

MEMORANDUM

Subject Proposal for a Code of Conduct for the UPC – 3rd draft
By EPLAW / EPLIT / **epi**
To The Preparatory Committee for the UPC
Dated May 17th , 2016

I.

Background

According to R 290 (2) UPC Rules of Procedure (“RoP”) 18th Draft, Representatives who appear before the Court shall strictly comply with any code of conduct adopted for such representatives by the Administrative Committee (in the following briefly referred to as “CoC”). However, as of today, no draft CoC exists.

For legal reasons, the scope of this CoC has to be limited to the scope required by the RoP, i.e. in particular the relationship between the Court and Representatives, and cannot be in contradiction to binding national law.

In late 2013, EPLAW formed a working group (in the following briefly referred to as “WG”), to assist the Court in developing a CoC covering practical needs as well as taking into consideration binding national regulations. Said WG undertook a comparative study of existing professional laws to identify needs as well as limitations for regulations within the CoC. The study focused on:

- (a) Conflicts and protection of confidential information;
- (b) Duties to the Court;
- (c) Experts and witnesses; and
- (d) Miscellaneous (including contingency fees, record keeping etc.).

While it was strongly felt that harmonization would be desirable for all topics, in particular (a) and (d) were found to be subject to numerous national rules, such that they cannot be addressed in the CoC without risk of creating conflicting laws. In contrast, (b) and (c) can and should be covered by the CoC without such risks.

In late 2014, EPLAW and EPLIT joined forces to develop a joint proposal for the CoC. In 2015, **epi** joined this group. In doing so, the respective organizations aimed to ensure consideration of a maximum of practical experience and professional standards across the relevant European professions.

The starting points for this draft proposal were the existing codes of conduct developed by CCBE and **epi**. These were supplemented wherever differing national laws or traditions appeared to make clear rules desirable.

The following is of course subject to further amendments to the RoP. Some observations in this respect were, however, made with regard to R. 291 (1) RoP while drafting the CoC. R. 291 (1) relates to the exclusion of representatives from the proceedings and, as presently drafted, would seem to compromise the position of both a Client and his/her Representative in ongoing litigation.

Presently, until any possible future joint disciplinary body is founded, a mechanism for referring such a matter to a relevant body for the respective national lawyers or the **epi** would seem more appropriate.

The draft CoC was discussed in the 3rd UPC Expert Panel Meeting in Paris on September 18th, 2015, where valuable feedback was received and thereafter incorporated. The draft Code of Conduct was presented to the full Preparatory Committee at its 15th meeting 14 of April 2016 where it met with general approval from Member States delegations. Furthermore, EPLAW, EPLIT and **epi** are grateful that experts in particular from IPLA and CCBE proposed amendments to the draft CoC in April and early May 2016, which are equally incorporated in the current version. All this was helpful to further improve the quality and acceptance of the CoC. In the coming weeks, EPLAW, EPLIT and **epi** will continue discussing the draft with interested parties.

II.

Proposal for a CoC

1. Field of Application

This Code is the Code of Conduct referred to in R. 290 (2) RoP. It shall apply to Representatives under Art. 48 (1) or (2) of the Agreement on a Unified Patent Court (“Agreement”) with respect to all activities related to proceedings before the Unified Patent Court (“Court”), considering that said Representatives may at the same time be subject to other professional and commercial codes and laws. For the avoidance of doubt, in case of any conflict between this CoC and the RoP, the latter prevail.

*Note: The reference to national professional laws is intended to remind practitioners that they may be subject to national, regional (e.g. **epi** or CCBE) or other codes of conduct in addition to this CoC. Also, for legal reasons, the scope of this CoC has to be limited to the scope required by the RoP, i.e. in particular the relationship between the Court and Representatives, and cannot be in contradiction to binding national law.*

2. General Conduct

2.1 Relationship with the Court

In all dealings with the Court and its employees, a Representative shall act respectfully and courteously and - based on sufficient education on the law and Rules governing the Court and proceedings before the Court - competently, and shall do everything possible to uphold the good reputation of his or her respective professional association.

Note: While the term “competently” is not and cannot be intended to impose any formal requirement for Continuing Professional Education (CPE), it seems important for enabling the Court to reach the objective of ensuring decisions of the highest quality (see Preamble of RoP) that Representatives inform themselves sufficiently about the new system and applicable law to prepare their cases correspondingly.

2.2. Fair Conduct of Proceedings

A Representative must always have due regard for the fair conduct of proceedings. He or she shall exercise his or her rights in good faith and shall not abuse the Court process. He or she shall be reasonably accommodating and flexible regarding scheduling and routine matters.

2.3 Contact with Judges of the Court

Save to the extent necessary for *ex parte* procedures, no Representative shall contact a judge about a specific case without the participation or prior consent of the Representative of every other party to those proceedings.

2.4. Demeanour in Court

2.4.1 A Representative shall act as an independent counsellor by serving the interests of his or her Clients in an unbiased manner without regard to his or her personal feelings or interests.

2.4.2 A Representative is responsible for taking appropriate steps to ensure the appropriate demeanour in Court of anyone accompanying him or her.

Note: "Accompanying" means attending in person or otherwise, e.g. by telephone or video link. "In Court" includes interim conferences, telephone conferences, video conferences or anything where there is an official communication between the Representative and Court. "Anyone" includes inter alia clients and patent attorneys assisting under Art. 48 (4) of the Agreement.

2.5. False or Misleading Information

A Representative shall be obliged not to misrepresent cases or facts before the Court either knowingly or with good reasons to know or where the inaccuracy could reasonably have been discovered. If a Representative becomes aware that he or she has inadvertently misled the Court, or that a witness has given evidence which is not true, the Representative shall seek the Client's consent to inform the Court as appropriate and in the absence of consent shall cease to represent the Client.

Note: The first sentence repeats Art. 48 (6). It serves mainly as an introduction for the second sentence. It addresses the situation where non-witness evidence is provided to Court by the Representative in good faith which turns out to be misleading later-on, or that witness evidence turns out to be incorrect. While this is important to achieve the objective of Art. 48 (6) of the Agreement, the intention is not to introduce a US-style inequitable conduct doctrine.

2.6. Privileged information

A Representative shall not disclose any document that is subject to privilege without the consent of the Client. Privileged “without prejudice” *inter partes* correspondence shall not be submitted in the absence of a waiver of the privilege on both sides.

Note: This is to emphasize that only a Client can waive privilege. and that privileged “without prejudice” inter partes correspondence shall not be submitted in absence of a waiver of the privilege on both sides.

3. Dealings with Witnesses and Party Experts

3.1. Information on legal obligations

A Representative shall ensure that witnesses are at all times fully informed about their obligation to tell the truth and of their liability under applicable national law in the event of any breach of this obligation. Equally, a Representative shall ensure that party experts are fully informed about their obligation to assist the court impartially, being independent and objective and not advocating for any party.

3.2. Contact

Subject to Clause 3.1 and to the extent necessary, a Representative may contact witnesses and party experts out of court in the context of a specific pending case in which they are involved, to verify the eligibility for their respective roles, to explain their roles, and to assist with the preparation of their evidence . A Representative must do everything to ensure that the substance of the evidence of a witness or party expert solely reflects the witness’s or expert’s respective recollection or opinion.

3.3. Compensation

If required, the Representative may arrange for reasonable compensation for the work of witnesses and party experts.

The Representative must upon request of the Court or upon reasonable request of a party inform the Court about the extent of that compensation.

Note: While the Court has discretion to give or withhold grounds for such a request, any party should give reasons for their request to avoid unnecessary disclosure or related obligations; whether such request is reasonable is up to the Court. Party experts are included alongside fact witnesses as their role under the Rules of Procedure is to provide for independent evidence. As part of a “reasonable compensation”, appropriate accommodation, travel costs, etc. for preparatory purposes should be allowable.

4. Change of representation

In the event of a change of representation in accordance with R. 293 RoP, the former Representative shall, unless the circumstances dictate otherwise, be responsible for effecting notification of the change to the Registry without undue delay.
