Lawyering Skills: the Way to Effective Performance as a Counselor and Advocate

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USING FACTS TO BUILD A PERSUASIVE LEGAL ARGUMENT: A CASE EXAMPLE

This is adapted from an actual case that came to the U.S. Supreme Court. The issue in the case was whether the government has a "duty of care" to protect children from abuse by their parents. The relevant cases that had previously been decided had limited the government's duty of care to custodial situations like prisons and mental hospitals, where the residents were unable to protect themselves from harm and depended on the government to provide protection. Excerpts from the parties' fact statements appear below.

Please answer the following questions:

1. Which attorney (the attorney for the child's family or the attorney for the government) wrote each fact statement? How can you tell?

2. What persuasive techniques does each attorney use in the organization and phrasing of the writing?

3. What is effective in each statement, and why? What is *not* effective, and why?

I.

STATEMENT OF THE CASE

A) The Course of the Proceedings Below

The district court considered and rejected the rule of *Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3rd Cir. 1985)* and held the relationship between the defendants and the child could not give rise to a constitutionally protected right of protection.

The Seventh Circuit also rejected *Bailey, supra,* and held that, although the authorities "inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father," the child had no constitutionally protected right which was violated thereby.

B) The Factual Background of the Case

Summary

Four-year-old Joshua DeShaney became totally and permanently brain-damaged as of March 8, 1984, because of the cumulative effects of a continuing process of physical abuse commited upon him by his father and the father's paramour over a long period. Fourteen months before his injuries became irreparable the local child protection agency began the active phase of its case management of Joshua's physical abuse and neglect situation, initially arranging for protective custody for his physical protection from abuse; the defendant officials returned him to the abusive home, on their own decision and without court action, and actively followed him at all times thereafter, dutifully recording in internal documents the child's deteriorating situation and their fears for his safety but taking no action whatever to protect the child.

Details

In January of 1982 the respondent Winnebago County Department of Social Services (hereinafter DSS) was notified, via the police department, that one Randy DeShaney was abusing his tiny son Joshua (the infant petitioner herein). The DSS had a special division, the Child Protection Unit, whose precise function was to identify and protect endangered children. (This was in response to the declared policy of Wisconsin law mandating specific efforts to protect endangered children and intervene on their behalf). The DSS on this occasion interviewed the father, who denied the assertions against him, but did not see the child, despite the statute's requirements; DSS did nothing further and closed its file.

In January, 1983, Joshua was seen in a local emergency room as a victim of child abuse, and the DSS was notified. At this time DSS arranged for temporary legal custody of Joshua to be taken, nominally by the hospital, while the County investigated. The investigation resulted in a

multi-disciplinary team meeting, at which the physicians, the child psychologist, the nurses, the police officers, the DSS caseworker and DSS supervisor (individual respondents herein), and the county's civil attorney were in attendance. Despite major indications of abuse, the county civil attorney announced that he was unwilling to bring this matter to court for any level of child protection whatever, for undocumented reasons. The DSS officials filed their internal report, noting that child abuse was strongly suspected and promising that they would continue actively and closely to monitor the child. Most especially, these respondents promised that they would bring Joshua to the Court for protection at the first additional indication of child abuse, with respondent Kemmeter saying in her report:

"I therefore recommend that the temporary physical custody order and any further allegations against this family be dismissed at this time but will refer it back into Court should there be any further injuries to this child of an unexplained origin." (Emphasis supplied).

The County gave up any thought of custody of Joshua and, on its own initiative and without a hearing, handed him back to his abusing father and the father's abusing girlfriend. The County did so although it had reason to know each of them was abusive, "because of lack of ability to substantiate" abuse.

The County DSS also entered into a contract with the father whereby he was to receive certain counseling, remove the girlfriend from the home, and enroll Joshua in Head-Start (thus providing independent monitoring of the child's condition). This agreement between the County DSS and the father for Joshua's benefit was ignored as soon as it was made, yet no action was taken by DSS.

Over the next fourteen months Joshua was seen repeatedly in hospital emergency rooms for suspicious traumatic injuries. On November 30, 1983, the emergency room physician directed the ER nurses to file a written child abuse report on Joshua, which they did. This report was communicated to the DSS caseworker, but nothing was done to follow up on it. DSS did not interview the family or observe the child about this formal medical report of child abuse, despite a clear statutory mandate to do both.

On another occasion a Head Start worker (still trying to get him enrolled pursuant to the agreement) found four-year-old Joshua alone at home, and telephoned DSS two separate times to inform them of his immediate jeopardy, yet no action whatever was taken. The worker again telephoned a third time the following day and spoke directly to the caseworker (respondent Kemmeter), describing how she had found Joshua alone and unsupervised, with no idea where the adults were or when they might return. Still no action of any kind was taken.

Throughout this time DSS maintained an open casefile on Joshua, and assigned a Child Protection Unit worker to his case. She (respondent Kemmeter) visited the home several times (although not in keeping with the Department's own guidelines). She claims to have had a close and caring relationship with Joshua: she would hold him on her lap and read to him. She

repeatedly documented in her casefile her continuing belief that Joshua was in danger, that she did not believe the excuses proffered by the adults for the frequent injuries to Joshua, and that she was extremely worried about him. She and DSS did nothing.

Kemmeter consistently violated the requirements of both good social work and her own agency by visiting Joshua rarely and intermittently. For the last three months of his conscious life, she even neglected to see Joshua himself on the few occasions when she did go to his home, instead in each instance accepting an excuse about his having a cold or being asleep in the middle of the day.

The caseworker herself observed what she has repeatedly described as cigarette burns on Joshua's face. As she later told the Family Court, "On November 9, 1983, the petitioner [Kemmeter] noted markings on Joshua's chin during a home visit which resembled cigarette burns," but she and DSS took no action.

On March 8, 1984, Joshua was again taken to the emergency room. He was found to be in a deep coma, with extensive old (but not new) bruising and discoloration over all parts of his body. Emergency brain surgery was done in an effort to save his life. The surgeon found massive pools of yellow liquid, consisting of the byproducts of old intra-cranial hemorrhages (that is, the old blood clots had been there long enough that the red blood had chemically decomposed, and only the yellow bilirubin element remained). The membrane covering the brain was stained blue, again by reason of the long-term standing and pooling of blood in the brain and the skull. Both of these are unequivocal evidence of brain damage and physical trauma to the head over a long period of time. The traumas had been inflicted on Joshua well before their cumulative effects eventually put Joshua into a coma and rendered his condition irreversible.

Throughout the time she was handling Joshua's case, the caseworker knew who the mother was and had ample means of contacting the mother, but did not do so, despite clear agency and professional guidelines to do so (and thus enlist another adult to protect Joshua). When it appeared that Joshua would die imminently the caseworker did, for the first and only time, contact the mother, to tell her that Joshua was dying.

When the natural mother and grandmother arrived, the caseworker told them, "I just knew the phone would ring some day and Joshua would be dead."

Joshua has lost nearly half the tissue in his brain, is permanently substantially paralyzed, and is profoundly and permanently retarded and brain damaged.

II.

STATEMENT OF THE CASE

Respondent Ann Kemmeter, a social worker with the Winnebago County Department of Social Services, first came into contact with Joshua DeShaney on January 22, 1983. On that date, Dr. Gehringer, a pediatrician at the Theda Clark Regional Medical Center, examined Joshua's multiple contusions and recommended that the child be admitted to the hospital because of "possible" child abuse. The hospital then contacted the Department, which in turn requested that an intake worker at the Winnebago County Circuit Court place temporary custody of Joshua with the hospital. Pursuant to the provisions of ' 48.025 and ' 48.207, Wis. Stats., the request was granted. (Id.)

Three days later, the hospital convened a child protection team to consider Joshua's case. n1 After the team discussed the child's condition in detail, the assistant corporation counsel -- charged by Wisconsin law with commencing any court action in cases of suspected child abuse, see ' 48.09, Wis. Stats. -- indicated that there was insufficient evidence to take the matter into Juvenile Court. Subsequently, as required by ' 48.981(3)(c)(3), Wis. Stats., the Department filed a report with the State of Wisconsin concluding that the suspicion of abuse was "unfounded."

n1 The team included Dr. Gehringer, Dr. Derozier (a clinical psychologist who had examined Joshua DeShaney), Tom Hoare (the hospital social worker), Respondent Ann Kemmeter, Respondent Cheryl Stelse (Ann Kemmeter's supervisor), John Bodnar (Assistant Corporation Counsel for Winnebago County), and Keith Nelson (Neenah Police Department detective), along with various other hospital personnel.

Based on the recommendation of the Theda Clark child protection team -- and as mandated by Wisconsin law n2 -- custody of Joshua was returned to his father, Randy DeShaney, on January 25, 1983. On February 14, 1983, the Winnebago County Juvenile Intake Court closed the child protective case; thereafter, the County's involvement with the DeShaney family was on a voluntary "family services" basis.

n2 The Wisconsin statutory scheme required the return of Joshua to his natural father "as soon as is reasonably possible." See generally ' ' 48.20, 48.21, Wis. Stats. The hospital's temporary physical custody could only have been maintained if a petition initiating proceedings under Chapter 48 of the Wisconsin Statutes had been filed by a "district attorney, city attorney or corporation counsel or other appropriate officials specified under s. 48.09." If a hearing is not held within forty-eight hours, the "juvenile court Commission shall order the child's immediate release from custody." ' 48.21(1)(b), Wis. Stats.

In particular, between February 14, 1983 and March 8, 1984, Ann Kemmeter continued to work with the DeShaney family. n3 The family entered into a voluntary and non-binding "social services agreement" with the Department, specifying the services to be afforded as "Individual and Family Adjustment," "Education," "Employment," and "Health." n4 Respondent Kemmeter thus focused her efforts on proper parenting and appropriate disciplinary techniques, and she observed the family setting when circumstances permitted. During her thirteen months of working with the DeShaney family, she made approximately twelve home visits and attempted five more. n5

n3 It was the practice of the Department to keep a specific voluntary family services case assigned to the worker that was originally involved with the case in the child protection services phase, even after the original referral had been deemed "unfounded."

n4 Judge Posner in the decision below incorrectly assumed that the written agreement was entered into pursuant to the provisions of ' 48.245, Wis. Stats., and was therefore binding. See Pet. App. at 36-37. Because the agreement with Mr. DeShaney was not entered into by an "intake worker" as part of an "informal disposition," however, ' 48.245, Wis. Stats. is inapplicable by its terms.

n5 It was Department policy for a caseworker to make one attempted home visit per month on any open family services case.

Pursuant to the procedures of the Department of Social Services, Respondent Kemmeter maintained an ongoing case narrative relating to her involvement with the DeShaney family. In this narrative, she expressed her "concern" and "suspicion" related to the possibility of child abuse occurring within the DeShaney family, but also felt that "[n]one of this can be proven, and at this point of time, none of them [i.e., the injuries] are serious enough to warrant court intervention." Respondent Cheryl Stelse, Kemmeter's immediate supervisor, concurred in this conclusion.

Prior to March 9, 1984, there were no further reports of suspected child abuse of the kind that would have been sufficient to trigger an investigation under ' 48.981, Wis. Stats. Moreover, at no point after the January 25, 1983, team meeting and prior to March 8, 1984, did Respondents Kemmeter and Stelse ever feel that there was sufficient evidence or facts pertaining to Joshua to take the matter to the Assistant Corporation Counsel for referral to court in an attempt to remove the child from his natural father. n6 On March 8, however, Joshua was taken to the emergency room and operated on after allegedly being beaten by his father. Winnebago County subsequently took custody of Joshua; his father was prosecuted for and convicted of child abuse.

n6 John Bodnar, the Assistant Corporation Counsel primarily involved in Juvenile Court matters for Winnebago County, has also stated that, after reviewing all of the information and facts assembled by the Winnebago County Department of Social Services from January 25, 1983, up to the alleged incident of March 8, 1984, at no point was there sufficient information or facts presented to pursue Joshua's case in Juvenile Court under ' 48.13(3), Wis. Stats.

Based on these events, n7 Joshua and Melody DeShaney brought suit against Respondents in the District Court for the Eastern District of Wisconsin, alleging violations of the Due Process Clause of the United States Constitution and *42 U.S.C. ' 1983.* n8 In general, Petitioners claimed that their injuries were caused by the failure of Respondents, Winnebago County Department of Social Services and its employees, to properly supervise, protect and monitor the welfare of Joshua DeShaney. n9

n7 The inaccuracies and unsupported facts set forth in Petitioners' brief are grossly unfair. A small sampling of these mischaracterizations includes: Petitioners state that in January, 1983 Joshua was seen in a local emergency room "as a victim of child abuse." This refers to the initial hospitalization when Joshua was admitted because of "possible child abuse," a suspicion that was never confirmed. Petitioners contend that nothing was done to follow up on a November 30, 1983 "written child abuse report," "despite a clear statutory mandate." The written referral, however, was not made pursuant to ' 48.981(3)(a), Wis. Stats. Furthermore, the form was not interpreted by others to constitute a formal diagnosis of child abuse. Petitioners state that a Head Start worker found Joshua at home alone and telephoned the Department on two separate occasions to inform it of his "immediate jeopardy" and that "no action whatever was taken." The Head Start worker on the day of the incident, however, merely left a message with a switchboard operator for Respondent Kemmeter to call. When Kemmeter was eventually able to contact her, she admonish the Head Start worker and advised that it would have been wise for her to either have gone to the police or to another person in the Department so that the message got through. Furthermore, Joshua's parents were confronted with the situation, but they stated that they had just gone to use the pay phone on the corner and were out for only fifteen minutes. Petitioners state that Kemmeter observed what "she has repeatedly described as cigarette burns" on Joshua's face. After a home visit on November 9, 1983, however, Kemmeter indicated only that she had observed marks on the child's chin and "wondered" if they might have been cigarette burns. When the parents were questioned about the matter, they stated that Joshua had been outside and had scraped his chin on the sidewalk.

n8 Melody DeShaney is Joshua's natural mother. After divorce proceedings between Randy and Melody, a Wyoming court transferred legal custody of Joshua to Randy. Thereafter, Melody DeShaney never requested that legal custody be transferred back to her. Joshua is presently in the custody of Winnebago County and lives in a group home.

n9 Despite these allegations, Petitioners acknowledge that, as stated in their complaint, "[a]t all relevant times to and until March 8, 1984, Joshua DeShaney was in the custody and control of Defendant, Randy DeShaney."

The District Court granted Respondents' motion for summary judgment, noting that, if Petitioners' arguments were accepted, "it would provide claims under Section 1983 to Plaintiffs whose injuries have little or nothing to do with the arbitrary use of governmental power for purposes of oppression," and that "[e]very social welfare program would become a charter of constitutionally sanctioned social and economic 'rights' which, unlike the civil and political rights

traditionally protected by ' 1983, require much more than the restraint of governmental power to 'guarantee.'"

The United States Court of Appeals for the Seventh Circuit affirmed. In an opinion by Judge Posner, the court concluded that "the state's failure to protect people from private violence or other mishaps not attributable to the conduct of its employees is not a deprivation of constitutionally protected property or liberty. . . . The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services." In addition, relying on this Court's decision in *Martinez v. California, 444 U.S. 277, 285 (1980),* the Court of Appeals further held that a "deprivation in the constitutional sense requires more than a minimal or fictitious causal connection between the action of the state and the injury of the plaintiff." Disagreeing with the Third Circuit's decision in *Estate of Bailey by Oare v. County of York, 786 F.2d 503 (1985),* the Seventh Circuit stated that "[w]e can find no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of 'special relationship.'"

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WRITING TO WIN: THE ART AND SCIENCE OF COMPELLING WRITTEN ADVOCACY

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INTRODUCTION

Writing a winning legal argument can often be the most important single element in a case. In this era of fewer and fewer jury trials, the prevalence of summary judgment, and endgame strategies more often focusing on appellate courts, a lawyer's skill in writing a winning legal argument – whether before a trial judge or on appeal – may well dictate whether the client wins or loses. That is not to say that all of the other facets of litigation, including discovery, oral argument, trial presentation, etc., are unimportant, but in some cases writing a winning legal argument may be the most crucial.

Fortunately, writing an excellent legal argument is not extremely difficult. While it takes care, focus and a good amount of hard work, it is certainly possible to write a winning legal argument by following the key, straightforward principles of effective written advocacy. This article sets forth a number of approaches, strategies and tips for developing and writing winning legal arguments. It looks at several important steps in preparing to write a compelling legal argument and then examines the key "do"s and "don't"s of brief writing. Along the way, it includes a number of examples of effective and ineffective written advocacy.

THE KEY STEPS IN PREPARING TO WRITE A WINNING ARGUMENT

Writing a winning argument takes a significant amount of preparation. While it is difficult to write anything very well without a lot of thought, it is particularly hard to write a focused, compelling legal argument without having first considered most of the likely content of the document. The following are the most important, critical steps in preparing to write an outstanding and persuasive legal argument.

Analyze the case. First, while this probably goes without saying, it is essential when considering any written legal argument

to begin by analyzing and thinking about the case. Even before reading documents and deposition transcripts or researching legal issues, it is important to spend some time (often several hours or perhaps even a day or two) reviewing the decision from the trial court, the complaint, any answer, any memoranda evaluating the claims in the case, and any other fundamental pleadings or analyses to understand what the important issues are in the case and what kinds of arguments have the potential to convince a judge or panel of judges regarding the issue(s) about which you are contemplating writing an argument. Certainly, if you are planning on writing a dispositive motion or an appeal brief, it is necessary to have carefully thought about the case before doing anything else. But even if you are writing a motion to exclude the testimony of an expert, or to compel discovery, it is very helpful to look at the case as a whole, determine the key issues in the case, and develop a sense for how the argument you are considering will fit into the rest of the case. At this point, it is also helpful to make a very preliminary list of the issues that you are beginning to consider for you argument.

Examine the relevant parts of the record. The next step in preparing to write a legal argument is to review thoroughly the parts of the record relevant to the argument that you are considering. In determining the content of your argument, it is very important to review all of the materials that contain factual information that may affect the argument. Therefore, if you are writing a motion to compel discovery, after having analyzed the case, you would need to examine all of the discovery requests and responses in the case, any relevant documents produced in the case, and any relevant deposition testimony. If you are writing a summary judgment brief, you would need to review all of the written discovery requests and responses in the case, all relevant produced documents and deposition testimony, and all of the prior pleadings and motions in the case; of course, you would also need to review any prior decisions by the court in your case. If you are writing an appeal brief, you would also need to examine the entire

trial transcript (if there is one) and all relevant exhibits admitted at trial as well as all pretrial and post trial briefs and rulings from the trial court. While such review can be time consuming, it really is essential to preparing a written argument that will persuade a judge or appellate panel that will either have first hand knowledge of the details of the record of the case or at least access to the entire record and law clerks who are likely to examine the parts of the record that they feel are relevant to your argument.

Preliminarily identify your theme and the issue or issues that you will address in your argument. Once you have analyzed the case and reviewed the relevant parts of the record, you should begin to get a pretty good idea of the issue or issues that you will address in your argument. To be sure, it may be easier to identify the issue if you are preparing a discovery or evidentiary motion. But you should attempt to identify the issues you will address even if you are preparing a summary judgment motion or an appeal brief. While you may abandon certain issues and adopt other issues as the writing process progresses, you want to have as good an idea as possible of the main issues before you undertake extensive research or spend a lot of time drafting. At this point, it is helpful to draft a one or two sentence statement of each issue that you are considering.

You should also begin to consider the theme of your brief and how it ties to the central issues in the case. You should tailor your theme to your audience and the stage of proceedings of your case. Thus, if your brief supports an evidentiary or a discovery motion, a straight-forward theme is ideal. If you are seeking to exclude the testimony of an expert witness, an effective theme could be "the expert's methodology is fatally flawed." Or if you are moving to compel privileged material, an effective theme could be "there is no valid privilege claim because the documents in question are neither relevant to nor provide attorney-client advice."

If your brief supports a summary judgment motion, a broader theme could be appropriate. Thus, in a breach of contract case, an appropriate theme could be "as a matter of law, the contract authorized defendant's conduct" or "because it is undisputed that defendant provided plaintiff with advance written notice that it would use parts from a new manufacturer, no reasonable jury could find that defendant failed to comply with the relevant contractual provisions on substitution of the manufacturer." In an antitrust case, an effective theme could be "there could not be any conspiracy as a matter of law because defendants had a genuine agency relationship and were not independent economic actors." In a patent case, an appropriate theme could be "no reasonable jury could find infringement in light of the parties' stipulated construction that a 'square peg' as used in the relevant claims could not fit into a 'round hole,' such as the hole used in the accused products."

You should bear in mind that when communicating to a judge or panel of judges, jury arguments or blatant appeals to emotion are less likely to be effective themes than those that specifically address the relevant law and facts. Thus a theme such as "this is a case about greed," while potentially effective in a jury trial, is unlikely to be your most effective theme in a written argument.

Other considerations are relevant to appellate briefs. It is critical to realize that appellate courts do not sit as super juries and are not likely to reverse a jury verdict or even trial court findings on the ground that they are unsupported by the evidence or clearly erroneous. Thus, if you are appealing an adverse judgment, if possible, you want to identify legal errors made by the court below that you can argue infected the factual determinations, jury instructions, or evidentiary rulings made or given by the trial court. The old adage that you don't want to retry on appeal the case you tried and lost is particularly apt. For example, in a criminal case, claims of evidentiary insufficiency, while occasionally successful,

are notoriously difficult to win on appeal. An argument that is much more likely to prevail is that critical evidence was mistakenly admitted or excluded or that the jury was given a seriously flawed jury instruction. Similarly, in a patent case, it is very difficult to prevail on an argument that the jury mistakenly credited the testimony of one party's incredible expert. But it is much more promising to argue that the court improperly construed the patent claims in issue or misapplied the law of obviousness or contributory infringement. Likewise, in a contract case, the odds are poor that you will convince an appellate court that no reasonable jury could have construed the parol evidence to support the adverse judgment. But you have a much better chance to prevail on an argument that the contract was unambiguous and parole evidence should have been excluded.

Accordingly, for the appellant, themes such as "the trial court misconstrued the applicable statute by ignoring its plain language, structure, legislative history and underlying purpose" or "the trial court's pervasive and erroneous legal and evidentiary rulings prevented the defendant from presenting its defense" could be effective.

To be sure, the arguments that you raise on appeal must have been preserved. But that does not mean that they must have been the "main event" in the trial court. An argument that was one of several presented in support of an unsuccessful summary judgment motion may be much more persuasive on appeal than one based on the most important ruling made at trial. Moreover, you may choose to "spin" an argument differently on appeal than it was below. For example, an argument made before the trial court that a piece of hearsay evidence should be admitted because it is inherently reliable and it would be unfair to exclude it in light of other rulings admitting similar hearsay evidence offered by the other side could evolve on appeal into an argument that the trial court destroyed the fundamental fairness of the trial by excluding perhaps the most critical evidence to your side. You have to be

careful that your spin on an argument isn't so far afield that it invites a response that the argument was not fairly presented to the trial court. But a properly preserved argument can really take on new and vibrant life on appeal.

When you are defending a favorable judgment, you will usually want to defend the judgment with vigor. Particularly if the standard of review is favorable, you will want to emphasize the reasonableness, clarity and persuasiveness of the ruling that you are defending. You may want to characterize your opponent's arguments as retreads that were fully considered and rejected below, or else as mischaracterizations of the law and/or facts. Thus, effective themes for the appellee could include "The trial court made careful, evidence-specific admissibility rulings that should not be disturbed on appeal," or "The record was replete with sufficient and detailed evidence supporting the jury's verdict."

Even when defending a favorable judgment, there is a need for skill and creativity. Thus, you shouldn't merely parrot the ultimately winning briefs below. You may be able to better explain the rationale supporting an affirmance. You may find better authorities that support your position. And you may be able to better convey the broader consequences of a decision in your favor.

In very rare cases, an appellate advocate may determine that a favorable ruling cannot persuasively be defended based on the rationale of the trial court. In such instances, you would usually be well served to defend that decision below as best you can, but also to provide alternative rationales that support the ruling. So long as the arguments you make are fairly supported by the record, you can defend the judgment on any ground.

Research the law pertaining to the issues you have identified. Once you have preliminarily identified the issues that you think you are likely to raise and begun to craft your theme, the

next step is to comprehensively research the law pertaining to those issues. This part of the process may be undertaken by the lawyer ultimately responsible for the written argument under consideration or it may be undertaken by several lawyers working with or under the guidance of the responsible lawyer. In all events, it is critical that the key issues are very carefully examined. The most helpful authorities will be statutes or cases that directly govern the issues about which you are concerned. If there is not a statute or case that directly controls, the next best authority may be a controlling case that addresses a different but analogous issue or has pertinent and helpful language, a non-controlling factually similar case from a lower court or different jurisdiction, or an administrative regulation that speaks to the relevant issue. Other helpful authorities may be non-controlling cases that address different but analogous issues, legislative history, treatises, law review articles, dictionaries, and other sources that can help develop your argument. When undertaking your primary research, it is important to make sure that you plan to rely, not merely on helpful language in a case or the legal rule that a case sets forth, but also upon how that language or rule was specifically applied to the facts in the case. Ultimately, the most persuasive authorities are those that articulate or adopt the legal rule that you advocate and then apply it to similar facts and reach the result that you advocate should be reached in your case. To be sure, there may be instances, such as in interpretation of a statute, where sources like legislative history or dictionaries may be more prominent than most cases would be in supporting your argument. But for the most part, it is the similarity of the application and outcome of the rule you advocate that will persuade judges to rule in your favor.

It is important not to rely on a single research method, such as computer searches. While it is possible that you may find most of the key authorities regarding your issue by performing only a single search method, it is also quite possible that you may miss one or more of the most pertinent authorities. It is usually ideal to begin your research by examining a treatise or a law review or

similar article that addresses the issue that you are researching. Such an examination will likely lead you to many of the authorities that you need. It is also beneficial to examine the relevant practice digest(s) that include the issue you are researching. For statutory research, it is usually helpful to consult the annotated version of the statute at issue. After you have reviewed such sources, it usually makes sense to supplement your research with computer searches. Unfortunately, it is far too common for a lawyer to miss important authorities by relying solely on either book research or computer research.

Complete your secondary research. Once you have carefully researched the primary issues in the case or with which you are concerned, it is often helpful to complete research on secondary issues. These might include the applicable standard of review on appeal or for summary judgment, general statements about the desirability of resolving certain issues by way of legal motion, and analogous areas of the law upon which you may wish to rely. While it is possible to complete such research at a later stage of the writing process, I have found that completing as much of the research as possible before undertaking any extensive drafting usually makes the drafting process go more smoothly.

Select the issues you that you will present. After having completed your research, it is a good idea to revisit your preliminary list of issues and refine that list. You may abandon one or more issues that are unlikely to be the basis for a persuasive legal argument. You may add one or more issues that your research has led you to consider. Think very carefully about these issues because they will serve as the foundation for your legal argument. You should also revise your prior descriptions of each issue that you had previously considered and draft one or two sentences defining each new issue that you intend to present. You may very well edit or alter your definition or abandon an issue at a later stage of the drafting process, but it is beneficial to have a clear idea of the composition of your issues before you begin to

draft your outline. You should also be very careful about the number of issues you select. As a general rule, presenting more than three issues in any brief runs the risk of signaling to the court that none of your issues has merit. While in an exceptional case, I have seen four or even five issues persuasively presented on an appeal, I have also seen many cases in which one or two legitimate issues were lost in a sea of several other weak or frivolous issues.

Draft a focused outline. In my view, one of the most critical steps in writing a winning legal argument is carefully developing a focused outline of your brief or other document. I typically recommend using the outlining process to develop the theme or themes of your written argument, to highlight the most important facts that you want to set forth in your document, the issues that you want to address, and the primary components of the arguments that you want to present. Therefore, it is usually helpful to include in your outline a description of the introduction and theme to your argument, the most important facts that you want to include in your written presentation, the point headings and subheadings for the argument section of your brief or document, the key cases and other authorities upon which you plan to rely (and ideally a one sentence description of each critical point from each authority), and at least a brief description of how you plan to apply the authorities to each issue that you plan to address. While there is no magic formula for how long such an outline should be, and it will vary depending on the length of your written presentation, an outline of 1-2 pages will often suffice for a single issue motion like a straightforward motion to compel, but an outline of 3-4 pages may be more appropriate for a summary judgment motion or an appellate brief. Occasionally, outlines of 5-6 pages may be warranted in a particularly complicated matter. Once you get much beyond that, however, your outline begins to resemble a first draft more than a true outline. If there are more than one lawyer working on the case, it is very helpful to circulate your outline and get feedback on it before beginning to draft your brief or document in earnest. Particularly, if there are more senior

lawyers working on the case, circulating an outline is an excellent opportunity to make sure that everyone is reasonably in agreement as to the approach to the brief before you have spent many hours drafting an argument that others may believe is unlikely to be persuasive.

GENERAL CONVENTIONS FOR EXCELLENT LEGAL WRITING

Before suggesting specific approaches to the different sections of a brief or similar legal document, it is important to discuss certain general conventions for excellent legal writing.

1. **Always employ respectful and appropriate language.** While this point should be obvious, I have observed a significant amount of legal writing (including from experienced attorneys) that does not evidence the appropriate respect and decorum necessary for formal writing that is intended to persuade a judge or panel of judges. Of course, you should never submit something like the following document:

United States District Court
Western District of Washington

George C. Swinger, JR.,
Plaintiff,

v.

Michael B. Cole, et al.,,
Defendants.

No. C04-5348RBL

Notice of Appeal

I hereby am informing you that I am appealing the asshole Ronald B. Leighton's decision in this matter.

you have been hereby served Notice, You're not getting away with this shit that easy.

Signed this 10th day of July 2006

George C. Swinger JR
Plaintiff / Pro se

But overblown rhetoric, the use of *ad hominem* attacks on opposing counsel or the opposing party, excessive and unjustified indignation, or merely insulting or snippy comments are just as ineffective. A winning legal argument is virtually always

comprised of temperate, respectful language that has persuasive value based on its content rather than its tone.

2. **Use simple, clear language and relatively short sentences.** Almost all good writing uses straightforward and understandable language. Clear and direct language is even more important for excellent legal writing. While some lawyers feel that it is impressive or somehow more persuasive to use jargon, large uncommon words, or convoluted phrases, such devices are usually unhelpful and off-putting. One of my colleagues suggested long ago that it is most advantageous to use language that any high school graduate would readily understand and to avoid language that invites reference to a dictionary or thesaurus. Similarly, it is best to avoid long, complicated, and/or run-on sentences. A complex thought can usually best be expressed through a series of short, declarative sentences, rather than a run-on sentence with multiple clauses. Even though it may be tempting to demonstrate your broad vocabulary and ability to perform word gymnastics, such tactics are much less likely to be effective than they are to irritate or confuse the reader.

3. **Develop focused paragraphs with appropriate topic sentences.** Just as unclear language and run-on sentences may confuse a reader, unfocused paragraphs or those lacking a clear point or topic are unlikely to advance your argument. Whether you are writing a factual summary or describing controlling precedent, use a clear topic sentence and then develop each paragraph so that it logically flows from your topic sentence. If you wish to transition to another point or thought, it is generally best to begin a new paragraph. With that said, it can be effective to list a few supporting points within a single paragraph by using transitions such as "first," and "second." For example:

> The cases cited by plaintiff are unavailing for several reasons. First, none of those cases addresses the language of the controlling statute. Rather,

> those cases all involve common-law doctrines that are inapplicable here. Second, those cases all predate the Supreme Court's recent decisions interpreting the controlling statute, and are therefore unreliable

But in all events, keep your writing focused and clear.

4. **Avoid footnotes in most circumstances.** Certain legal writing teachers claim that it is helpful to use footnotes for citations and less important factual or legal points. My experience and understanding is that that vast majority of judges, and likely the vast majority of the best practicing legal writers, disagree and find footnotes almost always more distracting than they are worth. It is virtually always easier to read a citation in the text of a document than to search the bottom of a page (or worse, in the case of endnotes, the last few pages of the document). And if a factual point or legal argument is not significant enough to be in the text of your brief, you should question whether it should be omitted entirely. To be sure, many excellent legal writers have different perspectives on this issue, and some regularly employ footnotes in certain circumstances. In my view, the *only* circumstances in which you should consider using a footnote are (i) when it would be distracting to state a necessary but substantively insignificant point – something such as "Intervenor incorporates and adopts the Statement of the Case set forth in Petitioner's Brief" at the beginning of a Supplemental Statement of the Case; (ii) where you wish to include the citation of many cases from non-controlling jurisdictions, such as where you want to show that all or many of the federal appellate courts agree with your position and you want to cite them following an *Accord* or *See also* signal; or (iii) where you feel compelled to include a point that is particularly tangential and distracting, such as a case's lengthy prior or subsequent history or the history of amendments to a statute. Accordingly, footnotes should virtually never be used to include facts relevant to your case or subsidiary legal arguments. Simply put, if the factual point or

5. **Do not under any circumstance misrepresent or overclaim any fact or legal authority.** A critical component of the persuasive value of a written argument is the credibility of the author. Any misrepresentation or inaccurate portrayal of a fact or authority in your document is likely to destroy that credibility. As one well-respected advocate put it:

> The four outstanding don'ts for brief-writers, in my judgment, are (a) inexcusable inaccuracy; (b) unsupported hyperbole; (c) unwarranted screaming; and (d) personalities and scandalous matter. They are don'ts, not only from the point of view of one's own professional standards and self-respect, but also from the narrow aspect of intelligent self-interest; every one of these faults is bound to backfire – and most unpleasantly.

Frederick Bernays Wiener, *Effective Appellate Advocacy* 149 (ABA Publishing, Rev. ed. 2004). If you always fairly and accurately describe the facts of your case and the authorities you rely upon (and avoid intemperate rhetoric as previously suggested), you will not have to worry that you may lose as a result of your own missteps rather than the substance of your arguments.

6. **Consider using helpful demonstrative aids.** A picture can be worth a thousand words (and will sometimes save that many words). While many excellent legal writers would never think to use demonstrative aids in a brief (particularly an appellate brief), a timeline, chart, diagram, table or even a picture can sometimes add immeasurably to the persuasiveness and clarity of an argument. For example, intellectual property lawyers have used such devices to great effect in trial court briefs, and in appellate briefs in patent cases in the U.S. Court of Appeals for the Federal Circuit. But such demonstratives can be usefully employed in many other cases.

7. **Review the rules of the court in which your case is pending.** It is, of course, necessary that you know the basic federal or state rules of procedure that apply in your case. Those will contain many of the rules governing your brief or document and what may or may not be required or appropriate to include. But many state and federal courts themselves have their own nuances with respect to the rules of procedure. It is therefore critical that you also know those "local" and/or "chambers" rules and tailor your written argument to conform to them. It is difficult to prevail on your brilliant legal argument if your brief gets "bounced" by the Clerk's Office.

8. **Edit carefully.** Always carefully edit your drafts. While theoretically possible, it is unlikely that you will get it exactly right the first time. Some writers go through a dozen or more drafts in the course of writing a legal argument; others may only work through a few. But virtually all good legal writers go through each draft in a focused effort to improve, tighten and polish their arguments. The editing process should include a rigorous assessment of your brief's structure, persuasiveness, language and syntax. As part of this process, you should also proofread very carefully. Always run a computer spell check, but also examine grammar, syntax and spelling yourself. You should also always check and double-check to make sure that you have included all portions of your document that are required by the rules of the court in which your case is pending (*e.g.*, statement of facts or jurisdiction, summary of argument, statement of related cases, etc.).

RELEVANT PORTIONS OF ROMANIAN ASYLUM LAW[1]

ARTICLE 13
Examination of the asylum application

(1) The decision regarding the resolution of the asylum application is made after a suitable examination is made of the applicant's circumstance by the specially designated officials, who are qualified in the topic of asylum. The latter presumes:

a. An individual examination of each asylum application and the making of an objective and impartial decision; and

b. Consultation of information from the country of origin, obtained from different sources, necessary to evaluate the personal circumstances of the asylum applicant.

(2) Any asylum application is analyzed individually and successively from the perspective of refugee status and subsidiary protection under the conditions provided by the present law.

ARTICLE 15
Benefit of the doubt

When part of the reasons or all the reasons submitted in the asylum application, which would justify granting a form of protection, are not proven with documents or other evidence, then the benefit of the doubt is granted, if all of the following conditions are fulfilled:

a) the applicant has done all in his power to support the asylum application;

b) all the relevant elements that are at the disposal of the applicant have been presented, and the lack of such elements has been reasonably justified;

c) the declarations of the applicant are considered coherent and plausible and are not contradicted by the information, relevant to the applicant's case, from the country of origin;

d) the applicant has submitted an asylum application as soon as possible and any delay is justified with sound reasons;

e) the general credibility of the applicant has been established.

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[1] *Romania: Law No. 122/2006 on Asylum in Romania* [Romania], 25 August 2006, available at: http://www.refworld.org/docid/44ace1424.html [accessed 18 May 2016]

ARTICLE 23
Refugee status

Refugee status is recognized, upon request, for the alien who, as the result of a well-founded fear of being persecuted because of race, religion, nationality, political opinion or membership to a particular social group, is outside of the country of origin and cannot or, owing to this fear, does not want the protection of this country, as well as the stateless person who, being out of the country where he had his usual residence due to the same reasons mentioned above, cannot or, due to the respective fear, does not wish to return.

ARTICLE 26
Subsidiary protection

(1) Subsidiary protection can be granted to the alien or stateless person who does not fulfil the conditions to have refugee status recognized and regarding whom there are well founded reasons to believe that, in the case of returning to the country of origin, respectively to the country where he has his usual residence, will be exposed to a serious risk, in the sense of the provisions of paragraph (2), and who cannot or, due to this risk, does not wish the protection of that country.

(2) The definition of a serious risk, in the sense of paragraph (1), is:
1. conviction to a death sentence or the execution of such a sentence; or
2. torture, inhuman or degrading treatments or punishment; or
3. a serious, individual threat to one's life or integrity, as a result of generalized violence in situations of internal or international armed conflict, if the applicant is part of the civilian population.

Law for the organization and practice of the lawyer's profession*

CHAPTER I
General provisions

"**Article 1.** - (1) The lawyer's profession shall be free and independent, based on an autonomous organization and functioning, under the terms of the law and the by-law of the profession.
(2) The lawyer's profession shall only be practised by lawyers appearing in the table of the bar they belong to, a bar which is a member of the National Association of the Romanian Bars, hereafter called *U.N.B.R.*
(3) The establishment and functioning of bars outside the U.N.B.R. shall be prohibited. The documents for their constitution and registration shall be null and void.
Article 2. - (1) In the exercise of his/her profession, a lawyer shall be independent and only subject to the law, the by-law of the profession, and the code of conduct.
(2) A lawyer shall promote and defend human rights, freedoms, and legitimate interests.
(3) A lawyer shall be entitled to assist and represent natural and legal entities before the courts of judicial authority and other jurisdictional bodies, criminal inquiry bodies, public authorities and institutions, as well as before other natural or legal entities, who/which shall have the obligation to facilitate the lawyer's unhindered activity, under the terms of the law.
(4) Anyone shall be entitled to choose his/her/its lawyer freely.
(5) In the exercise of one's right to defence, a lawyer shall have the right and obligation to persist in getting free access to justice, a fair law suit, and within a reasonable time delay.
Article 3. - (1) A lawyer's activity shall be represented by:
a) legal consultancy and petitions;
b) legal assistance and representation before courts of law, criminal inquiry bodies, jurisdictional authorities, notaries public and judicial executors, public administration bodies and institutions, as well as other legal entities, under the terms of the law;
c) drawing up legal documents, and certifying the parties' identities and the contents and dates of documents submitted for authentication;
d) assistance and representation of interested natural or legal entities before other public authorities, with provisions for certifying the parties' identities the and contents and dates of concluded documents;
e) defence and representation, using specific means, of the legitimate rights and interests of natural and legal entities in their relationships with public authorities, institutions, and any Romanian or foreign entity;
f) mediation activities;
g) fiduciary activities consisting of receiving, in deposit, on behalf and at the expense of the client, financial funds and goods resulting from the sale or execution of executory titles after the end of a succession procedure or liquidation, as well as the placement and good use of

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* **Law no. 51/1995 was published in the Official Gazette of Romania, Part I, no. 116 of 9 June 1995 and was re-published in the Official Gazette of Romania, Part I, no. 113 of 6 March 2001, based on article V of Law no. 231/2000, published in the Official Gazette of Romania, Part I, no. 635 of 7 December 2000, an adequate numbering being given to paragraphs and articles. Subsequent to it being republished, the law was amended by Law no. 489/2002, published in the Official Gazette of Romania, Part I, no. 578 of 5 August 2002, Law no. 201/2004, published in the Official Gazette of Romania, Part I, no. 483 of 28 May 2004, Law no. 255/2004, published in the Official Gazette of Romania, Part I, no. 559 of 23 June 2004, and Government Ordinance no. 94/2004, published in the Official Gazette of Romania, Part I, no. 803 of 31 August 2004 (approved by Law no. 507/2004, published in the Official Gazette of Romania, Part I, no. 1 080 of 19 November 2004). Amendments and additions shall be found in the contents of the document.**

these, on behalf and at the expense of the client, administration of funds or valuables in which the latter have been placed;
h) temporary establishment of trading companies' head offices at the lawyer's professional office, the registration of such companies, on behalf and at the expense of the client, of interest shares, shares, or stock of companies thus registered;
i) the activities stipulated under g) and h) may take place based on a new legal assistance contract;
j) any means and ways typical of the right to defence, under the terms of the law.
(2) The activities stipulated under paragraph (1) shall only be practised by a lawyer, unless the law stipulates otherwise."*
Article 4. - A lawyer shall be protected by the law in exercising his/her profession and in connection with it.
"**Article 5**. - (1) The forms of practising the lawyer's profession shall be, optionally: individual law offices, associated law offices, professional civil companies, or limited-liability professional civil companies.
(2) An individual law office may be used by a permanent lawyer, alone or together with other collaborating lawyers, with a view to exercising his/her profession.
(3) Individual law offices may become associated for the purpose of jointly exercising the profession; the rights and obligations of lawyers who hold associated law offices shall remain personal and may not be transferred. Accordingly, individual law offices may also become associated with professional civil companies.
(4) Individual law offices may form groups in order to create technical-economic facilities in view of exercising the lawyer's profession and shall preserve their individuality in their relationships with the clients.
(5) A professional civil company shall be established by two or more permanent lawyers. Collaborating lawyers or paid lawyers may also practise their profession in a professional civil company. A professional civil company and the lawyers who practise within it may not provide legal assistance to persons having conflicting interests.
(6) Law office groups, associated law offices, professional civil companies, and limited-liability professional civil companies may also have a joint property.
(7) A lawyer may change the form of practising the profession at any time, provided the bar he/she belongs to has been notified.
(8) A lawyer may not practise his/her profession in several forms of exercising it, at the same time.
(9) The forms of profession practising may only be alienated using documents concluded between living persons, between permanent lawyers and currently in the exercise of their profession, or may be liquidated on termination of their capacities, observing the regimen of investments regulated by the present law.
Article 5_1. - (1) A limited-liability professional civil company shall be constituted by partnership between at least 2 permanent lawyers and currently practising their profession; it shall be a legal entity, and shall have its own assets. The partners' contributions to the registered capital may be in industry, in cash or in kind, or represented by their professional activity, including the clientele they bring with them. The registered capital of the company shall be represented by transmissible and negotiable shares, and shall be at least the equivalent of EUR 10 000.
Share transfer may only be made to lawyers in the exercise of their profession. The professional activity shall be carried out by partner lawyers, collaborator lawyers, and paid lawyers. Lawyers who practise their profession within a limited-liability professional civil company shall only assume professional liability within the limits of the registered capital subscribed and deposited.

(2) A limited-liability professional civil company shall become a legal entity on the date of registration with the bar of the decision issued by the Council of the bar within the jurisdictional district of which its main head office is located.
(3) Limited-liability professional civil companies shall be subject to profit tax.
Article 6. - Any lawyer, irrespective of the form of profession exercise, may conclude collaboration conventions with experts or other specialists, under the terms of the law. Professional civil companies and limited-liability professional civil companies may only conclude such conventions with the consent of all partners.
Article 7. - (1) The forms of exercising the lawyer's profession and law office groups shall be individualised by name, as follows:
a) for individual law offices - name of the holder lawyer, followed by the phrase *law office*;
b) for associated law offices - names of all holders, followed by the phrase *associated law offices*;
c) for professional civil companies and limited-liability professional civil companies - name of at least one partner, followed by the phrase *civil law firm* or, as applicable, *limited-liability civil law firm*;
d) for law office groups - name of each law office holder, followed by the phrase *group law offices*.
(2) The denomination of the profession exercise form, individualised according to paragraph (1), may also be kept after the death or departure of one of the associates/partners, with the latter's consent or, as applicable, with the consent of the heir of the deceased, expressed in an authentic form.
(3) The denominations stipulated under paragraph (1) shall appear on the signs of such law offices or companies, under the terms stipulated by the by-law of the profession.
(4) As far as all forms of profession exercise by foreign lawyers are concerned, one may use the denomination and the name of the profession exercise form in force in Romania or abroad, under the terms of the present article.
Article 8. - (1) The conventions of law office group establishment or association, the constituting deeds of professional civil law companies and limited-liability professional civil law companies, as well as the conventions stipulated under article 6, shall be concluded in writing, observing the basic requirements stipulated by the law and the by-law of the profession.
(2) The Council of the bar having been notified shall check that the terms of the law are being met and, when this is the case, shall order convention registration within one month from application being filed.
(3) Any person who believes he/she is harmed as far as a legitimate right or interest of his/hers is concerned may file a complaint against the Council of the bar's decision with the professional jurisdiction bodies, under the terms of the present law and the by-law of the profession.
(4) Bars shall keep separate records of lawyers per each profession exercise form.
Article 9. - (1) Bars and the U.N.B.R. shall make sure the qualified exercise of the right to defence, the professional competence and discipline, and the protection of member lawyer's dignity and honour are being enforced.
(2) Only one bar, member of the U.N.B.R., shall exist in each county, having its head office in the capital of that county.
(3) Each bar shall organise and ensure the functioning of a judicial assistance service attached to each civil court. The Council of the bar shall be responsible for the organisation and functioning of that service,"*
Article 10. - A lawyer shall have the obligation to keep professional secrecy regarding any aspect of the cause entrusted to him/her, unless the law expressly stipulates otherwise.

*** Articles 1 - 3 and 5 - 9 were amended by Law no. 255/2004, article 5_1 was introduced by the same act, and paragraph (4) of article 7 was introduced by Law no. 489/2002.**

CHAPTER II
Acquiring the lawyer's capacity

SECTION 1
Terms for signing in to the lawyer's profession

"**Article 11.** - (1) A person who complies with the following conditions may be member of a bar in Romania:
a) he/she is a Romanian citizen and holder of civil and political rights;
b) he/she is a law faculty graduate or a doctor of law (Ph.D.);
c) he/she is not in one of the unworthiness cases stipulated by the present law;
d) he/she is medically fit to practise the lawyer's profession.
(2) Compliance with the condition stipulated under letter d) of paragraph (1) shall be proven by means of a medical certificate of good health, issued on the basis of the findings by a medical board constituted under the terms stipulated by the by-law of the profession.
Article 12. - (1) A member of a bar from another country may practise the lawyer's profession in Romania provided he/she meets the conditions stipulated by the law, except for the one concerning Romanian citizenship.
(2) In order to provide legal consultancy on Romanian law, a foreign lawyer shall have the obligation to take an examination checking his/her knowledge of Romanian law and Romanian language, organised by the U.N.B.R.
(3) A foreign lawyer may practise the lawyer's profession in Romania, within one of the organisation forms stipulated under article 5, at his/her choice.
(4) A foreign lawyer may not submit oral or written conclusions before the courts of law and the other jurisdictional and judicial bodies, except for international arbitration ones.
(5) The fees due to a foreign lawyer shall be recorded and fully paid in Romania.
(6) A foreign lawyer who practises his/her profession in Romania shall have the obligation to sign in to the special table kept by each bar, and shall be subject to the provisions of the present law, the by-law of the profession and the code of conduct."*

***Article 11 and 12 were amended by Law no. 255/2004, and letter a) of article 11 and paragraphs (2) and (3) of article 12 were also been amended by Law no. 489/2002.**

Article 13. - The following persons shall be deemed unworthy of being a lawyer:
a) a person having received a final sentence to prison by court decree, for an intentional crime, which is likely to harm professional prestige;
b) a person having committed abuses that have violated fundamental human rights and freedoms, as established by court decree;
c) a person who has received a sentence prohibiting him/her from exercising the lawyer's profession, for a time duration set by a court or disciplinary decree;
d) a fraudulently bankrupt person, even rehabilitated.
Article 14. - Practising the lawyer's profession shall be incompatible with:
a) a paid activity within another profession than the lawyer's one;
b) occupations affecting the dignity and independence of the lawyer's profession or good manners;
c) the direct practise of material trade actions.

Article 15. - Practising the lawyer's profession shall be compatible with:
a) the capacity of deputy or senator, councillor in local or county councils;
"b) teaching activities, and offices in higher legal education;"*
c) literary and publishing activity;
"d) the capacity of arbitrator, mediator, conciliator or negotiator, tax advisor, advisor in intellectual property, advisor in industrial property, licensed translator, administrator or liquidator within the procedures of judicial re-organisation or liquidation, under the terms of the law.

Article 16. - (1) The acceptance to profession shall be obtained based on an examination organised by the bar, under the provisions of the present law and the by-law of the profession.
(2) The following persons may be accepted to the profession, on request, being exempted from an examination:
a) a holder of the doctor of law's (Ph.D.) diploma;
b) a person who, by the date of being accepted to the lawyer's profession, has acted as a judge, public prosecutor, notary public, legal advisor or jurist for at least 10 years, and if such activity has not been terminated for disciplinary reasons that make him/her unworthy of the lawyer's profession.
(3) The persons who held the office of judge with the High Court of Cassation and Justice shall be exempted from the provisions of paragraph (1).

Article 16_1. - A person who meets the requirements stipulated by the law for being accepted to the lawyer's profession may apply for this at least 5 years before reaching the standard retirement age in the pension and social security system he/she belongs to."*

Article 15 b) and d) and article 16 were amended by Law no. 255/2004, and article 16_1 was introduced by the same act.

Article 17. - (1) At the beginning of the lawyer's profession practising, a lawyer shall be obliged to complete a two-year professional training term, during which time he/she shall have the capacity of lawyer on probation.
"(2) The conditions for completing the term, the rights and obligations of the lawyer on probation, of the supervising lawyer, as well as those of the bar towards them shall be regulated by the by-law of the profession."*
(3) The training term shall be suspended if the lawyer should serve in the military or be concentrated, if he/she is out of the profession for good grounds, or if the professional guidance should be terminated without the lawyer on probation being at fault. The prior term period already completed shall be taken into consideration when calculating term completion.
(4) After the training term is completed, the lawyer on probation shall take the examination for permanent lawyer.
"(5) A lawyer on probation who has failed three times in the examination for permanent lawyer shall be disbarred.

Article 18. - The activity of a lawyer on probation may only be guided by permanent lawyers with a length of service of at least 6 years in that capacity and who enjoy good professional reputation.

Article 19. - (1) The capacity of permanent lawyer shall be acquired by the lawyers on probation who have passed the examination for permanent lawyer under the terms of article 17, as well as the lawyers who have passed the graduation examination at the National Institute for the Training and the Improvement of Lawyers, under the terms stipulated by the by-law of the profession.

(2) The capacity of permanent lawyer shall be acquired by a person who has been registered to the profession under the terms of article 16 (2), if he/she acquired a permanent status in the legal position he/she used to practise before being accepted to the lawyer's profession.
(3) A person registered to the profession under article 16 (2) shall acquire the permanent lawyer's capacity if he/she has passed an examination for permanent status in the legal office he/she had held before. Those who do not fill the conditions regarding the length of service in their previous office shall be bound to take the examination for permanent lawyer.
(4) Lawyers who are former judges may not submit conclusions with the court they used to function with, and former public prosecutors or police officers may not provide legal assistance to the criminal inquiry unit where they used to carry out their activity, for 2 years after the termination of that office.
Article 20. - (1) The lawyer's profession may not be practised in civil courts, criminal courts, specialised courts and appeal courts, as well as public prosecutor's offices attached to such courts, where the lawyer's relatives, spouse or in-laws, down to the third level inclusive, work."*

*** Article 17 (2) and (5), articles 18, 19 and 20 (1) were amended by Law no. 255/2004.**

(2) The provisions of paragraph (1) shall also apply accordingly to a lawyer whose spouse, relatives, or in-laws, down to the third level inclusive, act as judges with the Constitutional Court, or financial judges, audit advisors or financial public prosecutors with the courts of the Court of Audit.
"(3) The provisions of paragraph (1) shall also apply accordingly to the Department of the Public Prosecutor attached to the High Court of Cassation and Justice, as well as the National Anti-Corruption Department of the Public Prosecutor.
(4) The provisions of paragraphs (1) - (3) shall also apply to holder lawyers, associated lawyers, collaborating lawyers or lawyers paid within the profession, who use that professional organisation form or the professional collaboration relationships set out under the terms of the law for the purpose of eluding these interdictions, under the sanction of perpetrating a serious discipline departure.
Article 21. - (1) When signing in to the bar, a lawyer shall take the following oath before the Council of the bar:
I swear to observe and uphold the Constitution and the laws of the country, human rights and freedoms, and to practise the lawyer's profession in honesty and dignity. So help me God!
(2) The oath may also be taken without the religious formula.
If this is the case, the oath shall start with the words: *I swear on my honour and conscience!*
Article 22. - (1) A lawyer on probation may only submit conclusions with civil courts and may assist or represent parties before the bodies and institutions stipulated under article 3.
(2) A permanent lawyer shall be entitled to submit conclusions with all the courts of law, except for the High Court of Cassation and Justice and the Constitutional Court, where he/she may submit conclusions if he/she has an un-interrupted length of service in the profession of at least 5 years from becoming permanent."*
Article 23. - (1) Bars shall have the obligation to draw up, on an annual basis, tables of permanent lawyers and lawyers on probation, in an alphabetical order, stating their full names, scientific degrees, date of signing in to the bar, professional head office, form of practising the profession, and courts of law where they are entitled to submit conclusions.
"(2) The second part of the table shall be comprised of associated law offices, professional civil companies, and limited-liability professional civil companies, stating their head offices and the lawyers comprising them.

(3) Bars shall see that the annual Table of Lawyers and the changes occurred are being sent, at the beginning of each year, to the courts of law, criminal inquiry bodies and administrative authorities of that county or of Bucharest municipality, as well as to the U.N.B.R."

Article 24. - (1) The Council of the bar shall issue decisions for transferring lawyers to the table of incompatible lawyers, on request or ex-officio, whereas one's re-placement on the Table of Lawyers entitled to practise the profession shall only be done on request, after the incompatibility condition has ceased.

"(2) When there is incompatibility, the decision of acceptance to the profession shall only be effective as of the date the incompatibility condition has ceased, which must be solved within two months from decision issuance.

Article 25. - Practising any legal assistance activity typical of the lawyer's profession and stipulated under article 3 by a natural or legal entity that has not the capacity of lawyer registered with a bar and does not figure on the table of that bar shall constitute a crime and shall be punished under the criminal law."*

***Paragraphs (3) and (4) of article 20 were introduced by Law no. 255/2004, and articles 21, 22, 23 (2) and (3), 24 (2) and 25 were amended by the same act.**

SECTION 2
Ending and suspension of the lawyer's capacity

"**Article 26**. - The lawyer's capacity shall end:

a) following one's written renunciation to practise the profession;

b) as a result of one's death;

c) if a measure of expulsion from the profession has been taken against that lawyer as a disciplinary sanction;

d) if such lawyer has received a final sentence for an action incriminated by criminal law and which renders him/her unworthy of being a lawyer, according to the law.

Article 27. - The lawyer's capacity shall be suspended:

a) if there is incompatibility, for the duration of such a condition;

b) during one's interdiction to practise, ordered by a court or disciplinary decree;

c) if he/she has failed to fully pay or he/she has paid only partially the fees and professional contributions to the bar, to the U.N.B.R., and to the lawyer's own social security system, for 3 months from such payments being overdue, and until all the debts have been paid;

d) following a written request by a lawyer."*

*** Articles 26 and 27 were amended by Law no. 255/2004.**

CHAPTER III
Lawyer's rights and duties

SECTION 1
Lawyer's rights

Article 28. - (1) A lawyer appearing on the bar's table shall be entitled to assist and represent any natural or legal entity, based on a contract concluded in a written form, which acquires a sure date after being recorded in the official registration book.

"(2) A lawyer as well as his/her client shall be entitled to give up the legal assistance contract or to amend it based on mutual consent, under the terms stipulated by the by-law of the profession.
The client's unilateral renunciation shall not constitute a cause for exemption from the payment of the due fee for the law services performed, as well as for covering the expenses incurred by the lawyer in the interest of the client's law suit.
Article 29. - A lawyer shall be entitled to elect and be elected to the profession's managing bodies, under the terms stipulated by the present law and the by-law.
"**Article 30.** - (1) For his/her professional activity, a lawyer shall be entitled to a fee and to all the expenses incurred in the interest of his/her client's law suit being covered.
(2) For this purpose, a lawyer may open a bank account for cashing in the fees and another one for depositing the amounts received from the client for law suit expenses in the latter's interest. The way of managing the amounts that have been handed over to the lawyer by the client, for law suit expenses in his/her interests, shall be set out in the convention between the lawyer and the client, under the terms stipulated by the by-law of the profession.
(3) The legal assistance contract, lawfully concluded, shall be an executory title. The civil court having jurisdiction over the lawyer's professional head office shall have competence for vesting it with an executory formula. The overdue fees and other expenses incurred by the lawyer in the interest of his/her client's law suit shall be recovered according to the provisions of the by-law of the profession.
Article 31. - Legal contests and complaints against lawyer's fees shall be solved by the president of the bar. The president's decision may be appealed with the Council of the bar."*
***Article 31_1.** - Repealed.

*** Articles 28 (2), 30 and 31 were amended by Law no. 255/2004, and article 31_1 was introduced by the same act and repealed by Government Ordinance no. 94/2004.**

Article 32. - (1) Lawyers shall have their own social security system.
(2) The social security system of lawyers shall be regulated by the law, and shall be based on their contributions, as well as other sources stipulated by the law or the By-law of the Lawyers' Insurance House.
(3) The time served as a lawyer shall be deemed length of service.
Article 33. - (1) In order to ensure professional secrecy, the professional documents and paperwork found on the lawyer or in his/her law office shall be inviolable.
A search of a lawyer or of his/her residence or law office, or taking writs and goods in custody may only be made by a public prosecutor, based on a warrant issued under the terms of the law."*

***Article 33 (1) was amended by Law no. 255/2004.**

(2) No one shall be allowed to listen to or to record, using any kind of technical means, a lawyer's telephone conversations, or to intercept and record his/her professional correspondence, except for the conditions and using the procedure stipulated by the law.
Article 34. - The contact between a lawyer and his/her client may not be hindered or controlled, directly or indirectly, by any state body.
"(2) If a client is under arrest or placed in detention, the administration of the arrest or detention facility shall have the obligation to take all necessary steps for complying with the rights stipulated under paragraph (1).
Article 35. - Individual lawyers, associated law offices, professional civil companies, and limited-liability professional civil companies shall be entitled to a professional head office

within the jurisdictional district of the bar they are registered with, and to secondary offices in some other Romanian or foreign bars in whose records they appear."*

*Paragraph (2) of article 34 was introduced by Law no. 255/2004, and article 35 was amended by the same act.

Article 36. - The Ministry of Justice shall provide the necessary spaces for lawyer's activities in the headquarters of the courts of law.

Article 37. - (1) In the exercise of their profession, lawyers shall be protected by the law, and may not be assimilated to civil servants or other employees.

(2) Insults, slandering, or threats against a lawyer while exercising his/her profession and in connection with it shall be punishable by prison from 3 months to 2 years, or a fine.

(3) Battering or other acts of violence against a lawyer under the terms of paragraph (2) shall be punishable by prison from 6 months to 3 years.

(4) A criminal action shall be started following the prior complaint by the injured party, and, for the actions stipulated under paragraph (3), ex-officio too. If the prior complaint is withdrawn, or the parties reach an agreement, any criminal liability shall be removed.

"(5) A lawyer shall have the obligation to observe the solemnity of the court being held, not to use words or phrases liable to harm the authority, dignity and honour of the court, the public prosecutor, the other lawyers and the parties or their representatives to the law suit.

(6) A lawyer shall not be criminally liable for statements made orally or in writing, in an adequate form and in compliance with the provisions of paragraph (5), before courts of law, criminal inquiry bodies or other jurisdictional administrative bodies, only if such statements are in connection with that cause's defence and necessary for establishing the truth.

(7) The lawyer's failure to comply with the provisions of paragraphs (5) and (6) shall constitute a serious discipline departure. Disciplinary liability shall not preclude criminal or civil legal liability, as applicable.

Article 37_1. - The criminal inquiry against and prosecution of a lawyer for criminal actions perpetrated in the exercise of his/her profession or in relation to it may only take place based on the approval by the general public prosecutor of the public prosecutor's office attached to the appeal court in whose jurisdictional district the actions have been perpetrated."*

* **Article 37 (5) and (6) was amended by Law no. 255/2004, and paragraph (7) of article 37 and article 37_1 were introduced by the same act.**

SECTION 2
Duties of lawyers

Article 38. - A lawyer shall be bound to thoroughly study the cases entrusted to him/her, taken by him/her or received ex-officio, to appear before the court on each deadline set by the court, the criminal inquiry bodies or other institutions, based on the mandate entrusted to him/her, to show consciousness and professional integrity, to plead with dignity before the judges and the parties in the law suit, to submit written conclusions or notes whenever the nature or difficulty of the cause requires it or the court of law so orders. The lawyer's failure to meet such professional duties that may be imputable to him/her shall constitute a discipline departure."*

Article 39. - A lawyer shall have the obligation to provide legal assistance for which he/she has been assigned ex-officio or free of charge by the bar.

Article 40. - A lawyer shall have the obligation to make an insurance for professional liability, under the terms stipulated by the by-law of the profession.

Article 41. - A lawyer shall have the obligation to participate in all the meetings summoned by the Council of the bar, in the professional activities and meetings of the managing bodies he/she belongs to. Repeated absences and without good grounds shall constitute a discipline departure.

"**Article 42.** - A lawyer shall have the obligation to keep the records required by the law and the by-law as regards the causes he/she is engaged in, and to pay on a regular basis and in due time the fees and contributions set for the establishment of the bar budget and the funds of the Lawyers' Insurance House of Romania and its branches. The U.N.B.R. budget shall be comprised of the contributions by the bars, set out under the law and the by-law of the profession."*

***Articles 38 and 42 were amended by Law no. 255/2004.**

Article 43. - A lawyer shall be bound to return the documents entrusted to him/her to the person from whom he/she received them.

Article 44. - (1) A lawyer may not assist or represent parties with conflicting interests in the same cause or in related causes, and may not plead against a party having previously consulted him/her about the actual disputed aspects of the cause.

(2) A lawyer may not be heard as a witness and may not provide information to any authority or person regarding a cause entrusted to him/her, unless he/she has the prior express and written consent of all his/her clients interested in the cause.

(3) The witness' capacity shall take precedence to that of lawyer as regards the actions and circumstances he/she became acquainted with before having become the defender or representative of any party involved in the cause.

(4) If heard as a witness, a lawyer may no longer carry out any professional activity in that cause.

(5) A lawyer may not act as an expert or translator in a cause in which he/she is hired as a defender.

"**Article 45.** - (1) A lawyer shall have the obligation to wear a robe before the courts of law.

(2) The characteristics of the robe shall be those set out in the by-law of the profession.

(3) Wearing the robe outside the precincts of the courts of law shall be prohibited, except when a lawyer is delegated by the bodies of the profession to represent the bar of the U.N.B.R. on an occasion that requires that attire."*

***Article 45 was amended by Law no. 255/2004.**

Article 46. - (1) A lawyer shall be prohibited from using, either directly or by means of intermediaries, procedures that are incompatible with professional dignity, for the purpose of attracting clients.

(2) A lawyer shall also be prohibited from using advertising or publicity means for the same purpose.

The by-law shall set out the instances when and the extent to which a lawyer may inform the public in connection with the practice of his/her profession.

CHAPTER IV
Organisation of the lawyer's profession

SECTION 1
Bar

Duty of Honesty Problem
Adapted from Lisa Lerman and Philip Schrag, Ethical Problems in the Practice of Law.

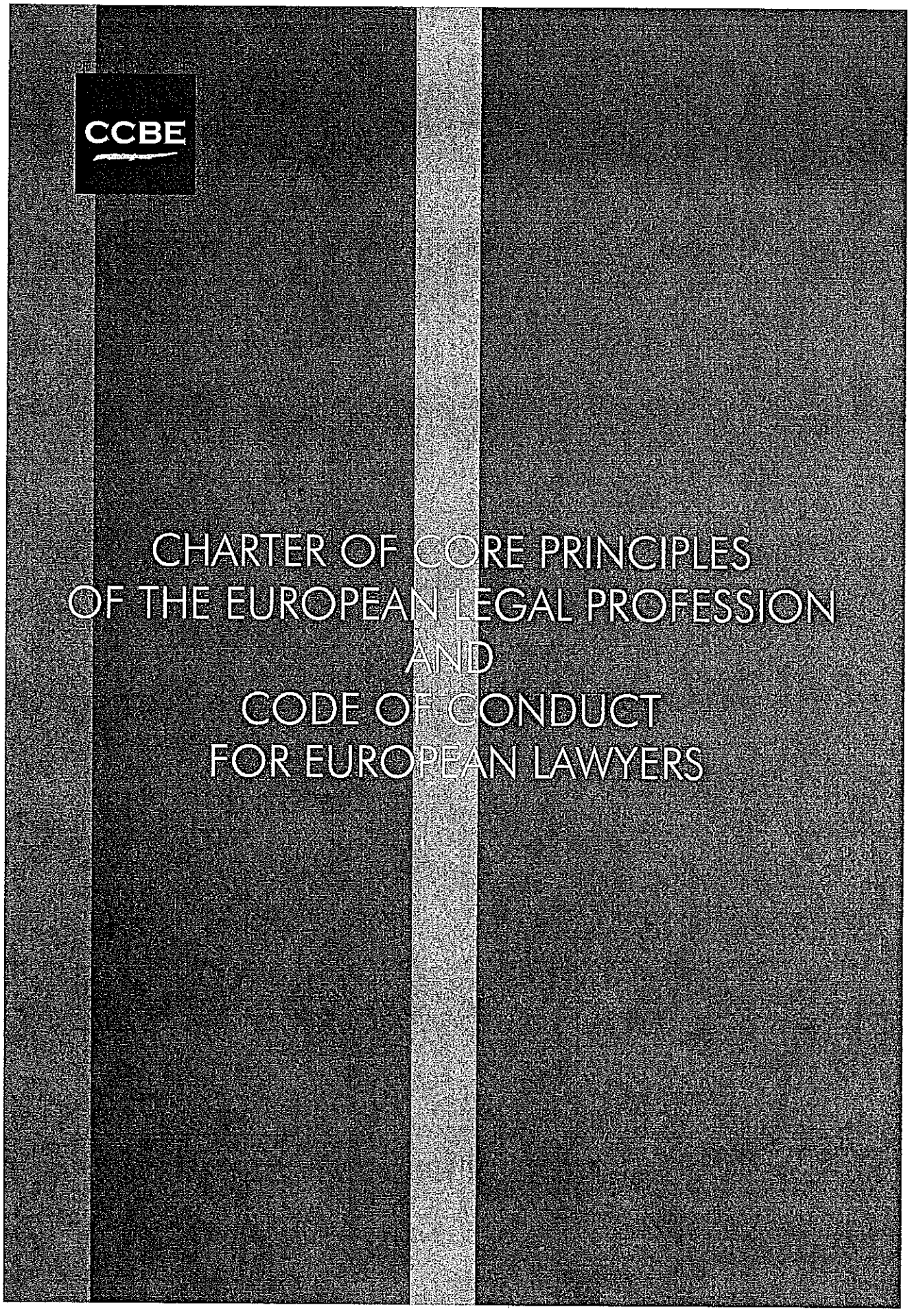
Part II

The attorneys for Joseph B. and the Romanian government have both submitted their written, sworn statements to the court. The court hearing is in two weeks. In this hearing, the parties will be required to present evidence that is consistent with their written statements.

However, there has been one important development.

Joseph B.'s attorney had been continuing to search for some corroboration of Joseph B's employment with the newspaper. The other editors seemed to be either in jail or in hiding. This morning, Joseph B.'s attorney had a major breakthrough. The attorney discovered that Sophia A., the former editor-in- chief of Democracy, escaped from jail and from Eastland, and is now living in a nearby country. The attorney contacted Sophia A. right away. The attorney told Sophia A. about Joseph B.'s asylum application and asked Sophia A. to provide a written statement and perhaps come to Romania to testify regarding Joseph B.'s former employment. Much to the attorney's surprise, Sophia A. said that she had never heard of Joseph B. The attorney described Joseph B.'s appearance and said that he might have worked for the newspaper under a different name. However, Sophia A. insisted that she knew all of her employees and that Joseph B. never worked for her.

Joseph B.'s attorney is now seeking ethical advice about what, if anything, to do.


CCBE
CHARTER OF CORE PRINCIPLES
OF THE EUROPEAN LEGAL PROFESSION
AND
CODE OF CONDUCT
FOR EUROPEAN LAWYERS

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The Council of Bars and Law Societies of Europe (CCBE) has as its principal object to represent its member Bars and Law Societies, whether they are full members (i.e. those of the European Union, the European Economic Area and the Swiss Confederation), or associated or observer members, on all matters of mutual interest relating to the exercise of the profession of lawyer, the development of the law and practice pertaining to the rule of law and the administration of justice and substantive developments in the law itself, both at a European and international level (Article III 1.a. of the CCBE Statutes).

In this respect, it is the official representative of Bars and Law Societies which between them comprise more than 1 million European lawyers.

The CCBE has adopted two foundation texts, which are included in this brochure, that are both complementary and very different in nature.

The more recent one is the ***Charter of Core Principles of the European Legal Profession*** which was adopted at the plenary session in Brussels on 24 November 2006. The Charter is not conceived as a code of conduct. It is aimed at applying to all of Europe, reaching out beyond the member, associate and observer states of the CCBE. The Charter contains a list of ten core principles common to the national and international rules regulating the legal profession.

The Charter aims, inter alia, to help bar associations that are struggling to establish their independence; and to increase understanding among lawyers of the importance of the lawyer's role in society; it is aimed both at lawyers themselves and at decision makers and the public in general.

The ***Code of Conduct for European Lawyers*** dates back to 28 October 1988. It has been amended three times; the latest amendment took place at the plenary session in Oporto on 19 May 2006. It is a binding text on all Member States: all lawyers who are members of the bars of these countries (whether their bars are full, associate or observer members of the CCBE) have to comply with the Code in their cross-border activities within the European Union, the European Economic Area and the Swiss Confederation as well as within associate and observer countries.

These two texts include a commentary for the first one, and an explanatory memorandum for the second one.

It is unnecessary to emphasise the importance of the set of norms set out in these two documents, which are the basis of the deontology of the European legal profession, and which contribute to shaping the European lawyer and the European bar.

31 January 2008

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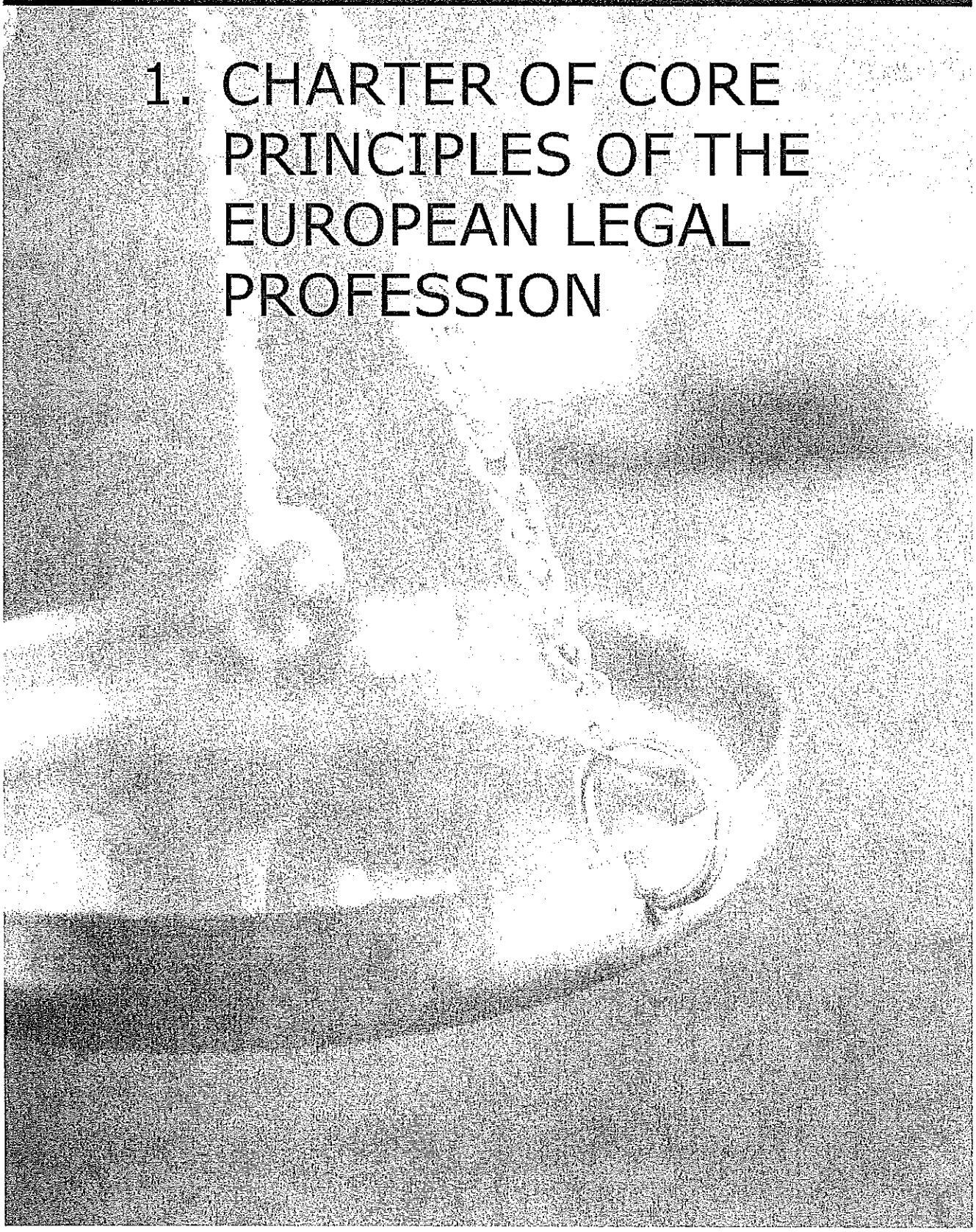
1. CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION



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"In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society."

– the CCBE's Code of Conduct for European Lawyers, article 1.1

There are core principles which are common to the whole European legal profession, even though these principles are expressed in slightly different ways in different jurisdictions. The core principles underlie the various national and international codes which govern the conduct of lawyers. European lawyers are committed to these principles, which are essential for the proper administration of justice, access to justice and the right to a fair trial, as required under the European Convention of Human Rights. Bars and Law Societies, courts, legislators, governments and international organisations should seek to uphold and protect the core principles in the public interest.

The core principles are, in particular:

(a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case;

(b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy;

(c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer;

(d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer;

(e) loyalty to the client;

(f) fair treatment of clients in relation to fees;

(g) the lawyer's professional competence;

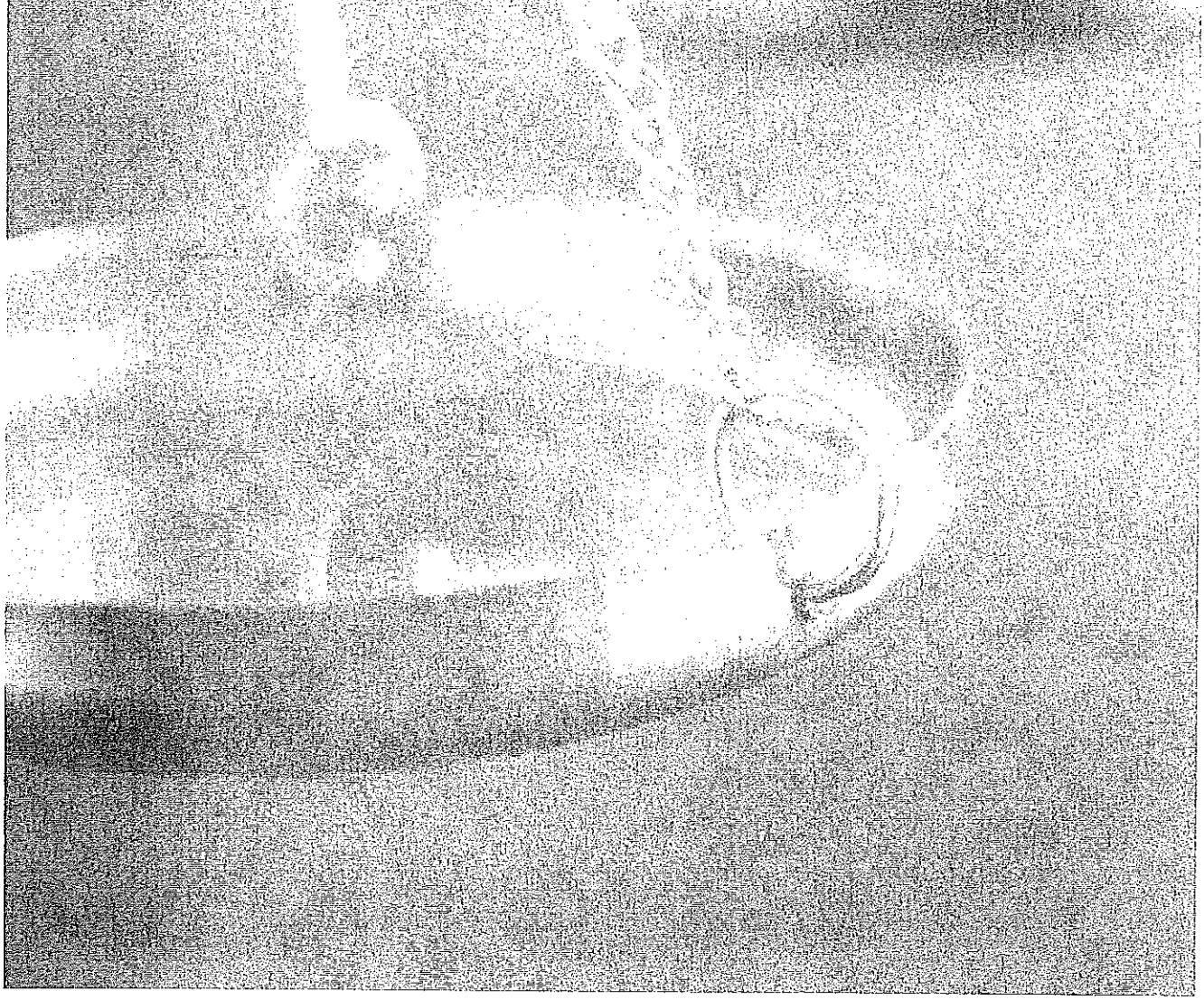
(h) respect towards professional colleagues;

(i) respect for the rule of law and the fair administration of justice; and

(j) the self-regulation of the legal profession.

6

2. A COMMENTARY ON THE CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION



1. On 25 November 2006 the CCBE unanimously adopted a "Charter of Core Principles of the European Legal Profession". The Charter contains a list of ten principles common to the whole European legal profession. Respect for these principles is the basis of the right to a legal defence, which is the cornerstone of all other fundamental rights in a democracy.

2. The core principles express the common ground which underlies all the national and international rules which govern the conduct of European lawyers.

3. The Charter takes into account:

   - national professional rules from states throughout Europe, including rules from non-CCBE states, which also share these common principles of European legal practice[1],
   - the CCBE's Code of Conduct for European Lawyers,
   - the Principles of General Application in the International Bar Association's International Code of Ethics[2],
   - recommendation Rec (2000) 21 of 25 October 2000 of the Committee of Ministers of the Council of Europe to Member States on the freedom of exercise of the profession of lawyer[3],
   - the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990[4],
   - the jurisprudence of the European Court of Human Rights and the European Court of Justice, and in particular the judgment of 19 February 2002 of the European Court of Justice in Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten (C-309/99)[5],
   - the Universal Declaration of Human Rights[6], the European Convention on Human Rights[7], and the European Union Charter of Fundamental Rights[8],
   - the European Parliament resolution on the legal professions and the general interest in the functioning of legal systems, 23 March 2006[9].

4. The Charter is designed to serve as a pan-European document, reaching out beyond the member, associate and observer states of the CCBE. It is hoped that the Charter will be of help, for instance, to bar associations that are struggling to establish their independence in Europe's emerging democracies.

5. It is hoped that the Charter will increase understanding among lawyers, decision makers and the public of the importance of the lawyer's role in society, and of the way in which the principles by which the legal profession is regulated support that role.

6. The lawyer's role, whether retained by an individual, a corporation or the state, is as the client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By

1 The national codes of conduct can be found on CCBE web site.
2 General Principles of the Legal Profession, adopted by the International Bar Association on 20 September 2006.
3 Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer (Adopted by the Committee of Ministers on 25 October 2000 at 727th meeting of the Ministers' Deputies).
4 Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
5 Case C-309/99 *J.C.J Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Avocaten,* [2002] ECR I-1577.
6 The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948.
7 Convention for the Protection of Human Rights and Fundamental Freedoms, signed by the members of the Council of Europe on 4 November 1950 in Rome.
8 Charter of Fundamental Rights of the European Union, signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000.
9 European Parliament resolution on the legal professions and the general interest in the functioning of the legal systems, adopted on 23 March 2006.

embodying all these elements, the lawyer, who faithfully serves his or her own client's interests and protects the client's rights, also fulfils the functions of the lawyer in society - which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law.

7. The CCBE trusts that judges, legislators, governments and international organisations will strive, along with bar associations, to uphold the principles set out in the Charter.

8. The Charter is prefaced by an extract from the preamble to the Code of Conduct for European lawyers, including the assertion that: "Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society." The rule of law is closely associated with democracy as currently understood in Europe.

9. The Charter's introductory paragraph claims that the principles in the Charter are essential for the fair administration of justice, access to justice and the right to a fair trial, as required by the European Convention on Human Rights. Lawyers and their bar associations will continue to be in the forefront in campaigning for these rights, whether in Europe's new emerging democracies, or in the more established democracies where such rights may be threatened.

Principle (a) – the independence of the lawyer, and the freedom of the lawyer to pursue the client's case:

A lawyer needs to be free - politically, economically and intellectually - in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed without this independence from the client there can be no guarantee of the quality of the lawyer's work. The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence, and bar associations must play an important role in helping to guarantee lawyers' independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer. It is notable that in unfree societies lawyers are prevented from pursuing their clients' cases, and may suffer imprisonment or death for attempting to do so.

Principle (b) – the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy:

It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others - the most intimate personal details or the most valuable commercial secrets - and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust. The Charter stresses the dual nature of this principle - observing confidentiality is not only the lawyer's duty - it is a fundamental human right of the client. The rules of "legal professional privilege" prohibit communications between lawyer and client from being used against the client. In some jurisdictions the right to confidentiality is seen as belonging to the client alone, whereas in other jurisdictions "professional secrecy" may also require that the lawyer keeps secret from his or her own client communications from the other party's lawyer imparted on the basis of confidence. Principle (b) encompasses all these related concepts - legal professional privilege, confidentiality and professional secrecy. The lawyer's duty to the client remains even after the lawyer has ceased to act.

Principle (c) – avoidance of conflicts of interest, whether between different clients or between the client and the lawyer:

For the proper exercise of his or her profession, the lawyer must avoid conflicts of interest. So a lawyer may not act for two clients in the same matter if there is a conflict, or a risk of conflict, between the interests of those clients. Equally a lawyer must refrain from acting for a new client if the lawyer is in possession of confidential information obtained from another current or former client. Nor must a lawyer take on a client if there is a conflict of interest between the client and the lawyer. If a conflict of interest arises in the course of acting for a client, the lawyer must cease to act. It can be seen that this principle is closely linked to principles (b) (confidentiality), (a) (independence) and (e) (loyalty).

Principle (d) – the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer:

To be trusted by clients, third parties, the courts and the state, the lawyer must be shown to be worthy of that trust. That is achieved by membership of an honourable profession; the corollary is that the lawyer must do nothing to damage either his or her own reputation or the reputation of the profession as a whole and public confidence in the profession. This does not mean that the lawyer has to be a perfect individual, but it does mean that he or she must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonour the profession. Disgraceful conduct may lead to sanctions including, in the most serious cases, expulsion from the profession.

Principle (e) – loyalty to the client:

Loyalty to the client is of the essence of the lawyer's role. The client must be able to trust the lawyer as adviser and as representative. To be loyal to the client, the lawyer must be independent (see principle (a)), must avoid conflicts of interest (see principle (c)), and must keep the client's confidences (see principle (b)). Some of the most delicate problems of professional conduct arise from the interaction between the principle of loyalty to the client and principles which set out the lawyer's wider duties – principle (d) (dignity and honour), principle (h) (respect towards professional colleagues) and in particular principle (i) (respect for the rule of law and the fair administration of justice). In dealing with such issues the lawyer must make it clear to the client that the lawyer cannot compromise his or her duties to the court and to the administration of justice in order to put forward a dishonest case on behalf of the client.

Principle (f) – fair treatment of clients in relation to fees:

A fee charged by a lawyer must be fully disclosed to the client, must be fair and reasonable, and must comply with the law and professional rules to which the lawyer is subject. Although professional codes (and principle (c) in this Charter) stress the importance of avoiding conflicts of interest between lawyer and client, the matter of the lawyer's fees seems to present an inherent danger of such a conflict. Accordingly, the principle dictates the necessity of professional regulation to see that the client is not overcharged.

Principle (g) – the lawyer's professional competence:

It is self-evident that the lawyer cannot effectively advise or represent the client unless the lawyer has the appropriate professional education and training. Recently, post-qualification training (continuing professional development) has gained increasing emphasis as a response to rapid rates of change in law and practice and in the technological and economic environment. Professional rules often stress that a lawyer must not take on a case which he or she is not competent to deal with.

Principle (h) – respect towards professional colleagues:

This principle represents more than an assertion of the need for courtesy – although even that is important in the highly sensitive and highly contentious matters in which lawyers are frequently involved on behalf of their respective clients. The principle relates to the role of the lawyer as intermediary, who can be trusted to speak the truth, to comply with professional rules and to keep his or her promises. The proper administration of justice requires lawyers to behave with respect to each other so that contentious matters can be resolved in a civilised way. Similarly it must be in the public interest for lawyers to deal in good faith with each other and not to deceive. Mutual respect between professional colleagues facilitates the proper administration of justice, assists in the resolution of conflicts by agreement, and is in the client's interest.

Principle (i) – respect for the rule of law and the fair administration of justice:

We have characterised part of the role of the lawyer as acting as a participant in the fair administration of justice. The same idea is sometimes expressed by describing the lawyer as an "officer of the court" or as a "minister of justice". A lawyer must never knowingly give false or misleading information to the court, nor should a lawyer ever lie to third parties in the course of his or her professional activities. These prohibitions frequently run counter to the immediate interests of the lawyer's client, and the handling of this apparent conflict between the interests of the client and the interests of justice presents delicate problems that the lawyer is professionally trained to solve. The lawyer is entitled to look to his or her bar association for assistance with such problems. But in the last analysis the lawyer can only successfully represent his or her client if the lawyer can be relied on by the courts and by third parties as a trusted intermediary and as a participant in the fair administration of justice.

Principle (j) – the self-regulation of the legal profession:

It is one of the hallmarks of unfree societies that the state, either overtly or covertly, controls the legal profession and the activities of lawyers. Most European legal professions display a combination of state regulation and self-regulation. In many cases the state, recognising the importance of the core principles, uses legislation to buttress them – for instance by giving statutory support to confidentiality, or by giving bar associations statutory power to make professional rules. The CCBE is convinced that only a strong element of self-regulation can guarantee lawyers' professional independence vis-à-vis the state, and without a guarantee of independence it is impossible for lawyers to fulfil their professional and legal role.