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Modeling the American Lawyer Ethics System

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JAMES E. MOLITERNO*

Modeling the American Lawyer Regulation System

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Cross border practice produces inevitable questions of choice of law regarding governing lawyer ethics codes. Inevitably, norms of lawyer conduct vary from state to state and continent to continent. Uncertainty about norms of conduct pervades lawyer to lawyer interactions in cross border contexts. Undoubtedly, greater uniformity of rules and standards would produce some benefits. But such uniformity of rules would likely produce illusory uniformity given cultural differences. To the extent such uniformity could occur and would be beneficial, the model of lawyer regulation and conduct should not be the U.S. model, despite recent initiatives to export U.S.-style lawyer ethics models to emerging democracies and developing states.

INTRODUCTION

Over the past decade or so, a massive exportation of U.S. lawyer ethics law has been taking place. The exportation has been managed largely, but not exclusively by ABA Rule of Law programs, funded extensively by grants from USAID.¹ I have

* Vincent Bradford Professor of Law at Washington & Lee University. Thanks to Amelia Guckenberger, Lethia Hammond and Jon Burtard for excellent research assistance and to my many international partners. This paper was first presented at a symposium at the University of London's Institute of Advanced Legal Studies, "Regulating and Deregulating Lawyers in the 21st Century," June 3, 2010.

¹ See *Rule of Law Initiative*, AMERICAN BAR ASSOCIATION <http://apps.americanbar.org/rol/> (last visited May 18, 2011).

participated in several of these projects. Many dedicated people do excellent work in these projects and nothing in this essay should be read to suggest that these projects lack value. But because they are exporting U.S.-style lawyer ethics regulation, a system that is a poor fit with legal cultures outside the U.S., some of the work harms the goal of enhancing uniformity in lawyer conduct and regulation.

In Tbilisi, Georgia, during a March 2011 trip to do lawyer ethics training, I followed-up on a story I had heard on a previous training trip: the new judicial ethics law, modeled on the ABA Model Code of Judicial Conduct, has been used as a tool of government control over the judiciary. As well, the institution of plea bargaining has resulted in serious abuse of criminal defense lawyers. A tool of criminal case processing efficiency in the United States is a tool of government abuse of defense lawyers in Georgia because the local power of prosecution offices is greatly out of proportion to the power of the private bar.² This is certainly not the result that was desired or anticipated by the advocates of the new judicial code or of the plea bargaining institution. But when too little attention is paid to local culture, mere adoption of excellent words and efficient practices can have deleterious results.

The large-scale adoption of U.S. models of lawyer and judge regulation outside the United States is likely to produce unfortunate results. The U.S. lawyer regulation system has much to recommend it, but it also has serious flaws, and more importantly for this purpose, it has no real relationship with lawyer culture outside the U.S.

I THE EXPORTATION

The exportation of U.S. legal ethics models has proceeded on many fronts, but the ABA Rule of Law Initiative (ROLI) has carried much of the load. These projects have had enormous success at establishing ABA-like lawyer associations, proposing and shepherding the adoption of ABA-like lawyer and judge ethics codes, and introducing U.S.-style dispute resolution models that carry lawyer ethics implications.

The Bangalore Principles of Judicial Conduct are one notable exception to the U.S. model adoptions. The Bangalore Principles represent a genuinely international amalgam, having been

² Letter from Council of the Bars and Law Societies of Europe (CCBE) to Georgian President Mikheil Saakashvili (December 21, 2010) (on file with author).

adopted by a diverse group. It is true that the ABA Model Code of Judicial Conduct and numerous U.S. state codes of judicial conduct figured prominently in the group's design work. It is also true that the Bangalore Principles are very broad in nature and represent less a code of judicial conduct than a statement of the key attributes of a successful judicial system, for example independence, impartiality, and the like.³ As a broad statement of attributes, the Bangalore document has been advanced by the ABA and its adoption in a given country would not preclude the adoption of more detailed U.S.-like codes of judicial conduct.

Some of the ABA successes have occurred in Albania, Armenia, Georgia, Kazakhstan, Kosovo, Kyrgyzstan, Bulgaria, Romania, and Jordan.⁴

Occasionally, the U.S. system loses a contest for adoption, usually to a Western European NGO competitor. For example, The Republic of Kosovo is currently experiencing a watershed moment in the history of its judicial sector and, under the guidance of numerous American NGOs and attorneys, has adopted many lawyer regulations modeled after the U.S. system. Nevertheless, in the midst of this transformation, the Kosovo General Assembly established a notary regime based on the European civil law model. Unlike notaries public in the United States, notaries in Kosovo will be government-licensed attorneys responsible for drafting legally enforceable contracts and providing legal advice to private parties, as they are in France and other French code-based civil law countries.⁵

Exceptions aside, the U.S. lawyer ethics and regulation model is experiencing enormous success in emerging democracies abroad.

II THE NEED FOR HARMONIZATION

Without doubt, there are advantages to having a consistent, worldwide system of lawyer regulation.⁶ Imagine a simple situation, some form of which is occurring all the time: a U.S. corporation is in a dispute with an Italian one. Both the U.S.

³ THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002) (adopted, Judicial Group on Strengthening Judicial Integrity; revised, Round Table Meeting of Chief Justices 2002), available at http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf.

⁴ For some details on each project and its exportation of US models of lawyer and judicial ethics, see James E. Moliterno, *Exporting American Legal Ethics*, 43 AKRON L. REV. 769, 771-75 (2010).

⁵ See Law on Notary, Republic of Kosovo, no. 03/L-10 (adopted Oct. 17, 2008).

⁶ See, e.g., Lawton P. Cummings, *Globalization and the Evisceration of the Corporate Attorney-Client Privilege: A Re-Examination of the Privilege and a Proposal for Harmonization*, 76 TENN. L. REV. 1 (2008).

lawyer and her Italian opponent are investigating fact issues that underlie the dispute. Each wants to speak with a former employee of the Italian corporation. The former employee now lives in Germany. As the two lawyers fly from their home cities to Munich, each wonders what lawyer ethics rules apply to their hoped-for contact with the former employee. Is the U.S. lawyer bound by her state's ethics code? By Italian ethics law? By the CCBE code? By German ethics law? And what should the U.S. lawyer anticipate about the Italian lawyer's actions? By what ethics law is the Italian lawyer governed?

It would be a good thing if they could be relieved of researching such an issue and be comforted to know that the same witness contact rules apply to both lawyers. Currently that is not the case and it is no answer to say they can agree to what law will apply, as if it were a contract term. The public interest in lawyer regulation does not permit a lawyer to negotiate away her obligations under the applicable lawyer ethics law.⁷

A uniform set of lawyer ethics rules would no doubt have advantages for the conduct of lawyer business and the free movement of legal services.⁸ Cross-border practice and licensure would be simplified.

Having uniform rules requires more than having uniformity of words in governing rules. There is an illusory harmonization when the words of the governing legal rules are similar, but the underlying legal culture is quite different. Words in rules mean what they mean in the culture and society that adopted those words, and in the case of lawyer ethics rules, the culture of the lawyers to whom the words will apply.

Adoption of U.S. forms of lawyer and judge regulation will not make the world's lawyers more like U.S. lawyers. They do not function in the U.S. culture and are not educated as common law lawyers.⁹ The legal systems within which they function are not like U.S. systems.

⁷ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. e (2000). "Choice of law in lawyer regulation. In general, traditional choice-of-law principles, such as those set out in the Restatement Second of Conflict of Laws, have governed questions of choice of law in *nondisciplinary* litigation involving lawyers." *Id.* § 5 cmt. h (2000) (emphasis added) (regarding choice of law in disciplinary matters).

⁸ See General Agreement on Trade in Services (GATS), Apr. 15, 1994, 1869 U.N.T.S. 183; Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001); Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875 (2010).

⁹ Even this goal seems sometimes within the reach of the U.S. NGOs. In Armenia, the Court of Cassation has begun to operate as a common law court pursuant to a law adopted in 2005. See Republic of Armenia Judicial Code, § 1, Art. 15, cl. 4 (2007),

Planting U.S. lawyer ethics rules in places as different from the United States as Kosovo, the Republic of Georgia, Thailand, Kazakhstan, and Jordan is sure to create unwanted results. Each of these nations has its own winding path of legal culture, leading to a present existence. None of them have the common law tradition. None of them have long histories of democracy. None of them have traditions of private lawyers as checks on the power of government. The English words of the U.S.-style code mean what they mean in Georgia, Thailand, and Kosovo, not what they mean in the United States.

Even the ABA Model Rules, which do their best to make all lawyers look alike, acknowledge this culture-driven meaning shift. Model Rule 4.1, dealing with materially false lawyer statements of fact, is often at play in negotiation conduct.¹⁰ The Comments to 4.1 themselves acknowledge the local nature of this rule's interpretation: it defines the conduct that is permissible in negotiation by reference to local norms of negotiation behavior.¹¹ If the same words mean something different in New York and Omaha, they surely mean something different between New York or Omaha and Tbilisi or Pristine.

III THE PRICE OF UNIFORMITY

Even if genuine uniformity were possible, there is a significant price to be paid for uniformity. To have a uniform rule, some choice must be made among the options. Will some existing rule be best? Or perhaps some amalgamation of the differing rules? Uniformity itself assumes that "one size fits all." That size should not be the U.S. size.

"The reasoning of a judicial act of the Cassation Court or the European Court of Human Rights in a case with certain factual circumstances (including the construal of the law) is binding on a court in the examination of a case with identical/similar factual circumstances, unless the latter court, by indicating solid arguments, justifies that such reasoning is not applicable to the factual circumstances at hand." (citation omitted). Armenia has a court system of general jurisdiction consisting of sixteen Courts of First Instance and the Court of Cassation. *See* The Judiciary of Armenia, <http://www.court.am/?l=en&mode>; ARMENIA CONST. arts. 92, 100; Republic of Armenia Judicial Code, § 1, art. III (2007). Decisions by the Court of Cassation are immediately binding and non-appealable. *See id.* Armenia also has specialized Administrative, Civil, and Criminal courts, as well as Civil and Criminal Courts of Appeals. *Id.*

¹⁰ MODEL RULES OF PROF'L CONDUCT R. 4.1, cmt. 2 (2004). The Comment refers to "generally accepted conventions in negotiation," which inevitably vary from one legal community to another.

¹¹ *Id.*

U.S. rules might be the choice most likely to be adopted because of U.S. strength and influence, but this model seems unlikely to be a successful fit. The U.S. lawyer is actually quite unique in the world. As a common law lawyer, she perceives herself, correctly, as a lawmaker.¹² She makes arguments to courts that become law when agreed with by a judge. Civil law lawyers have a quite different sense of themselves. They, and the judges to whom they argue, are law appliers, not lawmakers (except to the extent that a civil law lawyer might become a member of parliament). Without the effect of their victory in litigation establishing precedent, civil law lawyers lack the sense of connection between their court-work and changes in the law: a connection that is embedded in the psyche of common law lawyers.

The dispute resolution system itself is quite different in well-known ways, driving substantial differences in lawyer role. In most civil law systems, the lawyers do not formally present evidence to a court. The judge investigates a matter and forms a dossier of witness statements and other evidentiary material. The lawyers have less, and sometimes no, contact with witnesses, and certainly less evidence-related responsibility in hearings.¹³

In various surface ways, the U.S. model is quite unlike any other and would require remarkable adjustments to legal systems outside the United States to make sense.

Rules regarding advertising and solicitation¹⁴ are framed differently in the United States. not because of the bar's preferences,¹⁵ but because of the First Amendment's limitations on the bar's power.¹⁶ Such a robust speech freedom is rare.¹⁷

The beginning of the lawyer-client relationship is far more formal than in the United States.¹⁸ Outside the United States, the

12 GEOFFREY C. HAZARD JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* 68–69 (2004); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 23–24, 34–38, 109–10 (3d ed. 2007); KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 69–71 (Tony Weir trans., 3d ed. 1998); RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 56–57, 63 (Michael Kindred trans., 1972); F.H. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* 65–83 (1953).

13 HAZARD & DONDI, *supra* note 12, at 67.

14 MODEL RULES OF PROF'L CONDUCT R. 7.1–7.5.

15 Compare MODEL RULES OF PROF'L CONDUCT R. 7.1–7.5 with MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 *et seq.*, the latter of which predated Supreme Court application of the First Amendment to a lawyer's commercial speech.

16 See, e.g., *Bates v. Arizona State Bar Assoc.*, 433 U.S. 350 (1977).

17 HAZARD & DONDI, *supra* note 12, at 143.

18 Outside the U.S., lawyers speak of “receiving instructions” from their clients, which essentially begins the lawyer-client relationship. See, e.g., European E-Justice Portal, Fees available at https://e-justice.europa.eu/contentPresentation.do?lang=en&idCountry=at&idTaxonomy=37&member=1&vmac=0Zlwi8_R8HVrZ44WgbkDIFlm4CIUjRf2kbl05qZ8l1d4ZVH20YKrC1S2sqObMNU150Jj8pmyW8iMUXjs3H4gAAG

concept of beginning the lawyer-client relationship involves the client “giving instructions” to the lawyer. The concept in the United States is far more fluid.¹⁹

Conflicts of interest (incompatible relations) discussions outside the U.S. focus almost exclusively on multiple client issues, while other competing interests are discussed more in terms of priorities and lawyer independence. Lawyers’ independence from the state is less pronounced outside the United States; lawyers’ independence from the client is more pronounced outside the United States.

More fundamentally, the U.S. system of lawyer regulation persists in isolating lawyers from partnership relations with nonlawyers²⁰ while these barriers are being broken down in large and small ways elsewhere.²¹ Efforts in the United States to break down those restrictions have failed, and failed again. In the early 1980s, the concept was known as “ancillary business,”²² and it failed in the famous “fear of Sears” vote.²³ When the Reporter for the proposed amendments to the ABA model code was asked if this particular amendment would permit Sears to open a law firm, he candidly said, “yes.” The measure was roundly defeated.²⁴

GMAAALP (“In this regard, section 50(2) of the Richtlinien für die Ausübung des Rechtsanwaltsberufs und für die Überwachung der Pflichten des Rechtsanwalts [Guidelines on the Exercise of the Profession of Lawyer and the Supervision of Lawyers’ Obligations] (RL-BA) recommends that, *when receiving instructions on a new matter*, the lawyer should inform the client of the basis on which the fee will be charged and of his or her entitlement to an interim payment.”) (emphasis added).

¹⁹ See, e.g., *Togstad v. Vesely*, 291 N.W.2d 686 (Minn. 1980).

²⁰ MODEL RULES OF PROF’L CONDUCT R. 5.4 (prohibiting lawyers from sharing fees with nonlawyers, effectively preventing lawyer partnerships with nonlawyers).

²¹ European nations have been more willing to embrace multidisciplinary practice. See Legal Services Act (Tesco Law), 2007, (U.K.) (allowing British lawyers to both form partnerships with nonlawyers and also operate under external ownership or with outside investment); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 113 (2000) (noting that the origins of the MDP are in post-war Germany, where lawyers and tax accountants have been able to practice together in a partnership since the end of World War II); Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 *NW. J. INT’L L. & BUS.* 1, 19 (2009) (explaining that the Netherlands Bar Association’s regulations allow for lawyers to become partners with notaries and tax advisors, but not with auditors).

²² See MODEL RULES OF PROF’L CONDUCT R. 5.7 (allowing a scaled back, modest version of ancillary businesses conditioned on all participants obeying the lawyer ethics rules).

²³ See Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 *CAL. L. REV.* 1, 10–11 (1998) (discussing the debate over proposed Model Rule 5.4, which would have allowed lawyers to form business associations with nonlawyers).

²⁴ *Id.* at 11.

After a decade of informal inroads, most mass hiring of lawyers by accounting firms to do so-called “consulting,”²⁵ the move to permit multi-disciplinary practice (MDPs) was gaining ground.²⁶ Then Enron and the connection made between its officers’ defalcations and the relationships between lawyers and accountants within Arthur Anderson produced a powerful rejection of MDPs²⁷ and the adoption of the Sarbanes-Oxley Act,²⁸ effectively killing any talk of MDPs for almost another decade. The talk has returned, as a proposal for new business models to replace the old in the late 2000s economic crisis²⁹ and questions about the future competitiveness of the traditional law firm model.³⁰

In short, for the U.S. system to actually fit well in most emerging democracies, enormous social, cultural, and justice system changes would also have to occur. A lawyer code does not make the legal culture. Legal systems and lawyer codes are highly culture-bound and -based. On some level, asking whether a U.S. model would be better for a civil law nation or a civil law system

²⁵ Laurel S. Terry, *A Primer on MDPs: Should the “No” Rule Become the New Rule?*, 72 TEMP. L. REV. 869, 878–79 (1999) (noting that in 1999, 6362 lawyers worked for Big Five firms, and if the number of lawyers working at the Big Five firms was combined with the number of lawyer employed by traditional law firms, the listing of the ten largest law firms worldwide would include three of the Big Five).

²⁶ See Commission on Multidisciplinary Practice, American Bar Ass’n, Final Report (1999), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecommendation.html (recommending that MDPs be allowed to provide legal services); see also Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 410–15 (2004) (arguing that the expansion of MDPs would benefit a variety of client groups, including “elderly, juvenile, domestic violence, or immigrant clients”); see also Terry, *supra* note 25, at 891 (“Those who favor MDPs argue, inter alia, that MDPs provide one-stop shopping, better service (because of the broader expertise of the service-providers and closer cooperation of an interdisciplinary team), and cost-effectiveness.”).

²⁷ See David Millon, *Who “Caused” the Enron Debacle?*, 60 WASH. & LEE L. REV. 309, 319–21 (discussing the conflicts of interest present in the relationship between Arthur Anderson and Enron, which contributed to the Enron collapse); see also Lawrence J. Fox, *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547, 548 (2002) (claiming that “Enron proved the death knell of MDPs”).

²⁸ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

²⁹ See Larry E. Ribstein, *The Death of Big Law* 2010 Wis. L. Rev. 749 (2010) (proposing new business models to restructure the current economic models used by large law firms).

³⁰ See RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008) (predicting large changes in the legal marketplace resulting from new approaches to valuing legal services and new technologies used in the field); see also THOMAS MORGAN, *THE VANISHING AMERICAN LAWYER* (2010) (discussing the need for lawyers to adapt to new client expectations and gain expertise in nonlegal issues to succeed in the changing legal marketplace).

would be better for the United States is an absurd question. There is simply too much cultural foundation for a legal system or lawyer code for any system to be a good model in an entirely different culture.³¹

Further, the “U.S.-model” is not really one model but fifty-one. Fifty-one (plus all the individual federal courts), including different licensing entities and fifty-one codes. There is so much local variation on this level, that the U.S. system of licensure and local control is not a good fit with a global system.³² Any move to make the so-called U.S. model the international model would first have to navigate the harmonization of the fifty U.S. states and the District of Columbia and the variations among federal courts and administrative agencies. To date, those efforts at internal harmonization have fallen substantially short.³³

IV

WHAT HAPPENS WHEN A CODE DOES NOT FIT A CULTURE?

Laws made of well-crafted words that no one follows because of the culture misfit, reminiscent of Soviet-style codes, create mischief rather than good. The result in such circumstances is government power to oppress. Everyone violates such rules, therefore, anyone the government chooses to prosecute is factually guilty of violating the rule.

In Georgia, for example, a new judicial ethics code was installed with the help of U.S. NGOs.³⁴ The words of the code were admirable and reflected positive norms of behavior. But as they were installed, they misfit the judicial culture such that few judges were in compliance. That general noncompliance left the government with the power to remove judges it did not favor by charging them with ethics violations. Government-supported judges were violating the same rules, but those violations were ignored.

³¹ MERRYMAN & PÉREZ-PERDOMO, *supra* note 12, at 150.

³² Not only are the codes different in important respects from U.S. state to U.S. state, see, e.g., John S. Dzienkowski, Professional Responsibility Rules, Standards, and Statutes, State Variation section (Thompson-West 2009), but the licensing systems and requirements vary substantially. Comprehensive Guide to Bar Admission Requirements (ABA 2010).

³³ ABA Report of the Commission on Multijurisdictional Practice 7–12 (Aug. 2002) available at http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_6_5_1.authcheckdam.pdf (suggesting that efforts at single bar license are not currently realistic).

³⁴ GEORGIAN CODE OF JUDICIAL ETHICS (1998) (on file with author).

V WHAT MODEL THEN?

In the judicial ethics arena, much progress has been made from a genuinely international starting point: the Bangalore Principles. The Bangalore Principles of Judicial Conduct identify six core values of the judiciary: Independence, Impartiality, Integrity, Propriety, Equality, Competence, and Diligence. The values are followed by relevant principles and detailed statements of their application. The Principles represent the culmination of years of work and the input of senior and chief justices from over seventy-five countries, who considered over thirty judiciary codes, when developing the document.³⁵ The principles are unique in that they involve judicial self-regulation and find common ground with virtually every legal system. Although relatively recent, the Bangalore Principles have evoked a sea change by encouraging numerous nations to address the problems of judicial corruption.

In structure but not in level of detail, the Principles bear some resemblance to the former 1969 ABA Model Code of Professional Conduct. The six core “values” are structurally similar to the Canons. The Principles, however, present no “black letter” law, no Disciplinary Rules in the parlance of the ABA Model Code.

In 2000, the United Nations Center for International Crime Prevention (CICP) working with Transparency International, an NGO, invited chief justices and senior judges from eight Asian and African nations to convene in Vienna. Participants included the chief justice of Bangladesh, the chief justice of Karnataka State, India, the chief justice of Nigeria, the former chief justice of Tanzania, the chairman of the Judicial Service Commission of Uganda, and the vice president of the Constitutional Court of South Africa. The group was chaired by the former vice-president of the International Court of Justice, Christopher Weeramantry. These judges eventually became known as the Judicial Integrity Group.³⁶

The initial meeting was held in conjunction with the Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders for the purpose of addressing judicial corruption. Initial discussions led by CICP centered on the importance of the rule of law with regard to social and economic development and on the potential role the United Nations could

³⁵ Shelby A. Linton Keddie, *Outsourcing Justice: A Judge's Responsibility When Sending Parties to Mediation*, 25 PENN ST. INT'L L. REV. 717, 733 (2007).

³⁶ U.N. ODCCP Rep. of the First Meeting of the Judicial Integrity Group on Strengthening Judicial Integrity, Apr. 15–16, 2000 (2000), *available at* www.unodc.org/pdf/crime/gpacpublications/cicp6.pdf [hereinafter First Meeting].

play in helping countries strengthen judicial integrity. The CICIP envisioned involving other countries from varying judicial traditions that could build on the initiatives of the original group.

As a result, what eventually became known as the Judicial Integrity Group began the process of developing a proposed universal statement of judicial ethics. Preliminary discussions envisioned that the work would be utilized to develop an international judicial code, but over time, with input from a number of judges and countries, it became clear that a flexible set of universal principles that could be adapted to each State's unique judiciary would be more appropriate and a feasible starting point.

The group agreed that the national judiciary must assume an active role in strengthening judicial integrity by effecting systemic reforms and that there was an urgent need for a universally acceptable statement of judicial standards that could be enforced at the national level by the judiciary, without the intervention of the executive or legislative branches of government.³⁷ Although the initial group was selected from countries sharing common law traditions, the group quickly recognized the importance of involving judicial systems in civil law countries. With these goals in mind, the Judicial Integrity Group agreed to have regular contact with each other, observers, and coordinators for the purpose of sharing information and to meet for the second time in Bangalore, India.³⁸

The Judicial Integrity Group reconvened in Bangalore, India on February 24–26, 2001 and included special invitee Justice Claire L'Heureux Dubé, who sits on the Supreme Court of Canada and serves as president of the International Commission of Jurists. The meeting was hosted by the High Court and Government of Karnataka State, India and facilitated by the United Kingdom Department for International Development (DFID). During this meeting, a draft was presented by CICIP, core values were identified, and relevant principles were developed. Participants developed broad principles by drawing on the best practices and precedents from many jurisdictions throughout the world.³⁹ Participants agreed that the draft principles would be presented

³⁷ COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 9–10 (Sept. 2007), available at [http://www.unrol.org/files/publications_unodc_commentary-e\[1\].pdf](http://www.unrol.org/files/publications_unodc_commentary-e[1].pdf) [hereinafter COMMENTARY].

³⁸ See generally, First Meeting, *supra* note 36.

³⁹ U.N. ODCCP Rep. of the Second Meeting of the Judicial Group on Strengthening Judicial Integrity, Feb 24–26, 2001, 4–5 (2001), available at http://www.unodc.org/pdf/crime/gpac_publications/cicp5.pdf.

to the September 2001, meeting of the African Chief Justices in Nigeria, to the August 2001, meeting of the Chief Justices of the Commonwealth in Uganda, to the judges of the International Court of Justice, and to the International Advisory Council of the World Bank.

The participants also began to consider ways in which the draft principles could be further utilized and emphasized the need to take the draft to countries outside of the common law legal tradition. Dato Param Kumaraswamy, U.N. Special Rapporteur on the Independence of Judges and Lawyers, indicated that he was interested in the eventual adoption of an authenticated international code of justice by the U.N. General Assembly. Additionally, Justice L'Heureux Dubé of Canada, indicated the need for a representative body of chief justices that could promote a draft international code. Following the second meeting, the draft adopted by the Judicial Integrity Group began to be known as the Bangalore Draft Code of Judicial Conduct.

In subsequent months, the Bangalore Draft was dispersed to judges from both common and civil law countries. It was presented to and discussed at judicial conferences involving chief and senior justices from over seventy-five common and civil law countries. American Bar Association offices in Central and Eastern Europe had the Bangalore Draft translated into the national languages of Bosnia-Herzegovina, Bulgaria, Croatia, Kosovo, Romania, Serbia, and Slovakia. Subsequently, it was reviewed by judges, judicial associations, and regional constitutional and supreme courts.⁴⁰

In June 2002, the Bangalore Draft was reviewed by the Working Party of the Consultative Council of European Judges, a widely representative group chaired by Lord Justice Mance, resulting in a comprehensive discussion from the civil law perspective. Their written comments provided significant contributions regarding the independence of the judiciary as well as rules of professional conduct, ethics, and impartiality. The judges referenced recent codes of judicial conduct such as the Australian Guide to Judicial Conduct, the Model Rules of Conduct for Judges of the Baltic States, the Code of Judicial Ethics for Judges of the People's Republic of China, and the Code of Judicial Ethics of the Macedonian Judges Association.⁴¹

Based on the concerns and recommendations of the Judicial Integrity Group, Judge C.G. Weeramantry, the group's chairman,

⁴⁰ COMMENTARY, *supra* note 37, at 12.

⁴¹ *Id.* at 13.

convened a round-table meeting of chief and senior justices from non-common law jurisdictions. The meeting was held in order to obtain their views on the revised Bangalore Draft Code of Judicial Conduct. This time the justices met on November 25–26, 2002 at The Hague, Netherlands. The gathering was sponsored by a grant from the United Kingdom's DFID and supported by the U.N. Centre for Crime Prevention and the U.N. Office of the High Commissioner for Human Rights.

Participants included judges from Brazil, Czech Republic, Egypt, France, Mexico, Mozambique, The Netherlands, Norway, Philippines, and Germany. Eight additional judges from the International Court of Justice attended and participated in one session.⁴²

Along with the Bangalore Draft Code of Judicial Conduct, participants were given the Comments of the Working Party of the Consultative Council of European Judges (CCJE-GT) on the Bangalore Draft; the opinion prepared by the CCJE-GT specialist; the annotated version of the Bangalore Code of Judicial Conduct with comments by judges and judicial associations, including comments by judges in Central and Eastern European countries; and several U.N. documents including the Basic Principles on the Independence of the Judiciary, Basic Principles on the Role of Lawyers and the U.N. Guidelines of the Role of Prosecutors.⁴³

At the conclusion of the round-table meeting, several key amendments were adopted to the Bangalore Draft, including: the deletion of all references to a *code* of judicial conduct and instead describing the document in terms of *principles* of judicial conduct; re-prioritization of the order of the judicial values to their present order; the deletion of implementation and accountability as a value; and the inclusion of applications for each value and principle, rather than a code.⁴⁴ There was significant divergence regarding political restrictions. Civil law judges argued that there was not a general international consensus whether judges should be free to engage in or refrain from political participation. These judges noted that in one European country, judges are elected on the basis of party membership. In others, judges have the right to engage in politics and be elected as members of local councils while remaining as judges or to be elected to parliament resulting in the suspension of their judicial status. Ultimately, it was

⁴² U.N. ODC, Summary Record of the Round-Table Meeting of Chief Justices to Review the Bangalore Draft Code of Judicial Conduct 2 (Nov. 25–26, 2002), available at http://www.unodc.org/pdf/corruption/hague_meeting_02.pdf.

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 4–5.

decided that each country should determine a judge's requirement of neutrality, and the civil law judges conceded that judges should refrain from political activity likely to compromise judicial independence or the appearance of impartiality.⁴⁵ Out of the round-table, the Bangalore Principles of Judicial Conduct (Bangalore Principles) were developed and approved.

On January 10–12, 2003 the Judicial Integrity Group met in Colombo, Sri Lanka. The Group met to review mechanisms utilized in pilot survey programs in three selected countries: Uganda, Sri Lanka and Nigeria, share judicial experiences in addressing identified weaknesses in those countries, consider what steps ought to be taken to secure the passage of the Bangalore Principles before the U.N. General Assembly, and to decide what measures should be taken by national judiciaries in order to implement these Bangalore Principles.

During the third meeting, the Judicial Integrity Group learned from Dato Param Cumaraswamy, U.N. Special Rapporteur on the Independence of Judges and Lawyers, that the Bangalore Principles would be presented to the next session of the U.N. Commission on Human Rights as part of his report with the request that the Commission either endorse or note them. In this context, the Bangalore Principles were posted on the U.N. website, making them accessible throughout the world. It was also decided that discussions should take place with various Foreign Ministries for the purpose of presenting the Bangalore Principles of Judicial Conduct for adoption by the U.N. General Assembly. In addition, the Bangalore Principles were forwarded to the U.N. Crime Commission seeking a resolution requesting member states to implement the principles. Finally, the Group decided that the Chairman should write to the national Chief Justices in all countries to educate them about the Bangalore Principles and to invite comments. Above all, it was stressed that however universal acceptance of the Bangalore Principles was achieved, "ownership" must remain with national judiciaries and no part of the text should be amended except by national judicial organizations.⁴⁶

On April 23, 2003, the fifty-ninth Session of the U.N. Commission on Human Rights adopted a resolution, without dissent, that noted the Bangalore Principles of Judicial Conduct

⁴⁵ COMMENTARY, *supra* note 37, at 14–15.

⁴⁶ See generally, U.N. ODCCP Rep. of the Third Meeting of the Judicial Group on Strengthening Judicial Integrity, Jan. 10–12, 2003, 4–5 (2003), available at <http://www.unodc.org/pdf/crime/gpacpublications/cicp4.pdf> [hereinafter Third Meeting].

and brought the Principles to the attention of Member States, the relevant U.N. organizations and intergovernmental and nongovernmental organizations for their consideration.

The Judicial Integrity Group reconvened in Vienna, Austria on October 27–28, 2005. During this meeting the Group had a great deal to celebrate, given the wide notoriety the Bangalore Principles had attained. For example, the Principles had been utilized by the UNODC, the European Union, the Council of Europe, the Commonwealth Secretariat, and the Brandeis Institute for International Judges. In addition, the Bangalore Principles had been used by several countries such as Uganda, Sri Lanka, and Kenya. Both Belize and the Philippines had adopted judicial codes based entirely on the Bangalore Principles. A number of nongovernmental organizations including the International Commission of Jurists and the American Bar Association were incorporating the Principles in programs in Central Europe, Asia, and Africa, and several countries were using them to train judges in basic ethics.⁴⁷

In addition to the 2002 interactions with the Working Party of the Consultative Council of European Judges and the round-table meeting of non-common law chief justices described above, the Bangalore Principles had been presented to a November, 2002 meeting of Spanish-speaking Chief Justices in Cancun, Mexico; a January, 2003 meeting of Arab Federation of Constitutional Courts and Councils; an April 2003 Commonwealth Law Conference in Melbourne; an April, 2003 meeting of the World Jurists Association in Sydney, Australia; as well as a September, 2003 Conference of Asian-Pacific Chief Justices in Tokyo, Japan.⁴⁸

By involving a large number of organizations and judges, the Judicial Integrity Group received significant feedback that stressed the need for examples and illustrations explaining how the Bangalore Principles were intended to work.⁴⁹ The Group agreed on the need for a commentary guide that would explain the drafting and cross cultural process as well as the rationale for the values and principle included. The commentary was also needed to facilitate a better understanding of the applicability of the Bangalore Principles to domestic issues and problems.⁵⁰

⁴⁷ See generally, U.N. ODCCP Rep. of the Fourth Meeting of the Judicial Group on Strengthening Judicial Integrity, Oct. 27–28, 2005 (Oct. 2005), available at http://www.unodc.org/pdf/corruption/publication_jig4.pdf [hereinafter Fourth Meeting].

⁴⁸ See generally, Third Meeting, *supra* note 46.

⁴⁹ Fourth Meeting, *supra* note 47 at 5.

⁵⁰ COMMENTARY, *supra* note 37 at 16.

While developing the commentary, the Group members agreed to provide illustrations from local case law and other examples to the Group coordinator, who then utilized the examples in a draft commentary. In addition, it was decided that the commentary would reference relevant principles of international law including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Decisions by the Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights and others as well as decisions by constitutional courts and judicial advisory commissions were also utilized as sources. Group members agreed that the commentary should use the context of international instruments, courts, and treaties to explain the purpose of the Bangalore Principles and references to religious and cultural traditions underlying the values and principles should be included. Once a draft commentary was prepared, it was to be circulated for each individual member's consideration and approval.⁵¹

On April 2006, the Commission on Crime Prevention and Criminal Justice adopted, without dissent, a resolution co-sponsored by Egypt, France, Germany, Nigeria, and the Philippines. The resolution, Strengthening Basic Principles of Judicial Conduct, included a number of recommendations for the United Nations Economic and Social Council (ECOSOC). These recommendations included having the ECOSOC encourage U.N. Member States to consider the Bangalore Principles when reviewing or developing rules of judicial conduct, requesting that the ECOSOC invite Member States to submit opinions and suggested revisions to the Secretary-General; and forming an open-ended Intergovernmental Expert Group to work in cooperation with the Judicial Integrity Group and other international and regional judicial organizations to develop a Commentary on the Bangalore Principles of Judicial Conduct. In formulating the Commentary, the Intergovernmental Expert Group was charged with considering the views submitted by Member States. It was requested that the Secretary-General report to the Commission on Crime Prevention at its next meeting on the implementation of the proposed resolution.⁵²

In July 2006, the United Nations ECOSOC adopted the Strengthening Basic Principles of Judicial Conduct resolution without a vote.⁵³

⁵¹ See generally, Fourth Meeting, *supra* note 47.

⁵² See generally, COMMENTARY, *supra* note 37, at 17.

⁵³ *Id.*

During a March 2007, joint meeting, the Judicial Integrity Group and the Intergovernmental Expert Group, after an extensive review process, agreed upon the Commentary on the Bangalore Principles of Judicial Conduct (Commentary). Each paragraph was considered separately and each amendment or deletion was discussed and agreed upon.

Perhaps most impressive was the involvement and consensus of the number of participants involved. Participants included the Judicial Integrity Group and the Intergovernmental Expert Group, comprised of judges and senior officials from Algeria, Azerbaijan, Dominican Republic, Finland, Germany, Hungary, Indonesia, Iran, Latvia, Libya, Moldova, Morocco, Namibia, The Netherlands, Nigeria, The Islamic Republic of Pakistan, Panama, Romania, South Korea, Serbia, Sri Lanka, Syria, and the United States.

Additional participants included senior judges from the United Kingdom, France, Argentina, Indonesia, Egypt, Nepal, Spain, Hungary, Namibia, Germany, Finland, Algeria, and Nigeria. Several of the participants held international positions including Lord Mance, House of Lords, United Kingdom and former Chairman of the Consultative Council of European Judges; and Judge Christine Chanet, Conseillere, Cour de Cassation, France and Chair of the U.N. Human Rights Committee.⁵⁴

The Commentary expands upon the six core values and accompanying principles that comprise the Bangalore Principles of Judicial Conduct and incorporates relevant international and human rights instruments such as: the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, and others.⁵⁵ In addition, it includes relevant religious and cultural traditions from around the world. The appendix references the Ancient Middle East, Hindu Law, Buddhist Philosophy, Roman Law, Chinese Law, African Law, Jewish Law, Christianity, and Islamic Law.⁵⁶ Its focus on commonalities makes the Bangalore Principles appealing to virtually every country.

By 2007, the Bangalore Principles had been used to revise existing, or to create new, judicial codes in the following countries: the Netherlands, England, Wales, Mauritius, Bulgaria,

⁵⁴ *Id.* at 18.

⁵⁵ *Id.* at 111.

⁵⁶ *See generally, id.* at 135–41.

Uzbekistan, and Serbia. Additionally, the Bangalore Principles have been adopted in Belize and the Philippines,⁵⁷ in addition to some of the countries first involved in the drafting.

Given the widespread involvement of judges from around the world in developing the Bangalore Principles, it is difficult to measure their far-reaching effect. A search of international news sources reveals that a number of countries have either utilized or modeled the Bangalore Principles of Judicial Conduct. Some of these countries include Zambia,⁵⁸ Nepal⁵⁹, Republic of Moldova,⁶⁰ the Fiji Islands,⁶¹ Malaysia,⁶² and Botswana.⁶³ The United Kingdom Supreme Court's Guide to Judicial Conduct refers to the Bangalore Principles and incorporates its core values.⁶⁴

The Bangalore Principles have universal appeal, and as a result have been utilized by specialty judicial groups in addition to national ones. For example, the International Association of Youth and Family Judges and Magistrates incorporated references to the Bangalore Principles in its preamble to the Proposal For Principles of Judicial Ethics for Youth and Family Judges and Magistrates and recognized their application to judicial functions in this area. The final proposal included many of the Bangalore Principles' core values and principles.⁶⁵

A similar approach holds promise for lawyer regulation. It is true that lawyering is more complex than judging. A more complex mixture of competing interests and values comes into play for lawyers than for judges. Nonetheless, a genuinely

⁵⁷ Greg Mayne, *Judicial Integrity: The Accountability Gap and the Bangalore Principles*, TRANSPARENCY INTERNATIONAL GLOBAL CORRUPTION REPORT 2007 at 40, 42, (2007), available at http://www.transparency.org/publications/gcr/gcr_2007#3.

⁵⁸ *Zambia: Chief Justice Says Anti-Graft Laws Under Review*, WORLD NEWS CONNECTION, Jan. 22, 2010.

⁵⁹ *Judges to discuss code*, EKANTIPUR.COM, Mar. 31, 2009, available at 2009 WLNR 6100510.

⁶⁰ JUDICIAL ETHICS: DEVELOPMENTS, CHALLENGES AND SOLUTIONS. MOLDOVA'S EXPERIENCE IN ENFORCING ETHICS STANDARDS FOR JUDGES, available at http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/Ethics/Paper1_en.asp.

⁶¹ The Honorable Mr. Justice Fatiak, Chief Justice of Fiji, *Judicial Code of Conduct: Fiji Islands*, at http://www.paclii.org/fj/CodeofConduct/Foreword_and_Contents.htm.

⁶² *Review should follow principles*, NEW STRAITS TIMES, Apr. 4, 2003, available at 2003 WLNR 1869159.

⁶³ Kepaleswe C. Somolekae, Workshop Group No. 3, BUILDING A JUDICIAL CULTURE ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT, on file with ORIL.

⁶⁴ UNITED KINGDOM SUPREME COURT, GUIDE TO JUDICIAL CONDUCT (2009), available at http://www.supremecourt.gov.uk/docs/guide_to_judicial_conduct.pdf.

⁶⁵ Int'l Ass'n of Youth and Family Judges and Magistrates, Report on the Committee Appointed to Propose Principles of Judicial Ethics for Youth And Family Judges and Magistrates (2010), available at www.minoriefamiglia.it/%5cdownload%5CReport%20Eng%2010.04.24.pdf.

international starting point, focusing not on detail but on fundamental principles, could follow a similar path to as much harmonization as is possible.

IV

A FOCUS ON FUNDAMENTAL PRINCIPLES

Instead of pressing emerging democracies to adopt U.S.-style codes, NGOs should instead focus their attention on seeking harmony on fundamental principles. Training programs, for example, should focus not on pushing the particular attributes of U.S. systems and codes, but rather on underlying fundamentals. In Georgia, for example, training has been conducted for several years on jury trial practice skills. As of now, there are no jury trials in Georgia, yet the training is in the U.S.-style adversarial trial practice: voir dire, cross examination, handling exhibits, and closing jury arguments. This is the training that was provided to Georgian lawyers, none of whom had the slightest use for the skills taught nor the ethics principles that accompany them. During my own weeklong ethics training in Georgia in 2009, I asked the audience for examples of lawyer misconduct in court settings. I hoped to explore their perceptions of in-court misconduct by Georgian lawyers to facilitate our discussion of their code. Instead, in a turn around the table, they gave me example after example of jury trial lawyer misconduct, none of which can actually happen in their justice system, all of which they had been taught about by U.S. NGO trainers during the prior three years. They must have assumed that is what the American trainer would like to hear; in fact, I was asking the question to begin exploring their own system and the fundamentals of appropriate lawyer conduct within it.

IN THE WORKSHOP

By contrast, during my day-long training sessions for Kosovar judges, I focused not on the details of any particular code, theirs, ours, or any other, but rather on the core concept of impartiality. Given this single, central focus, and freed from covering the breadth of their code or the details of ours, I could create a day that would engage the judges (I hoped), challenge their intuitions, and leave them with lasting impressions. An old Chinese proverb states, "Tell me and I will forget. Show me and I will remember. Involve me and I will understand."⁶⁶ I wanted a day with all three modes, with most of the attention on the last.

⁶⁶ Oft-quoted Chinese proverb.

My theory of the training was this: the basic training (provided by another trainer on other occasions) was meant to provide a broad, surface exposure to the codes that govern Kosovar judges and lawyers. The basic training was meant to familiarize the participants with the essential background and text of rules. My training would focus on a single, central topic and develop the participants' understanding with more interactive and more engaging teaching methods. The advanced training would use extensive hypotheticals and role plays, providing the participants with more than mere knowledge of the language of the rules. Rather, the participants would leave the advanced training with mental experience at identifying and solving daily issues that pose ethical difficulty.

The standard day of advanced training itself proceeded as follows. I described the agenda and explained how the day would proceed, and that it would be somewhat different from *ex cathedra* training that they might be more accustomed to. I said that contrary to their customary expectations, I would not talk at them for more than thirty minutes. This notion and phrasing always produced a curious look and then smiles as the translation made its way through the system and into their headphones.

I gave a brief lecture on impartiality. Then, together with the participants and my co-trainers, we discussed two of the seven prepared hypotheticals. The discussion was lively and induced many comments by nearly every participant. The first hypothetical was deceptively simple and designed to not raise a disqualifying impartiality concern. "Judge regularly hears cases involving Bank. Judge's son currently has a loan application pending at Bank." My impression is that participants are accustomed to outsiders always presenting unethical conduct through hypotheticals and I believe that this undermines the credibility of some trainers. The participants come to view the trainers as overly sensitive people for whom every scenario is grave. Instead, my first hypothetical did not pose disqualifying conduct, and the participants on most training days expressed such a view, sometimes in challenging voices, as if they were disagreeing with me when I had not yet commented on the hypo. ("How can our families live? Must they not buy groceries at the market if the market has cases in my court? Must my children not trade with a bank? Some judge must hear the bank's cases. What of her children?") I agreed with them and I think some of them expected me to say otherwise. My agreement was disarming to some of them who seemed not to contemplate that I would have given them a hypothetical that I did not think presented a serious ethical difficulty. From this place of agreement, I then asked what

facts might be added to the first hypothetical that would change it to one presenting disqualifying or more ethically problematic circumstances. The participants proposed several such additions. (“Perhaps if the bank gives the loan to my son on too favorable terms, hoping to gain my favor. Perhaps if I called the bank to pressure them to give the loan. Perhaps if the pending case involves my son’s loan. Perhaps . . .”) Then we discussed when and why these additions would be problematic. I believe that this technique does more than merely give an example of what is problematic. It allows the participants to see the differences between problematic and non-problematic scenarios they might encounter. Rather than merely understanding what conduct falls on the problematic side of the line, they determine the line for themselves.

The second hypothetical was also deceptively simple, and some participants said it was too simple to warrant their time discussing it. “A breach of contract case is pending in Judge’s court. A buyer of paint claims that the paint was of poor quality and damaged the wood surface to which it was applied. Judge had had the same thing happen to him with the same brand of paint.” But in reality, the participants disagreed about its disqualifying implications and the reasons supporting their opinions. By pointing out their disagreement as the discussion proceeded, I was able to demonstrate that even seemingly simple, everyday situations might produce differing opinions from the most experienced and wise judges in the country. That observation allowed me to then highlight and summarize the various points of view and to articulate why the better views were better suited to a fair and impartial judiciary. I forced some discussion underneath the opinions about the problematic nature of this hypo. In particular, I got the group to identify what was the threat to impartiality. In this hypo, there are at least three:

1. We want judges to come to disputes without prior factual knowledge. Here, the judge has used the same paint with the same result claimed by the plaintiff.
2. We want judges to be free of prior bias against a party, and here the judge may harbor some ill feelings toward the paint company which has already harmed her.
3. We want judges who have no personal stake in the outcome, and this judge may be setting some precedent for purposes of either her own later litigation, or pressuring the paint company to pay damages to the judge for her loss.

This focus *under* the notion of impartiality should help the judges to see and sense threats to impartiality more thoughtfully.⁶⁷

In the time remaining before lunch, I asked participants if they could identify any situations that had arisen in their courts on which they might like to seek the opinions of their colleagues.

We adjourned for lunch, and following a usually too-large meal and some conversation through translators, we returned to complete the day.

After lunch, with the assistance of the excellent role playing of Drita Hajdari-Peci and my co-trainer Besim Kelmendi, we staged a role play regarding *ex parte* contact and corruption. In the role play, a judge (Besim) is sitting at a café on a lovely spring day. As he sits alone, he is approached by Drita, who greets him. Initially, he is not sure who she is, so she explains that she owns a travel company and reminds him of the group tour to the Adriatic coast he took with her company. He remembers the trip, of course, and then her. He invites her to join him. They have a nice conversation about the trip and she flatters him with talk of her other clients' pleasure at having him in their group. They seem to be enjoying each other's company when she tells him that her son has been arrested and his case is pending in Besim's court. He is not sure he knows the case, and she continues without pause to explain that her son is innocent and being manipulated by other young men. She carries on like this as long as he will let her, and then she asks if he can help her son. She gets an ambivalent, ambiguous answer and then turns the subject to Besim's daughter, who has applied for a job at her company. She asks if he will be "grateful" if she hires his daughter.

The participants, who had been whispering to one another, laughing and smiling during the role-play, commented on what the judge had done and what he should have done differently.

⁶⁷ The remaining hypos are these, although it was rare to get to even the third or fourth.

3. Judge is presiding over a traffic offense matter against a neighbor. Judge and the neighbor have recently had disputes because the neighbor plays loud music and hosts noisy parties.

4. Judge's son was killed during violence in the 1990s. Judge is now presiding over a criminal matter against a brother of the man who killed Judge's son.

5. Judge's father lost his property during the 1990s. Judge is now presiding over property restoration matters similar to his father's case.

6. Judge is presiding over an employment contract dispute. The employer is also the employer of Judge's daughter.

7. Judge is presiding over a traffic offense matter. The defendant is a social friend of Judge. They frequent the same café and see one another there almost daily.

They disagreed with one another. Besim explained what he had done as the judge in the role play and why. A very productive discussion ensued.

On some occasions, a judge in the audience would ask if he could play Besim's role and show how he would have responded to Drita's entreaties. On other occasions, I would play Besim's role for a second run through the role play. When I did this, the moment Drita turned attention to a case in my court, I would gently stop her, and say, "I am sorry, but one thing I cannot do as a judge is have any discussion of cases in my court, outside of my court. I must excuse myself, and hope you will enjoy the coffee and the lovely weather." I would stand and depart with Drita protesting as I walked away. At one training, the group cheered my response. At another, they explained that they could not do such a thing because they would be labeled as rude in their community. I asked Drita what she would do if the judge had done as I did. She said she would tell her friends and neighbors that the judge was rude to her, despite my gentle way of ending the conversation. I asked the judges what would happen if all judges behaved this way, and they acknowledged that in their relatively small communities, it would not be long before people understood that this was simply what a judge must do. On some occasions, I would turn to Drita after the participants had exhausted their discussion and ask her why her character approached the judge at his café. She said she hoped to gain some advantage for her son. I asked if she believed she could exert as much influence if she had made the same arguments to the judge in court with the other side's lawyer present. No, of course not, she said. So that is why we look askance at *ex parte* contact. That is why *ex parte* contact threatens impartiality. Through the use of experiential, role-based methods, the lessons were understood with greater depth as the day progressed.

Lessons about fundamental, transferable principles are the path to some harmony in lawyer and judicial ethics. From these beginnings, through a generation of lawyers who will work in global environments to a far greater extent than ours did, the details at the edges of ethics principles—confidentiality doctrine, truth-telling, client-getting, etc.—may or may not emerge.

CONCLUSION

Cross-border practice produces inevitable choice of law questions regarding lawyer ethics codes. Inevitably, norms of lawyer conduct vary from state to state and continent to continent. Uncertainty about norms of conduct pervades lawyer

to lawyer interactions in cross-border contexts. Undoubtedly, greater uniformity of rules and standards would produce some benefits, but such rule-based uniformity would be illusory in practice given cultural differences. To the extent such beneficial uniformity could be implemented, the model of lawyer regulation should not be the U.S. model, despite recent initiatives to export U.S.-style lawyer ethics models to emerging democracies and developing states.

With insufficient care and thought and knowledge, the U.S. system of lawyer ethics is being exported. Granted, that some global lawyer ethics harmonization would be useful, the U.S. model may be the least likely to fit elsewhere. The reception for the U.S. model has been quite open, especially in emerging democracies that are much-dependent on the United States in many ways. A Bangalore-style process, open and multi-cultural, holds greater promise for advancing the interest of lawyer ethics harmonization.