



**“LEGAL ETHICS AND PROFESSIONALISM IN COMPARATIVE PERSPECTIVE:  
THE CASE OF CHILE”**

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**MEXICALI, B.C.**

**MAY 9, 2007**

... Autonomous University of Baja California, Mexicali Campus, and the Trans-Border Institute at San Diego University, welcomes all of you to our keynote conference entitled "Legal Ethics in Comparative Perspective – The Case of Chile". The keynote speaker is Doctor Claudio Pavlic, National Defender of the South Metropolitan Regional Defender's Office of Santiago, Chile, whom we have the pleasure of welcoming.

He is joined by Dr. David Shirk, Director of the Trans-Border Institute at the University of San Diego, as well as by professor Roberto Villa Gonzalez, Assistant Director of the Mexicali Campus School of Law.

Doctor Claudio Pavlic is in charge of the Regional South Metro Santiago, Chile Public Defender's Office, where he is responsible for a team of more than 100 criminal law public defenders. His Office serves a population of about 3,000,000 citizens. Before being named Regional Defender, Doctor Pavlic served in several positions within the National Defender's Office and the Regional Defender's Office, even becoming at one point the Deputy National Public Defender during the years 2001-2002. An expert in the subject of legal ethics in Chile, he has given conferences and presentations in several panels and meetings on judicial training and public criminal defense throughout Latin America.

His lecture today is part of the seminar "Legal Ethics in Comparative Perspective", a series of keynote conferences on legal ethics in Spain, Mexico, Chile and USA. So let's welcome our keynote speaker, Dr. Pavlic. (2:05)

First I would like to highlight a few points about this seminar series. This seminar is sponsored by the Tinker Foundation; the idea behind this seminar was to try to share as best we could information in a comparative perspective on ethics and practices and professional responsibility in the practice of law. We at the Trans-Border Institute realized, through our projects to study justice reform in Mexico, that in our country, the U.S., we have over the last 60 years experienced a process of professionalization of the lawyer's profession, brought about by several institutional factors, political factors, important changes in our country, due for example to increased electoral competition in the U.S., particularly at a state and local level in the 20's, 30's; a process that has shifted the legal profession. In our country, with the creation and de-institutionalization of the bar associations (03:55) – and this was a multi-generational process in the US – which led to our realizing, when we started talking about the legal system here in Mexico, that you were currently experiencing, in this generation, some very meaningful changes in the practice of law. On the one hand, it is somewhat encouraging to see so many young people signing up for law courses, that is, that the number of law schools is growing so rapidly, but on the other it is somewhat concerning, because regulation of lawyers either by the Government or by Bar Associations is still somewhat weak. We really don't know how many lawyers are practicing in Mexico. Estimates range anywhere from about 40 thousand to perhaps even 80 thousand practicing attorneys, but we don't know exactly how many, or where are they practicing, because there is no mandatory affiliation mechanism. Basically, there is no oversight of the profession.

And with that we started to ask ourselves what could be a model that we could use to promote a system for a responsible and ethical practice of law, where the profession is respected by clients and the community. We are not at all trying to suggest that our system, the U.S. system, has the answer. We really want to study this question from a comparative perspective, to know which are the existing models, what works, and what they are experiencing in other countries, particularly in Latin America or Spain, which have obvious historical ties and share legal traditions with Mexico. (06:32)

So, we decided that it would be fruitful to have a series of conferences that could broaden our understanding of these systems and mechanisms; but we didn't want to simply bring together a fairly large group of students and law practitioners; we wanted for this conversation to be shared with a wider audience, and so we requested funding from FIUREP Foundation so that this conversation, this dialogue, this lecture by Doctor Lic. Pavlic could be recorded and shared through the internet. It will become part of a series of at least four conferences that you, each one of you, can access online at our webpage and hopefully also at the web page of our partners here in the UABC (Autonomous University of Baja California). We hope that this can become an opportunity for an in-depth study and debate about the benefits and perhaps the defects of different systems to promote professional ethics and responsibility in the practice of law.

So, we are now initiating a conversation that hopefully can continue in the classrooms, not only here in Baja California, but also in other parts of Mexico, in other parts of Latin America, and maybe in other parts of the world. This recording will be translated into English and will be transcribed in both languages, so that it can be used by practitioners and students of law.

I don't think there is anything left to add, other than to thank a few people, particularly two of our colleagues here at UABC Mexicali that have helped us put together this event; I would also like to mention, if you don't mind, my team at the University of San Diego, specially Mr. Rob Donnelly who led the organization of this event for us; Mr. Charles Pope and the assistants and students that are helping us right now, and without anything else to add, I would like to give a most cordial welcome to Dr. Pavlic who is a very distinguished expert from Chile. We welcome you and thank you for joining us in this series. Thank you! (09:27)

Thank you very much! I have been asked to use the podium, and I can also follow the rules. I hope it will meet the expectations of Doctor David Shirk, who I must first of all thank for inviting me, allowing me to share this afternoon with you. I would also like to thank his staff as a whole, with special thanks to those who have participated in creating this event, providing the physical space and also providing assistance, and who are for the most part members of this campus of the Autonomous University of Baja California. The Director, Mrs. Aurora Lacavez, the assistant director who is representing her today, Mr. Roberto Villa, and also the professors at this School of Law and University, Mrs. Maria Candelaria Pelayo, the Baja California judges who will be sharing with us this afternoon, and also these morning's speakers, who spoke to us about whether there were professional alternatives, Professor (completely inaudible names) of Nuevo Leon and of Coahuila, I said them backwards, but they are here and I'm very grateful for that. (10:50)

The topic that I've been asked to talk about this afternoon is one that I've reflected on as an academic, and have an interest in insofar as affiliation in my profession as an attorney. I've followed the structure that was suggested to me because it's a cycle of conferences about the same topic that are expected to deliver a notion that allows the comparison of the experience in Mexico, the country we are in today, Spain, The U.S., and China; so, I have been shaping and re-shaping how to express these ideas in the manner that I was asked, and the origins and the development of practices and the situations that promote regulations on the legal profession and judiciary services.

I will begin with a very brief history of how attorney organizations got started in our country.

The first attorney association in Chile was created in the year of 1862, a very long time ago, and maybe it was a bit premature because it only existed and operated for 2 years, excuse me! 6 years. Then, in 1915, the Attorney Institute was founded, which was the seed that became, in the years to follow, the Chile Bar Association Organization; there was a push to officialize regulations, and in 1925 the Bar Association is finally created as a legal institution in public law, and which included in its scope to regulate those who practiced this profession in Chile.

So, from the beginning, the issue of Ethics Control was an important component in the interest attorneys had in associating. Ergo, as far as I know, the attorney's organization, called the Bar Association, and the system assigned to control the professional conduct of lawyers were born at the same time in our country. (14:40)

As I was saying, the law that originated this first organization of lawyers dates back to 1928, and these regulations echo what had been previously stated in terms of looking after the progress, prestige and prerogatives of the legal profession and regulating the proper practice, preserving professional discipline, and providing protection to attorneys, which was drafted verbatim into the needed regulation. 15:16

There are some other elements that are also fundamental for me, such as the fact that this law also established mandatory affiliation, which is an element that, as we'll see as we go forward in the subject, was extremely important; and the setting of fees, that is, a Price Book that specified the fees

attorneys could charge for their services and as a result, in case of any conflict in its application, the Bar itself had the authority to resolve conflicts between civil lawyers. (16:00)

Now, during this whole period, the system for Ethics Control, starting in Chile in 1928, was exercised by a special court of the bar association which heard client claims against their attorneys and also claims between peers, meaning, any complaint that a lawyer might have had in relation to the activity of another. And it had a Penalty Book that went from censorship, bans, suspension of the professional practice, and finally the harshest penalty, the permanent removal from the legal profession. (16:57)

Without a doubt, this way of penalizing the inappropriate conducts of lawyers, served, first, as a very effective deterrent to ensure that the attorney would practice the profession in a manner that was as close as possible to ideal; and, second, it satisfied the interests of those who felt violated or harmed by the acts of an attorney in his or her practice, whatever that may be.

Now, this is the way it was in our country until 1981, and looking at all of you I believe that you felt that what I've been saying thus far was a good way of facing the issue of controlling ethics in professional practice.

Well! There are times when the evolution or the development or the application of new formulas goes backwards, sets us back a step, and ends up complicating what up to that moment was a system that worked, which made me want to quote Mr. Leonel Montes Olavarrieta, an author who, back in 1963, meaning, during the time when these regulations that I have just explained were in effect, in his work prevarication of attorneys and prosecutors, published by Editorial de Chile in the aforementioned year, expressed the following:

"The disciplinary jurisdiction of the Bar Association is highly effective in punishing the faults committed by these professionals in their practice, since its councils enjoy much more freedom than the court system. These organisms assess the evidence at their own discretion, they are not required to prove the specific misconduct, so they can process the cases more quickly and expeditiously, and their scope of authority is not considered as invasive of the powers of the judiciary" 19:18

As I was saying, Well... where does this need to introduce changes from time to time come from?

Due to the period that my country was under 17 years of military dictatorship, many elements of sometimes excessive liberalism were incorporated. And this was represented in changes to the Constitution that set forth the freedom of association. And it was perceived by those who wrote the amendment bill that the presence of professional associations with mandatory affiliation was a threat to this constitutional right of freedom of association and because of this, at the same time that the changes to the constitution would take effect, should our new Constitution be approved in 1980, the 1621 act was passed, in 1981, which eliminated the mandatory affiliation, eliminated the legal entity of public law for professional organisms and therefore prevented the professional associations and I mean in general! All the liberal professions, from applying those penalties I referred to at the beginning. 20:53

Well, and... How did the control of ethics of the liberal professions in Chile move forward after this amendment? The same regulation stated that the unions had to become union associations and follow the regulations that rule them. Therefore, a committee of ethics was present and is still present today within each one of the professional projects. Today the bar association still survives despite many other irregularities that I will mention later on: The Bar Association, as the Union Association of Chilean Lawyers. 21:43

The Ethics Committee I am referring to continues to be empowered to hear claims, to process those claims, and to apply penalties, but it is no longer able to impose serious penalties like the suspension of professional practice or the permanent banning from the profession, and the only thing it can do is expel that member from the union association he or she belongs to. The affected attorney, however, is not limited from continuing to practice. 22:26

The formula which intended to, and I believe it has done so with great success, give back the deterrence power of the established and applied penalties to the Union Bar Association, is to publish the penalties in a Bar Association monthly journal. So, you'll understand that although it is a tool, it is a magazine that is read only by the associated lawyers who receive it, and so only a limited group is informed of the penalty, but even so, it has been a good tool and a way to give a deterrent value to the penalties that the bar association imposes. 23:21

Now...the characteristics of union association deprived the bar association of a series of prerogatives that it used to have within the organization of justice and the organization and regulations that rule the justice administration in Chile. And for example, it deprived the management of the free law firms. The bar association, during what we can call this "spring" period, which lasted fifty years, managed the law firms that fulfilled the state's duty to provide free defense to the citizens that didn't have the possibility of hiring a lawyer to defend their rights in court. They were replaced by corporations under the justice department. And for you to realize the additional ideological loss they suffered, those bar associations that prevailed as union associations, weren't given even the chance to be members of the board of this corporation. 24:35

And the truth of the matter is that since 1981 there have been different currents that have been constantly presenting proposals to end with this state of affairs. 24:55

Now, at this point, I would like to quote the president of the supreme court of justice in Chile, who during the 2002 academic year opening speech at the Central University School of Law (located in Santiago), talking about one of the elements that according to union association regulations would resolve the problem and the result is that this element, that is, the knowledge of the violation or the ethical violation case was a matter for the courts of justice, said that, and I quote: 25:46

"Just looking at the court case logs is enough to realize that this type of action is very rare. We are not suggesting that there are no claims arising from such behavior; on the contrary, we know from what we are told by parties and from the mail we receive, that several officials are dissatisfied with the professional they hired to defend them or represent them and that they don't have the resources to hire a new professional to represent them against their original attorney" 26:25

This illustrates that the theoretical solution of entrusting the management of ethic violation claims to the ordinary courts of justice is definitely the wrong road. 26:01

I will also comment, in regards to the constitution which also continues to exist and to the participation of those of us who have pronounced our opinions regarding the rules the code of ethics should contain as far as misconduct, which is, in fact, a violation of law in some cases and a violation of the Ethics regulations in others. Conceptually it can be expressed as deontology or the rules of deontology. 27:20

I could go on pointing out a significant number of roles that the bar association ceased to have as a consequence of the elimination of mandatory affiliation. Attorney registration ceased to have the same meaning. That record, with the affiliated attorney's ID number, was part of his or her individuality whenever he or she had to appear before the court, but it stopped being necessary. 27:55

I should point out that I started practicing as an attorney in 1989, when lawyers still had the custom of identifying themselves in writing including their Bar Association ID number. I did so as well, but more as an act of rebelliousness than anything else, because it was not required in order to be allowed to appear; and thus began those currents I was mentioning that would eventually revert the situation. 28:44

If I can get this thing working... Here I start to try to return to the suggestions regarding the topic, and so I will talk about ethics and professionalism both in legal practice and as members of associations. In developing these topics, today we have already covered some ground as far as the ethical situation in legal practice. To what I've already expressed, I'd like to add a brief history on the workings of the

Court of Ethics of the Chilean Bar Association. I was able to obtain records for the years of 2004, 2005 and 2006. According these records, there are approximately 8,000 lawyers registered in the Chilean Bar Association. 29:45

In 2004, 112 claims were filed against attorneys, they were put together for me so I could bring them to this presentation, and 102 of the decisions were explained to me when I went to pick up the information; now, these were not necessarily decisions on the same claims filed that year, so there might be some discrepancy later, since more claims were filed than resolved. 30:15

Out of these 112 claims in 2004, 27 were admitted, 25 were dismissed, 19 were settled out of court, and this is where their strength is, this time with a direct effect on a court proceeding, because the attorney against whom the complaint was filed decides to settle out of court with the claimant to keep it from becoming public. So there are several options during the process that follows after a claim is made. In 17 of these cases, appeals were filed against the decision of the ethics committee. Some were filed by the affected attorney, and 5 were filed by the People.

And with different results, because 10 other cases some were considered without grounds, and this is significant, because those claims that are filed before the Bar against attorneys who are not members of the Bar are considered without grounds by said Bar... and I also had a chance to work on this during the 90s, on changing it so that this case was instead of being dismissed turned over to the regular courts to allow the claimant the opportunity to have this recourse.

But, again, we came against a lack of incentive, because they would once again have to hire someone to represent them. Free legal aid firms would not lend their services to file a case against an attorney, which is absolutely wrong, but we could not within the Bar process ethics cases filed against non-member attorneys.

In 2005, 106 cases were filed, and the percentages are the same as the numbers in this case, since the number of cases was close to a 100: 39 were admitted, 31 were dismissed, 37 were settled with the claimants. In 2006 the number of claims goes down to 94, with 33 admitted, 34 dismissed, 22 settled out of court, 17 of the decisions appealed – 14 by the defendant attorney and 3 by the claimant; the number of cases dismissed for being without grounds also decreased, to 3, and finally, I would like to expand upon this brief statistical analysis to talk about the most frequent violations heard by this Court.

The first is taking cases and then not fulfilling their duties; then receiving compensation for it and not agreeing to give it back to the client; then being hired to collect a debt on behalf of the client and failing to deliver said funds in a timely fashion – and here you can tell the confusion that's created, because as a district attorney it is clear that this type of claim would mean that there was a criminal act that could be prosecuted. On a side note, on some of the occasions when I have had the chance to talk about this issue with colleagues from different countries I have discovered that this confusion, this lack of accountability for moneys received by an attorney from a client is one that repeats itself in all the claims against attorneys all around the world. I don't know whether that's the case in Mexico, perhaps you could tell me whether this is so since you and whether you have specific regulations as to accountability for monies received for services from clients, such as keeping a separate account for these funds and a series of other strategies for avoiding suspicion of wrong-doing, and also to avoid sanctions – and I should point out that, in the case of the U.S., at the American Bar Association this type of violations was also one of the most frequently heard in cases against attorneys.

Acting against the interest of a client... I would like to make this point very clear, because this would make the attorney liable for damages. This is something that has been seldom seen in our country, and that is to file a civil suit against the attorney for damages. Because if the attorney acts in such a way that it causes demonstrable damages to his client, then this gives way to a civil action to repair those damages. But I remember that 2 or 3 decades ago there was a heated discussion about how difficult it was, for example, to prosecute doctors for criminal medical malpractice, and why was it difficult? Because very few doctors were willing to report that their colleagues had made a mistake. But even given this explanation, which is not completely valid, I don't know that it has kept cases from

being filed. But there is a perpetual inhibition by clients to file civil suits against their attorneys. This is a phenomenon for which I have no explanation, but which should be studied further, particularly in light of what we were saying at the beginning, referring to the fact that in all our countries the number of lawyers is ever greater as more and more Schools of Law are giving out Law degrees to more and more people in each of our countries. I'm sure this will be an important field of study for our colleagues, it something to think about.

I would also like to point out that the lack of the right information about the results of professional endeavors... this is an issue that comes up very often... that perhaps what affects the client the most is not only lack of information, but the quality and timeliness of the information. These are very important aspects for achieving what in modern management is called customer satisfaction, and a concept that we need to start to understand that it does apply to the legal profession and with full force.

Ethics and Professionalism in the Judicial system. During the last few years, our country has joined the debate of Ethics control of the activities performed by judges public officials within the judicial system. In 2003, our Supreme Court passed a document entitled "Principles of Judicial Ethics". This document establishes an Ethics Control Commission, as well as who would be in charge of the Ethics Commission. The basis for its creation - I'm going to read a paragraph from the document - are as follows: "Whereas the judges, aides in the administration of justice, and other employees are required to behave appropriately both in the execution of their duties and in their social life, now therefore this Supreme Court finds it necessary to implement a series of principles and guidelines already contained in the different legal provisions to regulate this activity, in order to place justice in the hands of public servants with unquestionable technical, professional, and ethical capacity, such that they are able to meet the ever increasing demands of society that come before them to be decided upon. As a result, it is necessary to define some of the concepts and norms that are the foundation of this regulation and that guide these activities without prejudice to the powers, duties, and prohibitions set forth in the applicable laws.

This is how the Supreme Court expressed the foundation for establishing an ethics control system, for not only judges, but also justices, and other legal system officials and employees. This Ethics Commission, or rather, the actions of this Ethics Commission, was defined by the Supreme Court by means of certain principles to be observed. I personally think it took a risk, by conceptualizing in the simplest terms, which are listed in this next slide: dignity, integrity, independence, dedication, seriousness, respect, and reservation.

The document drafted by the court conceptualizes each of these elements. And I personally believe it took a risk, because given that what this commission does is to assign liability, within its scope, of the actions of anyone within the judicial system, and it might not be enforceable if a violation is reported, and said violation is not expressly included in these conceptualizations... that to me is a limitation. I think it would have been better to perhaps mention those principles in a very general sense, but to have the content be drafted by the Ethics Commission as it started hearing specific cases. I think that would have been a better formula to avoid having some people be able to get away with something without being sanctioned because of some technicality in how it was interpreted.

Another complication caused by the implementation of this system by the Supreme Court is that this Commission that it created is an organism that simply helps the court, which is the one who has the final decision on disciplinary matters; that is, when the Ethics Commission issues a finding it has two options, either it dismisses the case or it turns it over to the court for disciplinary action; thus the court has been given the decision in advance as to whether to discipline the public servant or even remove him from office when it is within the power of the court to do so. This causes duplicity of review and duplicity of decision. This is, in my opinion, a good definition of what happens, because when a case is presented against someone, they have to be subjected to 2 proceedings: the Commission hears the case first, and then turns it over to the courts, who hear it again, with the same result, or with in all likelihood the same result.

So, in my opinion there is – and perhaps now I’m speaking as a defense attorney – the right to a proper defense is not clearly set forth in the document I have been telling you about. The investigation is a closed investigation, the evidence against him is not made known to the defendant, and so he is precluded from being able to mount a proper defense, a material defense, as it is called in academic and debate circles. So, the defense is severely limited in this process, but we expect the judiciary, albeit whatever internal conflicts it may have, to guarantee anyone accused in this type of proceedings their due right to a proper defense.

Very well, moving on with the topic of this series, I would like to talk to you about some of the innovations, some of the next steps that have been taken in our country to improve the ethical and professional behavior in the practice of law.

In 2003, a bill was introduced in the Ministry of Justice for a new Professional Ethics code for those in the legal field. This code of ethics was drafted by a commission created by the Supreme Court and made up of the deans of all the schools of law throughout Chile; the person who oversaw the drafting of this bill was the dean of the Valparaiso Catholic University Law School.

This law... well, this bill, actually, was submitted to the Ministry of Justice. I remember that there was a ceremony held at the headquarters of the Bar Association – because this time they did include a representative from the Bar association in the mission – however, to date I have not heard any further news about it. The issue here was that the interests of the members and the political will to truly work for everyone’s interest are not always as aligned as we would like.

But it did lead to something more palpable. There is a new bill for mandatory bar membership, by a constitutional Law professor from Chile University Law School, Professor Jorge Mario Pimsio. His proposal, tied to the Bicentennial (we will be celebrating the Bicentennial of the Republic of Chile in 2010), is a series of constitutional amendments to perfect the constitution that governs us today. And this bill includes a Section on mandatory Bar membership. Now, keep in mind that this bill was born in academia, I mean, it’s there, it exists, it is known, but its being adopted and becoming a reality is still far from happening, as far as I know. Hopefully I’ll have more news in the future.

There is also a contribution by the institution where I work, linked to the discussion in Chile about legal ethics. In the year 2000, as part of the gradual implementation of the criminal procedural reform, the institution where I currently work, the Public Defender’s Office, was created, and we started working right away. Slowly at first... to give you an idea, in our first year of operation we had 26 attorneys defending in two small regions, one in the southern border and another in the north... today, since June 2005, with the Reform, we now have a Public Defender’s office everywhere in Chile, with a total of 460 public defenders.

OK, very quickly... With attorneys having to perform their duties in this new setting, one different to the one we were accustomed to, with a different procedural approach, an adversarial justice system, which allowed oral arguments and with new inter-relation dynamics between district attorneys and public defenders, an environment of consensual justice – with the different alternatives it brings – meant that the defense attorney now had to face different challenges, and so, a discussion started within our Institution as to how to resolve these. The creation of an Ethics Commission within our Institution was proposed. Well, it has become a reality and I have the good fortune of being part of it. We are hearing the concerns of defense attorneys, heads of the different units, and from other professionals in each of the 14 regional defender’s offices throughout the country. And this Ethics Commission issues rules that are made available upon request, and also records them as guidelines to create a sort of compendium, which is very small thus far, but which (we hope) will grow with time and will serve as a guide for defense attorneys to use in ethics matters.

To illustrate, I would like to share the example of the issue of conflict of interest. As we well know, resources are always scarce, and so there are not always enough defense attorneys at a given location, and so suddenly there is a case and there are several people accused of a crime, and the public defender assigned to interview them for the initial hearing realizes that there is a conflict of interest between two or more of the people he is to defend. Well, the initial reaction is “well, we do

not have another public defender, so..." and so we're wrong from the outset. Then, we have this risk of acting with conflicted interests. Where do we draw the line? This is one of the issues that the Ethics Commission has been working on. We want to detect this conflict of interests from the beginning, such that if a public defense attorney should suspect even the possibility of having opposing positions between one defendant and another he is representing, in other words, as soon as he discovers that there might be a conflict of interest, to let the court know about it to avoid even the appearance of impropriety. Once the defense informs the court that there is a conflict of interest, then the court is aware that one of the parties may be more at fault than the other, or may in fact be the true perpetrator, or whatever the case may be. This is just one of a million situations – in the defense alone – where a conflict of interests may be present in the life of an attorney. Let's say, for example, that you are interviewing your client, and that the client starts to provide information about the co-defendant, damaging information; how do you stop the interview to request that the other party be represented by a different attorney? What happens, as a defense attorney, is that you receive information, and once you have it, it is humanly impossible to ignore this information you are already aware of in the execution of your work further down the road. This is an issue that's tied to the activities of the criminal public defense; it is important, and it's something new in Chile, that came about with the criminal procedural reform and which we are not used to yet. With that, I get to a second point in which the acts of a defense attorney enter into conflict with the ethics regulations currently in effect in our country.

The current Ethics Code defines an attorney as an aide in the administration of justice. But if we look at what the criminal defense attorney does, we see that it is a service provided in the best interest of the client, and the interest of the client – if we do not carefully define what exactly is that administration of justice referred to in the regulation – one could think that most of what a criminal defense attorney does violates legal ethics. To resolve this problem, our proposal has been to have a precise definition of what 'administration of justice' means. Because the way the regulation is written could allow an attorney to do things during the case that were not in the best interest of his own client.

There are, in my opinion, two factors that come into play to justify that the role of the criminal public defender as an aide in the administration of justice refers to a concept of justice that excludes the role of helping incarcerate the guilty. Why? Because we have, on the one hand, the legal right of the accused to remain silent during every phase of his case, and that silence does not only apply to not being able to take the stand voluntarily refusing to take the stand, but for that silence to not be able to be interpreted as an admission of guilt. This extends to a whole other series of activities; for example, an argument we had against a strategy that is often used during the investigation phase of a criminal case, which was called "crime scene reconstruction". In this case, the accused was taken to the scene of the crime and was asked to reenact the facts that led to his being accused. Since the beginning of the reform, they agreed that yes! The accused had the right to remain silent, but that he was obligated to reenact whatever did, or did not do to recreate the facts during the investigation. What we later argued is that any action, any reenactment, is something the accused has the right to refuse to do, since he is not obligated to carry out any activities that might incriminate him. His right to remain silent extends beyond just statements. And if we combine that with the undeniable attorney-client privilege, we have that if our client has the right to remain silent and we have the obligation to keep the information he provides a secret, then we cannot on the other hand become aides to that old concept of 'administration of justice' that includes achieving an incarceration sentence against that person.

This is another one of those cases that is being discussed, and the discussion has been led by those of us who work as criminal defense attorneys. 58:40

I would also like to add that, once the procedural reform went into effect in Chile, those who had only looked at this new system as a system that would more efficiently resolve legal issues, and did not take into account that protecting the rights of the person would become part of this new system quickly became its strongest critics and started submitting counter-reforms. That is, to reduce the number of individual 's rights, increase the powers and discretion of the police, do away with limitations on the powers of district attorneys, and even to the extreme of wanting to eliminate the principle of objectivity.

So, my point is that the public criminal defense has assumed the role – in the parliamentary discussion of legal reform bills – of continually defending the rights of the accused. This is why we have continually sought to learn the experiences of other countries with which we have done joint studies as to our goals in this legal reform, to be able to collect this information from the study communities and be able to present it as referendum in the parliamentary discussion of this reform bill.

It is important for someone to raise their hand when the discussion only seeks to facilitate prosecution, to raise their hand for legitimate reasons; I always add that because we as defense attorneys have this posture because we are citizens, and we believe we have the right to a quality criminal defense because in the end we realize that, statistically at least, there is a good chance that we can become defendants in a criminal case ourselves. And so we want a quality prosecution, but we want it to be a prosecution that is respectful of the rights of individuals, and if we do not have a referendum for the political authorities and the parliamentary authorities to hear this ‘voice of the system’, then we could end up with strong counter-reforms that could undermine the efforts being made by our government to improve the quality of our criminal justice system.

Now, I would like to point out that not everything is so dark in Chile in regards to this topic. In the year 2005 constitutional reforms were made that gave back to the professional associations the status of juridical persons of public law and left the possibility that those same professional associations and their ethic courts could go back to applying effective concrete penalties. 00:45

However, this constitutional modification maintains the freedom of association, maintaining the voluntary affiliation and leaving to the creation of the law of the special ethic courts, the ethic control of the professionals that are not members of the professional associations. And here comes the part that allows us still to maintain some cynicism in regards to this matter, and it is that it has been already two years since the constitutional modification and still the processing of the law that gives creation to these special courts hasn't started yet.

Finally I believe that the clock is ticking, so I'll move faster to the conclusion. 01:46

I also had there a point in regards to opinion. On the 17th of this month, there is elections in the bar association and there are 3 lists fighting some positions that are open in the council. And it appeared in the newspaper “El Mercurio”, which is the most important newspaper of our country, a letter signed by some academic colleagues where they propose certain points, which are precisely linked to the desire that I have manifested here in all my presentation of recovering the mandatory affiliation. To understand that the exception for the constitutional freedom of association is valid. Topic that Yes! The professional associations have a concrete possibility of controlling from the deontologist point of view the professional activity of a lawyer. 02:45

And finally and already summarizing to the maximum my presentation, I would like to say that while preparing this assignment and presentation, I demonstrated some ideas that to my judgment are very important to be able to understand this phenomena and that I repeat a little of what I mentioned previously, about the characteristics of the ethical dilemma. 03:14

That the ethical dilemma, according to the U.S. professor Rushworth Kidder, who is the director of the New England Ethics Institute and who has participated in several seminars in Chile in regards to the topic of ethics, but more linked to the area of journalism and not specifically law, he states that: the most critical problem of the ethic dilemma is that normally the discussion does not happen between the good ones and the bad ones. It doesn't happen because usually when there is a discussion between the good and the bad ones, the rule is that we find a legal regulation that solves the problem. It either prohibits or penalizes the incorrect conduct. The problem with ethic dilemma exists because there are conflicting values and both sides hold some validity. So, the question as to who has the valid posture in this dilemma, can be approached with more precision by those who are closer to the phenomenon. If the problem of the ethical conflict is produced inside the area of the attorney's professional practice, those who have a stronger legitimate force to pronounce themselves in regards to this dilemma are the lawyers themselves. 04:46

So, if we can achieve in our country's evolution to be able to regain all that I have proposed here as the ideal, we could again have a system that permits the self-regulation, which is what professor Kidder manifests as his ideal to solve the ethical problem. 05:11

In our case the self-regulation must be not individual but through the union. That the lawyers ourselves can have the real and concrete faculty to pronounce ourselves in regards to this conflict, of such reduced characteristics and confusing possibilities of solution. If those solutions are not made by someone close to the problem, huge mistakes could be made. And that is why in my opinion it's so important that there is a real possibility of a deontological control in the case of the lawyers for our country. 05:54

I appreciate again the opportunity. Thank you very much to all of you! I hope you have shared some of these ideas and that you can transmit them in whichever way they can be valid in your own reality. Thank you very much! 06:10

### **Question and Answer Session**

Thank you very much! Your presentation in this topic was very interesting, and especially very current. And well, we will now open the floor to questions and answers. 06:43

If someone wishes to ask a question, please raise your hand. 06:52

**Q:** Doctor, my warm and cordial congratulations for the excellent and well-organized lecture that you have kindly presented on legal ethics. I would like to ask you what problems arose in Chile during the dictatorship in regards to the ethics in legal practice? What happened to the attorneys with the repression towards the professional job of lawyers? I don't know if you would like to add a brief comment on this point. Thank you very much! 07:36

**A:** The truth is that I do not know of discussions provoked by the whole exceptional situation from the point of view of the normality of the rule of law that was experienced during that period of time in my country and if it has any chapter within the bar association. I would say that the constitutional modifications were another chapter for more.....subtracting power to a union association as the bar. But I had to relate this with some activity that the bar association would have developed and that would stimulate this decision of those who wrote constitutional laws to prevent this mandatory association and start acting as a union. There has not been discussions on this topic in my country, but yes in regards to how the justice courts acted in front of the requests of the disappearances of people, as it is named in my country, or of political antagonists. But in the area of bar association and the union lawyer's performance, there is nothing in the subject that I could quote as something concrete. 09:09

**Q:** Participant; Doctor, many Congratulations for the conference! In Mexico, the main legal argument for not having mandatory affiliation is the freedom of association. What is the legal, not political, argument of this topic in Chile? And I would like to add a commentary. In Mexico we have at least 800 law institutions with a registration of more than 250,000 students; then the numbers are way higher than what I had mentioned. Thank you very much! 09:50

**A:** The right of freedom of association is the constitutional regulation that was incorporated in the constitution in 1980 and that contemplates the freedom of association as a constitutional right. Therefore it's a constitutional disposition that is solidified by the act of the law that eliminates the mandatory affiliation and eliminates a series of characteristics given to the professional associations. The legal personality of public law is eliminated, it must be organized as an organization of private law and that is why union associations require another legal regulation. I don't know if this answers your question. 10:46

**Q:** I would just like to make a comment. The data that we have about the number of lawyers is based on a study made trying to estimate the number of lawyers, but as I mentioned, the data and numbers we have are estimations, because there isn't a registry of those who are currently active. I have a question, if I'm allowed to make a question from the table. For me it is not clear, if it was the intention of the law of 1981 to basically limit lawyer's activities? Was an action of the dictatorship to prevent the mobilization of the lawyers as an organized group? As we currently see in Pakistan, lawyers that are organizing themselves against the government, if this was, let's say, an act of prevention from the dictatorship? Or if instead it was based on some kind of argument, as the Professor said, on the right of association or if it was used as a pretext of constitutional law or of freedom of expression, etc. 12:32

**A:** I think I can repeat to you what I answered to Professor Daniel Solorio's question. I believe and I may be wrong, maybe I wasn't a direct witness of the facts and it may be that some background detail is escaping me that's not part of what I studied to prepare this lecture. What I observe in this is a modification. In reality it was the job of a committee, not democratic. That committee was elected by the dictatorial government and locked themselves up to write a new constitution and that new constitution of the year 1980 includes in a very strange way, very liberal principles, I would say. Then, the same dilemma that we had in our country during the military dictatorship, produced the decision in regards to financial organization, which was of a pronounced liberal tendency. Even the school, the alma mater of the economists who participated was the school of Chicago and the economists who assumed jobs in that period of time were named the Chicago Boys. And I would say something similar happened in the constitutional area and I believe that, if there would have been a strong and decisive activity from the bar association to become a referent of powerful opposition to the government, I could suspect that there was something of this behind it. But, this affected all the professional associations in the same way, and I don't have, as of today, elements to affirm something like what you express. But without a doubt, it meant a very concrete prejudice for what should be the ideal of the deontology of all the liberal professions. 14:48

**Q:** I first want to congratulate you for your intervention. Two questions; the first is: besides being a lawyer, having your professional title in Chile, to perform the job of defender either private or public, are there some other legal requisites that are required, specially in the criminal area, pre-requisites to be able to perform this type of service? This is my first question. My second question is: I believe I understood, if I didn't you can correct me, that the reform of the criminal justice system in Chile, it was seemingly wrong in terms of what it offered but that at the moment it seemed ideal to be able to convince, but that it was inadequate in the sense that it wasn't aligned to the truth exactly, and that maybe there was not enough attention paid to the real reasons for a change in the new justice system? This questions, I would like it if you could go into it a little bit more in regards to your concerns, because as you know, Mexico has been contemplating a lot what we call oral and clear trial. I think that a big part of the Republic is extending more and more the correct ideas of what the change really means. But still there is a lot of misinformation and I still believe that many parts of the Republic, even academics, even judges, not to mention the public, I believe that precisely the oral trial is something of logic limitation or not of what would be understood to be the north American criminal trials, on one side. On the other side, that it would be much faster and that it would be a much more effective criminal pursuit. Meaning, the ideas are still pending, so here in Mexico there's a lot of interest in what is the right and honest strategy to be able to promote this reform.17:11

**A:** Thank you very much for your questions. They are both very interesting! First of all, the defense in the criminal justice requires only that the lawyer that acts as the defender have the professional title. And why was it presented in these terms? Because the defense practiced either by the bar association through the law firms and later on by the corporation of judicial assistance, practiced the criminal defenses through the work of law graduates, following the pre-requisite of their professional practice to obtain the title. And that in most of the countries, it was completely logic that the person who acted as a court defender would be a titled lawyer, and in Chile they are the highest percentage. We all know that the clients of the criminal system are not commonly the ones that have resources to pay for a lawyer, so these people were attended by the candidates to the title of lawyer, or by those coming out of an institution that still exists that is called "shift attorney" and that is a position for those lawyers who don't have any other profession and that is their work. Shifts are organized by the superior courts

in different types of areas. Now, the established pre-requisite is to be a lawyer with a title, but there is a derived consequence of regulations contained in the criminal process code. There is the position of the judge, of any judge of the criminal area, whether it is a guarantee judge which is the one that acts in the preliminary phase, or the judges in the oral court, which is a collegiate court made of three judges (the Chilean system has no jury) that can declare at any moment the abandon of the defense. And that abandon of the defense can be founded out of lack of knowledge or out of lack of abilities to perform in the defense of the person accused of a crime. Then, the creation of the institution of public criminal defense to comply with the state duty of giving a service of defense, not only contemplated the part of having a team of certified lawyers, but also very well trained lawyers in the new regulations of the law, in all that has to do with the annexed activities of the defense that before weren't part of it, like the investigative activities, the relations with the witnesses, abilities to interview, and finally also with a very developed knowledge of the criminal regulations. And why? Because there is permanently the possibility of being a constitutional control over the quality of the defense. Because of this, the lawyer for the defense must perform in a standard of quality that will allow the judge to understand that there is equilibrium between the posture of the defense and the posture of the defendant. Now there is an annexed element to this and that is that the federal public defense in Chile is a mixed system that combines functionary lawyers with hired lawyers, through a process of bids so that they attend a certain number of cases per unit of time. In the case of hiring the required lawyers, the institution performs ability tests and these have already been done in our country three times, where any lawyer, if it passes the tests, is allowed to show up to be part of the studies or of the groups of lawyers that make a bid. So we also have our own filter to make sure that the defense lawyer for the public defense office, is an attorney, not only with the title, but also that is adequately trained to perform. We have seen in the area of the private practice attorneys declaring abandon of the defense. Unfortunately there are colleagues that go to an oral hearing without the appropriate knowledge or the appropriate experience. Then we see the results from the abandon on the defense, like for example the suspension of an oral hearing, they have notified the public criminal defense so that we can assign a lawyer and that lawyer needs to take the time necessary to be able to continue with the trial. That is the first concern you expressed to me. 22:49 The second one, I would say it is a very interesting element and it allows us to understand why in our country the new law regulations that served as a fundament for the reforms, were approved unanimously by the parliament. That is to say, all the political body concurred to reform the criminal legal system. I would say that the conservative group looked at this project like an opportunity for a more effective system of criminal persecution, and the progressive group saw it as a system in which the guarantees and rights involved in the criminal conflict were effectively respected, mainly the representatives that were the ones that had the weakest position in the anterior system, but also the victim with a public attorney that is destined to represent his interests in the legal process. So, it wasn't a matter of discourse, but it was a matter of each one from their particular point of view chose it as a positive element and promoted to approve this reform. 24:04

**Q:** Why would then there be the reaction ... was there a misunderstanding?

**A:** I know there are journalists present here, but I believe that there's an important responsibility in the way that journalism generates attention from the public in a determined situation. And in the areas of criminal justice we have a phenomenon that happened very often and that is that a person charged for a crime arrested by the police would walk out to his house, while the case was still open, with the precautionary measure different that the one that would be used today, and that created a scandal. That kind of things started to generate a posture that some politicians pretended to use for their own benefit. And that is what happens when there's a striking case and then some extreme critic takes a posture in some jurisdictional decision and very quickly it turns into a political issue, ready to obtain a benefit. 25:21

**Q:** And with that we will close this keynote presentation, but not without first giving a deserved token of appreciation to our presenter, by the hand of professor Roberto Villa Gonzalez and on behalf of the Director of this School. It reads, verbatim: 2007, year of the 50th anniversary of the Autonomous University of Baja California; Autonomous University of Baja California School of Law, Mexicali Campus, gives this token of recognition to Dr. Claudio Pavlic for having delivered the interesting keynote lecture entitled, "Legal Ethics in a Comparative Perspective: the case of Chile", celebrated on Wednesday,

May 9<sup>th</sup> of this year in the Main Hall of this School of Law, for the teachers and students of said School at this University. Sincerely, for the full realization of man, Signed by Professor Ma Aurora C. Berúmen, School Director, and Mr. David Shirk, Director of the Trans-border Institute at the University of San Diego; once again, it will be professor Roberto Villa González who will deliver this award.