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Resolving Multinational Ethical Issues: What Law Applies?

Your company has its headquarters in Paris, with operations in Florida and Southeast Asia. A factory accident occurs in Asia. Litigation is inevitable. You find the former factory manager, now retired in Florida, and want to interview him and have him available as a witness. He is essential to your defense. He refuses to cooperate with you unless you pay him $500 per day. Making such payments is strictly prohibited in some countries but permitted in others. Pay him or not? Your local counsel in Asia advises you to take statements from the injured workers, even though they have counsel, because there is no local equivalent to Model Rule 4.2, which would prohibit contacting represented parties without the consent of their lawyers. Take the statements or not?

By John K. Villa

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The answers to these questions depend upon what ethical rule applies to your conduct. In multinational operations, there is currently no clear answer, but help may be on the way.

The starting point for choice of law questions involving the application of the ethical rules is Rule 8.5 of the *Model Rules of Professional Conduct.* Subsection (b) of this rule provides:

> In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
> (1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rule of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
> (2) for any other conduct,
> (i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and
> (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.[1]

On its face, Rule 8.5(b) seems to resolve any choice of law issue involving practice in multiple jurisdictions, although such is not the thrust of the current official commentary on 8.5(b). Restating 8.5(b) simply, if the conduct in question pertains to a matter before a particular tribunal, the rules of the tribunal will be controlling; otherwise, the law of the jurisdiction in which the lawyer is admitted or principally practices will govern, unless the conduct in issue clearly has its "predominant effect" in another jurisdiction in which the lawyer is licensed to practice.

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For multinational ethics issues, the rub is the commentary accompanying Rule 8.5. Comment 5 states that this choice of law provision "is not intended to apply to transnational practice."[2] Instead, "[c]hoice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law."[3] Although the existence of agreements and/or international law may ideally provide a workable means for resolving choice of law problems arising in transnational practice, the author has uncovered no agreements or international law that provide rules for answering this type of problem.

So how have the courts handled this dilemma? In situations in which a dispute in the United States has been affected by an issue involving a foreign lawyer and a foreign client, the few reported cases that have addressed the question have not surprisingly reached different results. They may, however, have adopted a common analytical approach.

In *Image Technical Services, Inc. v. Eastman Kodak Co.*,[4] for example, the issue involved the validity of an oral waiver of a direct conflict of interest that had been obtained by the Hong Kong office of a multinational law firm from a corporate client operating in Hong Kong. Because a suit was pending in California, a state whose ethics rules required written waivers of direct conflicts, the defendant moved for the disqualification of plaintiffs' counsel, arguing that the oral waiver was not sufficient. In granting the defendant's motion on the basis of California's ethics rules,[5] the federal district court rejected the contention of plaintiffs' counsel that the California rules were inapplicable to the conduct of counsel who acted wholly outside of California and who were not members of the California bar:

> This argument is without merit. First . . . the standards of professional conduct *before this court* are those applicable under the California Rules of Professional Responsibility. Second, by Coudert's own admission, the disclosure made to the Hong Kong Eastman Chemical officials was that the San Francisco office would participate in briefs before the Supreme Court. Aside from the fact that such a disclosure is insufficient to meet Coudert's duties to its clients . . . the disclosure about the San Francisco attorneys directly raises the duty of attorneys who are members of the California bar.[6]

Even though it could be argued that American courts should respect the ethical norms of a foreign jurisdiction, particularly when the rule governs conduct in the foreign jurisdiction between clients and their lawyers who do business within that jurisdiction, the decision in the *Eastman Kodak* case may be supported, in part, by the general principle, reflected in subsection (b)(1) of Rule 8.5, that the rules of the tribunal trump the rules of other jurisdictions.[7] As demonstrated by the decision of another federal court, however, an alternative approach for resolving this issue is possible—with potentially different results.

In re Potash Antitrust Litigation[8] involved a class action antitrust lawsuit brought by fertilizer producers in the United States against several potash producers, some of which were Canadian corporations. At issue before the court was the defendants' motion to prevent from acting as a consultant for the plaintiffs a Canadian lawyer who was the former general counsel

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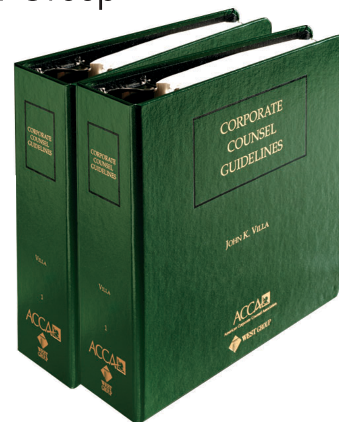

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for one of the Canadian defendants, but who was not counsel of record. In ruling on the motion, the court held that the Canadian—not American—ethical rules applied to the issue of the Canadian lawyer's disqualification. The reason was that the lawyer was not licensed to practice before the court and that the conduct in question implicated duties and principles to which the lawyer was bound as a Canadian lawyer.[9]

As one can observe, the two courts in effect applied a Rule 8.5(b) analysis without specifically saying as much. Despite the paucity of case law addressing the issue, the rule that can be gleaned from this meager precedent is that choice of law principles applicable in actions involving multinational practices should be the same as those that govern multistate ethics problems[10]—notwithstanding the disclaimer in the commentary to Rule 8.5.

This sensible approach has been advocated by the Section of International Law and Practice ("SILP") of the American Bar Association, which has urged the Ethics 2000 Commission of the ABA Center for Professional Responsibility to change the commentary to the rule to read as follows:

> The choice of law provision in Rule 8.5 applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between competent regulatory authorities in the affected jurisdictions address the issue and provide otherwise.[11]

As recognized by SILP, the practice of law today is increasingly transnational in nature; consequently, clearer guidance is necessary on how to resolve conflicts involving the ethics rules of various national jurisdictions.[12] Applying the "predominant effect" principle set forth in Rule 8.5(b)(2) to the conduct of transnational lawyers, unless contrary to applicable international laws, treaties, or agreements, would, as SILP stresses, provide the guidance lacking in the present formulation of the rule.[13]

Although the Ethics 2000 Commission has recently recommended that the commentary to Rule 8.5 be amended in the manner suggested by SILP, the issue has not been resolved but is still under review by the Commission on Multijurisdictional Practice of the ABA.[14] In the meantime, therefore, lawyers engaged in transnational practice should adhere to the law and disciplinary rules of their licensing jurisdiction, unless those are contrary to the law or ethical rules in the jurisdiction in which an action may be pending on behalf of a client. To do otherwise could subject lawyers not only to disciplinary action, but also to sanctions that could have significantly adverse effects on the lawyers' ability to represent their clients.[15]

ACCA MJP Advocacy

ACCA supports multijurisdictional practice ("MJP") reform to Model Rules 5.5 and 8.5, among others. As of the date that this issue of the *ACCA Docket* went to press, the ABA MJP Commission proposals that Mr. Villa refers to in his Ethics & Privilege column were not yet finalized, but by the time that you read this column, they should be final and available for viewing on the ABA MJP Commission website at www.abanet.org/cpr/mjp-home.html. If the Commission's proposals are passed by the ABA House of Delegates in August at the ABA Annual Meeting, the new model rules and comments would be offered to states for their consideration and, we hope, adoption.

NOTES

1. *ABA Model Rules of Professional Conduct*, Rule 8.5(b) (2001).
2. *Id.*, cmt. 6 (emphasis added).
3. *Id.*
4. 820 F. Supp. 1212 (N.D. Cal. 1993).
5. *Id.* at 1218.
6. *Id.* at 1215, fn. 5 (emphasis in original).
7. *See* J. Villa, Corporate Counsel Guidelines § 3.02[B] (West Group and ACCA 2001).
8. 1993 WL 543013 (D. Minn. 1993).
9. *Id.* at *8.
10. Thus, a tribunal's ethics rules will govern the conduct of lawyers who appear as counsel of record in litigation before the court; in other cases, the ethics rules of the country in which the lawyer is admitted or principally practices will govern, unless the conduct in issue clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice. *See ABA Model Rules of Professional Conduct*, Rule 8.5(b), *supra* note 1.
11. *See* Letter of Daniel Magraw, Chair, and Robert Lutz, Chair-Elect, of the Section of International Law and Practice to the Members of the Ethics 2000 Commission, dated May 9, 2001, available at www.abanet.org/cpr/mjp-comm_silp.html.
12. *Id.*
13. *Id.*
14. *See* Center for Professional Responsibility, *Summary of House of Delegates Action on Report 401 during ABA Meeting in Philadelphia, February 2002*, at www.abanet.org/cpr/ethics2k.html.
15. *See* J. Villa, Corporate Counsel Guidelines, *supra* note 7, § 3.02[C].