawyer to (1) handle his client’s case and, generally, his interests with due diligence and care, (2) to observe the Rules and Regulations issued by the *Nederlandse Orde van Advocaten* (“NOvA”), the Law Society, and (3) to behave as a proper lawyer befits.<sup>7</sup>

Disciplinary law is administered by 5 Disciplinary Councils—*Raden van Discipline*—with a right of appeal to the Disciplinary Court—*Hof van Discipline*.<sup>8</sup> As the rules of Article 46 are quite broad and open, the disciplinary courts are assisted by the Rules of Conduct, a set of rules drawn up by the NOvA.<sup>9</sup> An example of these rules is Rule 7 of the Code of Conduct of Advocates of which I have made a translation and attached it hereto as Appendix A. These Rules represent what is considered “behaviour as befits a proper lawyer” from time to time. They do not have the status of a law or a formal Rule, as given by the NOvA; rather, they are considered to be an aid to the disciplinary judges as they evaluate a lawyer’s conduct.<sup>10</sup>

## I. CONFLICTS OF INTEREST

Most, if not all, codes contain rules dealing with conflicts of interest. Why? Because representing a client is impossible for a lawyer if there is not a relationship based on mutual trust. The client must be able to tell his lawyer everything without being afraid that the

5. EVERSLEDs, LLP, ATTORNEY-CLIENT PRIVILEGE IN EUROPE: UNDERSTANDING HOW THE RELATIONSHIP WORKS 29 (2007) available at <http://www.eversheds.com/documents/AttorneyClientPrivilege.pdf>.

6. The Lawyers Act of 1952 (*Advocatenwet*), art. 46 (1952). Article 46 states:

Lawyers are subject to disciplinary law in respect of any acts or omissions in violation of the duty of care they owe to those whose interests they defend or should defend (i.e. the client FAWB) in respect of breaches of the Rules established by the NOvA and in respect of any acts or omissions which do not befit a proper lawyer. This disciplinary law is administered, in the first instance, by the Disciplinary Councils and in appeal and the highest instance, by the Disciplinary Court.

*Id.*

7. *Id.* (providing the text of Article 46). Article 46 is due to be changed shortly; however, the changes are not in any way relevant to today’s discussions.

8. *Id.*

9. *Nederlandse Orde van Advocaten, Legislation, rules and regulations*, <http://www.advocatenorde.nl/english/legislation/vademecum.asp>.

10. The Lawyers Act of 1952 (*Advocatenwet*), *supra* note 6.

information will be disclosed other than by mutual agreement. Arguably, the worst thing a lawyer can do to damage the relationship of trust is to act against his own client, to betray the client. Clients, regardless as to whether they are private persons or corporate clients, will invariably think of their lawyer as their confidential aid, the person to whom they entrust their deepest secrets. A breach of this trust means a breach of the trust society should have in the Bar, the legal profession. As a result, bar associations tend to protect the essential element of trust carefully.

The Dutch rule, like many others, forbids representing two (or more) clients with conflicting interests.<sup>11</sup> This is not identical to representing two or more clients at the same time in the same matter, of course. A typical example is the lawyer representing two partners in a conflict with a third partner. There are no problems until the interests of the two partners no longer run parallel. In the Dutch system—and not only in that system!—when the interests of the two partners collide, both clients must be sent away.<sup>12</sup> If the lawyer continued to represent either of them, the other would certainly fear that all of the information he had entrusted to his former lawyer would henceforth be used against him. This is a breach of trust.

Another typical example is a lawyer representing both husband and wife in a divorce case. In the Netherlands a divorce may be applied for in a joint petition, with one single lawyer representing both parties.<sup>13</sup> Again, the very moment a conflict arises, or threatens to arise, and the conflict cannot easily be resolved, say farewell to both clients.

The Dutch Code quite recently incorporated the provisions on acting against existing or former clients.<sup>14</sup> This was done in order to clarify some points of law, as the principles embodied in these paragraphs were already applied by the disciplinary councils and court.

The essence behind these “new” provisions is that a lawyer is not allowed to act against a client or former client as a general rule unless an exception applies.<sup>15</sup> In other words, “no, unless.” The “unless” consists of:

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11. THE CODE OF CONDUCT OF ADVOCATES (GEDRAGSREGELS) R. 7 (1992). The rule is reprinted *infra* in Appendix A.

12. *Id.*

13. THE CIVIL CODE OF THE NETHERLANDS (BURGERLIJK WETBOEK) art. 1:154 (1992).

14. *See infra* app. A, ¶¶ 4, 5, 6.

15. THE CODE OF CONDUCT OF ADVOCATES (GEDRAGSREGELS), *supra* note 11.

- i. it must not be the same matter, which is not so easy to define, but which the disciplinary councils are quite able to do.<sup>16</sup>
- ii. There must not be any confidential information known to the lawyer which may be relevant in the case against the former client. And note: the client will generally consider all information to fall in this category!<sup>17</sup>
- iii. There are no other reasonable objections. If there has been a very close relationship (not necessarily personal) between lawyer and client it may be wise not to act against this client.<sup>18</sup>

These 3 requirements are cumulative; they should all be met before the lawyer may decide to accept the brief.

This seems to me to provide the answer to the first question I have been asked to address: What is a conflict? Answer: A conflict is acting for/representing a client in a matter where the opposite party is a client or has been a client of the lawyer concerned or of another lawyer in the firm, unless the special circumstances referred to in Rule 7, Sections 5 or 6, are present. This is obvious when the interests of either party are at conflict; but, there is also a potential conflict in a case where the lawyer possesses confidential information which may have a bearing on the matter.

## II. INFORMED CONSENT

Section 6 of Rule 7 allows one to disregard Section 4 if the client agrees that the lawyer may act in a conflict and the client's consent has been given on the basis of sufficient information.<sup>19</sup> The sufficiency of the information will depend on the client: a non-educated person will require more information and explication than a sophisticated corporate counsel. There appears to be a slight drafting error in Rule 7 in that Subsection 6 refers to Section 5 which refers to Section 4.<sup>20</sup> In other words, the informed consent exception seems to apply only to Section 4 and, consequently, not to subsection 1 which gives the main rule. This is, of course, not intended. Overall, a lawyer may represent a client in a conflict of interest case if the client has allowed him to do so.<sup>21</sup>

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16. *Id.* R. 7.5.

17. *Id.*

18. *Id.*

19. THE CODE OF CONDUCT OF ADVOCATES (GEDRAGSREGELS), *supra* note 11, R. 7.6.

20. *Id.* R. 7.

21. *Id.*

As a conflict assumes (at least) two parties, the consent of both parties is usually required.<sup>22</sup> This, however, may pose a question as to confidentiality. Suppose new client A requests assistance in a matter against old client B. Both A and B will have to agree to the lawyer's representation of A. However, in order to obtain either A or B's consent, the lawyer has to disclose the names of both parties to the other. This is normally a breach of the duty of confidentiality. Often, when major companies are involved, the knowledge about who the lawyer is will be in the public domain, but, in other cases, this may prove to be a question which has to be handled with care and diligence. If the problem cannot be solved, the lawyer should refuse to represent that client.

Section 7 of Rule 7 provides that the conflict rules apply to all partners of a firm and all other lawyers belonging to that firm.<sup>23</sup> It also includes non-lawyers in or related to the partnership, regardless as to whether they are located at the same place.<sup>24</sup> My old firm, NautaDutilh, has offices in Amsterdam and Rotterdam. Conflicts should be detected in the client base of both offices. In addition, the clients of our Brussels office are "clients" as well. So, although the Rule does not spell this out, it should also be applied to foreign offices of the same firm.

### III. IF CHURCHILL & ROOSEVELT HAD AN OFFICE IN AMSTERDAM . . .<sup>25</sup>

The Dutch disciplinary authorities tend to take the New York point of view as expressed in DR 1-105.<sup>26</sup> For example, both Sterling and

22. *Id.*

23. *Id.* R. 7.7.

24. *Id.*

25. *See infra* app. B.

26. N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 1-105 (2007). DR 1-105 states:

Disciplinary Authority and Choice of Law.

A. A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

B. In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

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

2. For any other conduct:

a. If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

b. If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting

Hinshaw are clients of one and the same firm. While there is not necessarily a conflict, the general rule says that a firm cannot act against a client.<sup>27</sup> However, "against" does not solely mean a conflict. Advising two clients on the same legal question may constitute a conflict of interest. So, consent ought to be sought.

## APPENDIX A

### Code of Conduct for Lawyers (the Netherlands), Rule 7:

1. A lawyer may not defend the interests of two or more parties if the interests of these parties conflict or a development leading to a conflict is probable.

2. A lawyer, defending the interests of two or more parties is in general obliged to withdraw totally from the matter as soon as a conflict of interests arises which cannot be solved immediately.

3. A lawyer who has defended the interests of two or more parties and who has withdrawn from the matter, shall not act against the party or parties in respect of whom he has withdrawn in that same matter or a continuation thereof.

4. A lawyer may not act against a former or present client of his or of a colleague from the same firm, except as provided in the following sections.

5. A lawyer is only allowed to deviate from the provision of Rule 7 section 4 if

1. The interests which the lawyer is requested to defend do not regard the same matter in which the client or former client is or was represented by that lawyer or a colleague from the same firm, neither are, nor were, the interests the lawyer is requested to defend related to that matter nor is a development leading thereto probable.
2. Neither the lawyer nor any of his colleagues from the same firm disposes of any confidential information of whatever nature obtained from his former or present client or other information pertaining to the person or

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

*Id.*

27. THE CODE OF CONDUCT OF ADVOCATES (GEDRAGSREGELS), *supra* note 11, R. 7.4.

enterprise of that client which may be of interest to the matter against that client.

3. There are no other reasonable objections on the part of the present or former client or of the party who is requesting the lawyer to represent his interests.

6. If the conditions of section 5 have not been met, the lawyer may however be free to deviate from section 4 in the event both the party who is requesting the lawyer to represent his interests and the former or present client against whom the lawyer is requested to act have consented that the lawyer so acts on the basis of proper information provided timely in advance.

7. The provisions of the previous sections apply to all lawyers forming part of the same firm (in the sense of legal organization).

## APPENDIX B

*Professor Bannier's article imparts his analysis of a hypothetical that was posed to a panel at the Association of Professional Responsibility Lawyers' May 2008 meeting in Amsterdam. The following is the substance of the hypothetical, reprinted with the generous permission of its author, James W. Paul, Partner and General Counsel of Clifford Chance US LLP:*

Churchill & Roosevelt is a large international law firm with offices in a number of cities, including New York and London. The C&R London partners are members of and practice through an English partnership regulated by the Solicitors Regulation Authority. The other partners of C&R are members of the same English partnership but, in the case of those working in New York, are also partners in and practice through a New York partnership regulated by the courts of the State of New York. One of the primary goals of the firm is to involve as many offices of the firm in the representation of its largest international clients. C&R's website claims that it operates as one firm worldwide and it prides itself on the close coordination of its multi-jurisdictional practice.

On June 1, 2008, C&R (London) is instructed by a long-time current client and private equity firm, Victoria Plc, which is looking to purchase a wholly-owned subsidiary of another C&R client, Lincoln Corp., a U.S. based company headquartered in St. Louis. Victoria is paying part of the purchase price through a routine financing provided by a large international bank headquartered in New York. Conflicts clearing personnel in London went through their client/matter intake

process and, as a result, C&R accept the mandate and begin work. No client consents were sought. None of the London lawyers for Victoria is admitted in New York.

By August 15, 2008, the basic terms of the transaction have been agreed and due diligence is commencing in earnest. Because there will be several U.S. law opinions to be given, C&R (London) seeks the assistance of its New York office. All of the New York based lawyers are admitted only in New York but, under English law, each of them would be permitted to render U.S. law advice in London without further licensing. Both the London and New York offices are currently representing Victoria on unrelated matters, but Lincoln has only been represented by the London office.