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UPC Representatives: time to talk about rules of conduct

Boukje van der Maazen (Brinkhof) · Tuesday, December 10th, 2024

It has been 1,5 years since the UPC opened its door. The novelty is wearing off as the UPC's case law takes shape. This is a good moment to reflect a little more on another aspect of the UPC's operation: the rules of conduct that UPC representatives have to follow.

In general, the rules of conduct for representatives consist of three pillars, covering the relationship with (1) the client, (2) other (patent) attorneys and (3) the court.

The various qualified lawyers before the UPC have to comply with different 'ground rules', i.e. their national bar rules / codes of conduct. In addition, they are all bound by the Council of Bars & Law Societies of Europe (CCBE) [Code of Conduct](#). The CCBE Code of Conduct applies to European lawyers (see the list of CCBE Members on p. 19 of the Code of Conduct) who are involved in cross-border activities. For example, and importantly, the CCBE Code of Conduct contains a provision on the confidentiality of cross-border communications between lawyers (Art. 5.3 – in short, you have to indicate confidentiality up front). The CCBE also states that “*a lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal*” (Art. 4.1). As far as the UPC is concerned, the UPCA (Art. 48(6) UPCA), Rules of Procedure (R. 8(3) and Part 5 – Chapter 3 RoP) and [UPC Code of Conduct for Representatives](#) add a (thin) layer on top. The fact that the UPC's rules of conduct do not replace national codes of conduct was recently confirmed in decision of the LD Paris ([C-Kore / Novawell](#))

As a side note: UPC representatives are not – additionally – bound by the rules of conduct of another member state if they act before the Local Division in that member state. European lawyers are normally only allowed to practice before their own national courts. However, [Directive 98/5/EC](#) does not come into play. This Directive stipulates that EU lawyers can practise on a permanent basis in another Member State (“host Member State”), but are then bound by the national bar rules of the host Member State – in addition to the rules of the country of origin.

Apart from lawyers, European Patent Attorneys may represent parties in UPC proceedings. Patent attorneys are bound by their own, separate code(s) of conduct. The CCBE Code of Conduct does not apply to them, but the UPC rules of conduct do.

In short, different rules could apply from one UPC representative to another. The question is: does this lead to any relevant differences when acting at the UPC? Let's go back to the three pillars:

1. Relations with the client

Any differences between the rules on the relations with the client do not – at first sight – seem to have an impact on UPC proceedings. Not directly related to conduct, but highly important nonetheless: the UPC contains provisions on attorney-client privilege (Art. 48(5) UPCA and R. 287 RoP) and litigation privilege (R. 288 RoP), thereby harmonizing what can be subject to disclosure in UPC proceedings.

2. Relations with other (patent) attorneys

The UPC Code of Conduct contains a provision on the demeanour of representatives towards each other in court. Art. 2.4.2. reads: “*A representative shall act courteously towards other representatives [...]*” It is silent about behaviour outside of the court room. In light of the CCBE Code of Conduct (see above), there does not seem to be any real potential problems as far as the relationship between lawyers is concerned. As for patent attorneys the [epi Code of Conduct](#) seemingly applies, also insofar as it deals with relations with other patent attorneys. The epi Code of Conduct refers to the UPC on various occasions, just not specifically in the provision dealing with the relations with other patent attorneys. Communications between patent attorneys and lawyers do not seem covered by any code of conduct. Given the lack of guidance on this situation, it is advisable to discuss and agree confidentiality in advance if you want to prevent your email from reaching the UPC.

3. Relations with the court

Art. 6 of the epi Code of Conduct specifically refers to relations with the Unified Patent Court and will therefore apply in parallel to the UPC rules on conduct.

As far as lawyers are concerned, the situation is less clear. A preliminary question is whether the national rules on the relationship with the court apply at all when acting before the UPC? I have not been able to find a definitive answer to this question. The *C-Kore / Novawell* case referred to above did not relate to this ‘pillar’. The UPC Code of Conduct does imply that binding national rules, also insofar as they concern the relationship with a court, also apply at the UPC. Below Art. 1 “Field of application”, it is noted that the scope of the UPC Code of Conduct concerns in particular the relationship between the UPC and representatives, and “*cannot be in contradiction to binding national law*”. The UPC Code of Conduct thus could be seen as an attempt at minimum harmonization, but I’m unsure if a conflict with binding national law is completely ruled out. Where national rules and UPC rules apply in parallel, there may be relevant differences between parties’ respective UPC representatives. I will provide an example.

Imagine the following. You, a Dutch lawyer, represent the defendant in a case before the UPC. At the end of the oral hearing the court announces when it will provide the written decision. A few days later, a new fact comes to light that significantly improves your client’s position. Based on the Dutch Code of Conduct, you are in principle not allowed to approach the court once a decision date has been announced, unless you have the consent of the opposing party. There is no such restriction in various other national codes of conduct, such as the German one, which applies to the opposing counsel. If the situation were reversed, there is no doubt that opposing counsel would just inform the court of the new information. What do you do?

The initial (default) thought of a Dutch lawyer will likely be “I cannot file this new information without consent”. However this may change upon some further reflection. The aforementioned Dutch Code of Conduct (“Gedragsregels”) is non-binding, but provides guidance as to what

constitutes the proper performance of the duties of an ‘adequate lawyer’. It can therefore be argued that in this particular situation before the UPC, a certain guideline need not be followed. The situation would be different if the blocking factor would be a binding rule (which also exist for Dutch lawyers). As mentioned above, the UPC Code of Conduct itself implies that binding national rules will still have to be followed at the UPC. I am not aware of the binding nature of other national rules of conduct.

This leads to two main conclusions. First, UPC representatives should be aware that their behaviour in the context of UPC proceedings is subject to (additional) rules, which may be different from the ‘standard’ they are used to in the national context. At present, in my experience, some of the UPC rules of conduct have not yet been fully internalised by UPC representatives. Art. 2.3 UPC Code of Conduct / R. 8(3) RoP on communication with the judges / court is an example. Some lawyers are, from their national practice, used to unilateral phone calls and emails directly with judges and continue this practice in the UPC. Although, as far as I’m aware, such communications usually are of a more practical nature, it would be highly desirable for representatives to resort to written communications to the court clerk, copying in opposing counsel. Second, more discussion on the applicability of national rules on the relationship with the court may prove useful in anticipating possible ‘dilemmas’ as described above.

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