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Mark I. Harrison

Mary Gray Davidson

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The Ethical Implications of Partnerships and Other Associations Involving American and Foreign Lawyers

Mark I. Harrison* and Mary Gray Davidson**

Abstract

This article addresses the impact of globalization on legal services and the ethical issues raised by the phenomenon in which U.S. and non-U.S. lawyers form partnerships and other associations. The article begins by noting the dramatic increase in the last decade of the export of U.S. legal services and the importation of foreign legal services into the U.S. The article addresses the basis for this phenomenon, providing statistics that show the shift in business and financial markets and explaining that lawyers have "followed the money." The article continues by noting the legal issues that arise when U.S. lawyers provide legal services in other countries, including affiliating with foreign lawyers, competency of the U.S. lawyer to advise clients on foreign law, and unauthorized practice of law. The article continues by analyzing ABA Formal Opinion 01-423 and its implications; this Formal Opinion directly addressed the issue of partnerships between U.S. and non-U.S. lawyers. The discussion of the "rationale" of the Formal Opinion 01-423 provides insight into the concerns of one of the members of the Committee that issued the Opinion. The final section of this article identifies other ethics issues that are implicated when U.S. lawyers form partnerships or practice law in foreign countries. This section discusses principles of competence, confidentiality, attorney-client privilege, conflicts, and unauthorized practice of law.

* Partner, Osborn Maledon, Phoenix, AZ; Member, ABA Standing Committee on Ethics and Professional Responsibility (1999-2002), which drafted Formal Opinion 01-423.

** Associate, Bryan Cave LLP, Phoenix, AZ.

I. Introduction

In 2002, American¹ lawyers exported more than \$3.27 billion in legal services.² That is two and one half times the dollar value of services exported a decade ago.³ U.S. imports of legal services also doubled in the past decade, from \$311 million to \$768 million.⁴

The rise in the export of U.S. legal services corresponds to the increasing levels of international business transactions. As U.S. companies seek to expand their business beyond U.S. borders, the demand has risen for lawyers conversant in the laws of other countries and international business law. U.S. law firms have responded to the ascendancy of the global economy by providing advice about foreign law to their international clients. It has also led to many U.S. firms opening offices in foreign countries in order to serve those clients. Initially, U.S. firms sent their U.S.-trained and licensed lawyers to practice in their foreign offices. More recently, U.S. firms have been partnering or associating with foreign lawyers to provide the expertise in the laws and practices of jurisdictions outside the United States. Likewise, foreign-based law firms are hiring American lawyers or merging with U.S. law firms to advise clients on matters of U.S. law.

This upsurge in the number of American lawyers and firms practicing law internationally has outpaced the rules governing the practice of law. In the past, legal services were generally local in nature. So too, individual states established the ethical rules governing the practice of law in the United States, with the assumption that lawyers licensed in a jurisdiction would limit their services to that jurisdiction. Case law in the United States has likewise tended to focus on the location of either the lawyer or the client in determining whether a lawyer advising clients across state lines has engaged in the unauthorized practice of law.⁵

The American Bar Association Standing Committee on Ethics and Professional Responsibility (“Committee”) issued a formal opinion in 2001 to address whether the trend among American law firms to form

1. This article uses the term “American lawyer” to refer to lawyers licensed to practice in a U.S. jurisdiction.

2. United States Department of Commerce, Bureau of Economic Analysis, Table 1: Private Services Trade by Type, 1992-2002 *available at* <http://www.bea.doc.gov/ea/di/1001serv/1003serv/tab103.xls> (last visited Jan. 12, 2004).

3. *Id.* U.S. exports of legal services in 1992 totaled \$1.35 billion.

4. *Id.*

5. *See, e.g.,* *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (1998); *see generally* Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT’L L., 1135 (2001) (discussing the drawbacks to the various tests used by U.S. courts to determine whether a lawyer has engaged in UPL).

partnerships with foreign lawyers⁶ violates various provisions of the Model Rules of Professional Conduct which prohibit the formation of partnerships with nonlawyers, sharing fees with nonlawyers, and engaging in or assisting others in the unauthorized practice of law.⁷ ABA Formal Opinion 01-423 recognizes the need for guidance on the ethical issues presented by the transnational practice of law. Part one of this article addresses the impact of globalization on legal services and the ethical issues raised by this phenomenon. Part two examines and considers the implications of the ABA Formal Opinion 01-423. Part three briefly discusses other ethical issues implicated when American lawyers form partnerships or practice law in foreign countries.

II. The Globalization of Legal Services

A. *Following the Money*

The past thirty years have seen a profound shift in business and financial markets.⁸ Businesses have expanded both their production and marketing beyond national borders. The globalization⁹ of the business and capital markets has led to new challenges for lawyers working in these fields, creating a need to understand both substantively and procedurally the laws of other countries.¹⁰ U.S. lawyers, for example, are now advising clients on international capital market transactions, a relatively new area of specialization.¹¹ In addition, American lawyers advise their American and foreign clients on more traditional matters such as joint ventures, cross-border tax issues, licensing and distribution

6. This article adopts the same definition of the term "foreign lawyer" used in ABA Formal Opinion 01-423 which denotes "a person who has not been licensed generally to practice law by any state, territory or commonwealth of the United States, but who is authorized to practice in a recognized legal profession by a jurisdiction elsewhere." ABA Formal Op. 423 (2001) n.3.

7. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 423 (2001) [hereinafter *Opinion*].

8. See generally, Mary C. Daly, *The Randolph W. Throver Symposium: The Role of the General Counsel: Perspective: The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1064 (1997).

9. *Id.* n.2 (defining *globalization* as a "multidimensional financial, social, and cultural phenomenon. Chiefly responsible for its genesis is the occurrence within a short period of time of unprecedented advances in telecommunications, transportation, and information retrieval systems as well as the political upheavals that replaced communist and social regimes with democratic systems of government and capitalist economic policies.").

10. *Id.* at 1065.

11. Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093, 1099 n.24 (2000).

agreements, mergers and acquisitions, privatizations and project financing.¹² The traditional client base of U.S. firms is also expanding and now includes public and private foreign entities as well as multinational corporations.¹³

To keep up with the demand produced by globalization, American lawyers are not only advising their clients on foreign law, but U.S. law firms are also expanding across national boundaries. A recent study of the foreign offices of seventy-two of the largest and most international U.S. law firms confirms that “as economic changes draw clients to new locations, lawyers follow.”¹⁴ The 2003 survey of the 250 largest law firms in the United States reveals that 105 of those firms now have foreign offices.¹⁵ The most popular foreign cities for U.S. firms are London, Brussels, Paris, Frankfurt, Tokyo and Hong Kong.¹⁶ Even in 2003, when the 250 largest U.S. law firms grew by only 1.6%, the lowest rate since 1994, the number of lawyers working abroad for those firms grew by 12.9%.¹⁷ One of those firms, Jones Day, merged with a 150-lawyer firm in London on January 1, 2003 and opened a 12-lawyer office in Munich that same day.¹⁸ As Jones Day managing partner Stephen Brogan told *The National Law Journal*, “[W]e are simply following our client base.”¹⁹ Likewise, U.S. firms have closed offices in locations where economic opportunities have dwindled, which has happened in several Central European countries.²⁰

In the past, foreign offices of U.S. firms were staffed by American lawyers from the home office.²¹ This “ensured quality control and supported the connection between the foreign and home offices.”²² Increasingly, U.S. firms are hiring locally-licensed lawyers, often not trained in the United States, to staff their foreign offices.²³ They may also hire foreign lawyers with U.S. graduate LL.M. degrees for their

12. *Id.* at 1099.

13. *Id.* at 1094.

14. *Id.* at 1108.

15. *Methodology*, THE NATIONAL LAW JOURNAL, Nov. 24, 2003, at S9.

16. *See id.*; Silver, *supra* note 13, at 1120 and Tables 1 and 2.

17. David Hechler, 1.6% Growth is Lowest Since 1994; The Biggest Firms' Total Head Count Was Flat, But Next Year Looks Good, THE NATIONAL LAW JOURNAL, Nov. 24, 2003, at S2.

18. Steve Scidenberg, *The Good and the Bad of Firm Mergers; No. 2 Jones Day Grew by 17%, while Schnader Harrison Shrank by 43%*, Special to THE NATIONAL LAW JOURNAL, Nov. 24, 2003, at S7.

19. *Id.*

20. Silver, *supra* note 13, at 1119.

21. *Id.* at 1145.

22. *Id.*

23. *Id.*

foreign offices.²⁴ This is the result, in part, of the perception that U.S. firms “need to have insiders in the various countries involved.”²⁵ On the other hand, some American commentators have questioned the quality of the legal services rendered in the foreign offices of U.S. firms populated almost entirely by foreign-trained lawyers.²⁶ As an increasing number of U.S. law firms attempt to meet the challenge of providing advice to clients transacting business in foreign countries, it is equally important to anticipate and address the legal and ethical issues implicated by this phenomenon.

B. Legal Issues

1. Affiliating with Foreign Lawyers

The Model Rules of Professional Conduct (Rules) do not specifically address affiliations between U.S.-licensed lawyers and foreign lawyers. The most relevant rule regarding the increasing association between U.S. and foreign lawyers is Model Rule 5.4, which prohibits nonlawyers from sharing in legal fees, being partners, or holding any other interest in an organization that practices law.²⁷ The

24. *Id.* at 1148 n.202.

25. *Id.* at 1145 n.196.

26. *See id.* n.202 (noting ABA’s uneasiness with the growing role of LL.M. programs for foreign lawyers).

27. MODEL RULES OF PROF’L CONDUCT R. 5.4 (2003) provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the state of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

key question for the ABA committee that issued Formal Opinion 01-423 was whether foreign lawyers qualify as "lawyers" or as "nonlawyers" for purposes of Rule 5.4. If foreign lawyers are deemed non-lawyers, then any partnerships or other associations would violate the rule against sharing legal fees with nonlawyers.

2. Competency of the American Lawyer to Advise Clients on Foreign Law

The Rules of Professional Conduct do not directly address the ethics of an American lawyer advising clients about foreign law. However, various rules are implicated when American lawyers practice law outside the jurisdiction(s) in which they are licensed. For example, Rule 1.1 requires that a lawyer provide competent representation to a client. The Comment to Rule 1.1 allows a lawyer to accept a representation where the requisite level of competence can be achieved by reasonable preparation or by associating with a lawyer of established competence.

Competence in the practice of transnational law requires that the American lawyer be aware of significant legal differences between the U.S. system of law and foreign systems. The distinction may be as basic as understanding the differences between well-developed common law traditions, as practiced in the United States and Britain, and civil law, as practiced in countries such as France and Spain.²⁸ Or, the lawyer may need to recognize the limitations of practicing in China's nascent legal system, where the attorney system was once viewed as "an instrument for striking the ruled class" and in which private law firms did not even exist until the 1980s.²⁹ These traditions can produce significant differences and even conflicts between U.S. law and foreign law.

Rules governing client confidences, such as Rule 1.6, or the evidentiary attorney-client privilege can vary widely between legal systems and, in some legal systems, may be non-existent. The American lawyer practicing abroad must be aware of and be competent to address all of these other issues implicated by the lawyer's assignment. Moreover, in fulfilling her duties pursuant to Rules 1.4(b) and 2.1, the American lawyer must be able to advise the client on the material differences between the law of the jurisdiction the client may be

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

28. See Olga M. Pina, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797, 800 (1988).

29. Yujie Gu, Note, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 DRAKE L. REV. 173, 191 (1999).

accustomed to and the law of the foreign jurisdiction where the client wishes to conduct business.

3. Unauthorized Practice of Law

When American lawyers advise clients on foreign law, they risk engaging in the unauthorized practice of law. Rule 5.5 forbids a U.S. lawyer from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction. The rule thus implies that the lawyer has a duty of due diligence regarding the rules in effect in the foreign jurisdiction, as well as the material differences in the laws of the jurisdictions, American or foreign, where she practices.

UPL issues are also implicated if foreign lawyers are not considered lawyers under Rule 5.4 because Rule 5.5 forbids American lawyers from assisting in the unauthorized practice of law by nonlawyers. Lawyers not licensed in the United States may be more like legal assistants or “paraprofessionals” to whom the American lawyer delegates work, while retaining ultimate responsibility for the work.³⁰ In that case, American lawyers may not share fees with the nonlawyers.

III. ABA Formal Opinion 01-423

A. *The Opinion*

The issues raised in the prior section are addressed by the ABA’s Standing Committee on Ethics and Professional Conduct in Formal Opinion 01-423 (Opinion). The Opinion concludes that forming partnerships with foreign lawyers is not prohibited by any of the Model Rules of Professional Responsibility, provided certain standards are met.

The text of the Opinion provides:

It is permissible under the Model Rules for American lawyers to form partnerships or other entities to practice law in which foreign lawyers are partners or owners, as long as the foreign lawyers are members of a recognized legal profession in a foreign jurisdiction and the arrangement is in compliance with the law of jurisdictions where the firm practices. Members of a profession that is not recognized as a legal profession by the foreign jurisdiction would, however, be deemed “nonlawyers” such that admitting them to partnership would violate Rule 5.4 (Professional Independence of Lawyer). Before accepting a foreign lawyer as a partner, the responsible lawyers in a U.S. law firm have an ethical obligation to take reasonable steps to ensure that the foreign lawyer qualifies under this standard and that

30. See MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. (2003).

the arrangement is in compliance with the law of the jurisdictions where the firm practices. The responsible lawyers in a U.S. law firm also have ethical obligations to take reasonable steps to ensure that matters in their U.S. offices involving representation in a foreign jurisdiction are managed in accordance with applicable ethical rules, and that all lawyers in the firm comply with other applicable ethical rules.

B. *Rationale for the Opinion*

As explained earlier, the Model Rules do not specifically address affiliations between American lawyers and foreign lawyers. However, the prohibitions of Model Rule 5.4 against sharing legal fees with nonlawyers forms the basis of the Opinion.³¹

The purpose of Model Rule 5.4 is to protect the lawyer's independence in exercising her professional judgment on behalf of the client, free from the influence of nonlawyers.³² That is why lawyers, rather than nonlawyers, must own and control law practices—to ensure that clients are protected by the professional standards governing lawyers. Rule 5.4 addresses the concern that nonlawyers are not trained in the law nor ethically required to observe and satisfy the standards set forth in the Model Rules of Professional Conduct.³³

The ABA Committee concluded that if foreign lawyers meet certain conditions, then they should be considered lawyers rather than nonlawyers for purposes of Rule 5.4.³⁴ The Committee reached this conclusion because it has consistently interpreted Rule 5.4 to primarily prohibit entrepreneurial relationships between lawyers and nonlawyers.³⁵ In fact, the ABA House of Delegates adopted Rule 5.4 because of threats to lawyer professional independence presented by corporate ownership or public investment in law firms.³⁶

By allowing only lawyers to own and control law practices, Rule 5.4 is intended to protect the lawyer's independence and to assure that clients receive the protections of the professional standards required of lawyers. The Committee opined that foreign lawyers who are members of a recognized legal profession in their home countries are presumably capable of according clients these same protections. The Committee determined, therefore, that Model Rule 5.4 does not prohibit American

31. See Opinion, *supra* note 9.

32. See R. 5.4 cmt.

33. Opinion, *supra* note 9.

34. *Id.*

35. *Id.* n.7.

36. *Id.* n.6.

lawyers from affiliating with foreign lawyers.

The Committee also found support for this conclusion in Model Rule 7.5, which allows lawyers to associate with lawyers in other jurisdictions.³⁷ The only limitation on such associations is that a firm specify on its letterhead and elsewhere “the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office [of the firm] is located.”³⁸ The Committee concluded that nothing in Rule 7.5 “or any other Rule, or in the legislative history of the Model Rules, suggests that the term ‘jurisdiction’ as used in Rule 7.5(b) excluded jurisdictions outside the United States.”³⁹

The Committee found further support for its decision in the 1993 ABA House of Delegates Report⁴⁰ which recognized the advantages of foreign lawyers assisting clients in the United States with issues of foreign law. Likewise, the report found it advantageous for American lawyers to advise clients abroad with respect to U.S. law.⁴¹ The rule adopted by the House of Delegates also allows licensed foreign legal consultants to be partners in law firms. The foreign lawyer is then subject to the licensing jurisdiction’s Rules of Professional Conduct and its attorney discipline procedures, as well as the attorney-client privileges and work product protection applicable in the jurisdiction.⁴²

Finally, the Committee stated that the prohibition of Rule 5.5 on the unauthorized practice of law⁴³ was not intended to preclude a foreign lawyer, who does not practice law in a particular jurisdiction, from being a partner or an associate in a firm with a presence in that jurisdiction. Rather, the Committee indicated that Rule 5.5 was designed to protect clients and the legal system from the adverse effects of incompetence or unethical conduct. Rule 5.5 achieves this goal by providing for attorney discipline for those who assist in the unauthorized practice of law or for violations of the admissions standards of a jurisdiction.⁴⁴

C. *Requirements under Formal Opinion 01-423 for Partnering/ Associating with Foreign Lawyers*

In order to qualify as a “lawyer” for purposes of Rule 5.4, the

37. *Id.*

38. MODEL RULES OF PROF’L RESPONSIBILITY R. 7.5(b).

39. Opinion, *supra* note 9.

40. House of Delegates Report 105E, Model Rule for the Licensing of Legal Consultants, August 1993.

41. *Id.*

42. *Id.* at §§ 5, 6.

43. Opinion, *supra* note 9, n.12 (the Committee notes that “‘practicing law’ is a regulatory concept dependent upon the law of each jurisdiction.”).

44. *Id.*

Opinion requires that the foreign lawyer be a member of a recognized legal profession in the affected foreign jurisdiction. The Committee recognized that the term "profession" has been subject to debate, and that there is no single definition of "legal profession" or even of "lawyer." But, generally, the Committee observed that a "legal profession" indicates a certain level of education and/or training, licensing in order to practice, ethical standards, and a system of sanctions for violating those standards.⁴⁵ This is ultimately a factual determination and must take into consideration the legal structure of the jurisdiction and the nature of the services customarily performed by the persons in question.⁴⁶ In general, a person who is trained to provide advice about the laws of the foreign jurisdiction and to represent clients in its legal system and is licensed to do so, qualifies as a foreign lawyer.⁴⁷

The Opinion also requires the American lawyer who affiliates with a foreign lawyer to take reasonable steps to ensure that the foreign lawyer qualifies as a member of a recognized legal profession in her own jurisdiction and is licensed or otherwise authorized to practice law in that jurisdiction. The responsible American lawyer must also ensure that the arrangement complies with the law of the jurisdictions where the firm practices.

The Opinion states that if professionals in a foreign jurisdiction are not members of a recognized legal profession in that jurisdiction, then those persons should be considered nonlawyers for purposes of Rule 5.4 and ineligible for partnership in a U.S. law firm. Foreign professionals in countries where there is no recognized legal profession would also fail to qualify as lawyers in the United States or for fee sharing in a U.S. firm.

Among the types of foreign professionals who would qualify as lawyers for purposes of Rule 5.4 are *avocats* (courtroom lawyers) and *conseils juridique* (transactional or business lawyers). Those who would not ordinarily be deemed lawyers include *notarios* (notaries), who perform very different tasks in civil law countries and are not the functional equivalent of lawyers. For example, in Belgium, lawyers may not effect transfers of real estate or authenticate signatures, as they may in the United States. These tasks are the monopoly of notaries,⁴⁸ and thus these practitioners are not lawyers within the meaning of the

45. *Id.*

46. Before reaching this conclusion, the Committee struggled with the question whether it could properly condone the association of American lawyers with lawyers in a foreign country in which the values and functions of the legal profession are materially different from the American legal profession.

47. Opinion, *supra* note 9.

48. *Id.* n.17.

Opinion.

The Opinion also recognizes that the law and ethical standards in foreign jurisdictions may differ greatly from U.S. law and standards. For example, the attorney-client privilege in civil law countries applies differently and is not available in all instances where it would apply in the United States.⁴⁹ The scope of client confidentiality in some foreign countries may also differ from U.S. jurisdictions. These differences would not necessarily disqualify a foreign lawyer from partnership in a U.S. firm. However, the American lawyer working on the matter in a U.S. office has an affirmative duty under Rules 1.4 (Communication) and 1.6 (Confidentiality of Information) to identify and explain any diminished protections to the client so that the client can make an informed decision about its representation in a foreign jurisdiction. In addition, responsible lawyers in U.S. firms must make reasonable efforts to ensure that client information in their U.S. offices is protected in accordance with Rules 5.1 (Responsibilities of a Partner or Supervisory Lawyer) and 1.6 (Confidentiality of Information), that conflicts are managed in accordance with Rule 1.7 (Conflict of Interest: General Rule), and that all lawyers in the firm comply with the applicable rules of professional conduct.⁵⁰

IV. Additional Ethical Implications for the American Lawyer Who Advises Clients on Foreign Laws

The following section outlines some additional difficulties confronting the lawyer operating across national borders. This section is not meant to provide a thorough discussion or analysis of any of these areas but, rather, to provide an introduction to some additional challenges confronting the transnational lawyer.

A. *The Challenges in Providing Competent Representation in the Transnational Practice of Law*

The very first rule in the Model Rules of Professional Conduct requires that a lawyer provide competent representation to a client. As discussed in Section II(B)(2), competent representation may be provided in a novel field through study or by associating with a lawyer who has the necessary skills. For the American lawyer who wishes to practice

49. *Id.* n.19.

50. *Id.* n.21. The Opinion refers to the Model Rules of Professional Conduct, if in effect in a jurisdiction. Otherwise, the Committee refers to the other ethical and disciplinary standards in effect in the jurisdiction. The Committee cautions, however, that it is not addressing the choice of law issues that may come into play when lawyers are engaged in a multinational legal matter.

transnationally, adequate preparation can be much more challenging than simply preparing to practice in a different U.S. jurisdiction. First, the American common law tradition is not as widespread as the civil law tradition. Under the civil law model, “codified law and tradition, and not case law precedent, form the basis of judicial review.”⁵¹ The common law court is bound by all decisions issued by superior courts, whereas civil law courts are more “imbued with the old positivistic idea that deciding a case involves nothing more than ‘applying’ a particular given rule of law to the facts in issue by means of an act of categorization,” ideally by applying the appropriate statute rather than rules or principles developed by the judiciary.⁵²

The two traditions also differ procedurally. Comparisons between the two traditions often describe the common law system as adversarial while the civil law system is inquisitorial. For example, lawyers in common law countries, such as the United States, play a key role in examining witnesses and presenting evidence to the court.⁵³ In civil law countries, by contrast, the lawyer’s role may be more circumscribed, with judges playing a lead role in questioning the accused. In fact, the practice of counsel taking pre-trial depositions of witnesses in common law countries may actually be unlawful in civil law countries.⁵⁴

Finally, in order to provide competent representation across borders, the lawyer should know more than just the laws governing the foreign system. Competency may relate to matters as basic as the ability to communicate in the language of the foreign jurisdiction. The effective American lawyer should also be able to assist the client in bridging what has been referred to as “the cultural gap,” that is, the “barriers to international business and trade that are created by differing cultural, social, political, and economic systems.”⁵⁵ As one commentator has remarked, “[t]he failure of a lawyer properly to understand the sense of different legal concepts or to adapt to different modes of practice in various parts of the world can cause negotiations to collapse, contracts to be drafted incorrectly, transactions to go awry, or for that matter can endanger the long-term viability of a valuable foreign investment.”⁵⁶

51. Lauren R. Frank, Note, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957, 966 n.58 (2000).

52. Zweigert and Kotz, *Law-Finding and Procedure in Common Law, Civil Law*, AN INTRODUCTION TO COMPARATIVE LAW 264 (1992).

53. See Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 688 (2000).

54. *Id.*

55. Roger J. Goebel, *Professional Qualification and Education Requirements for Law Practice in a Foreign County: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 447 (1989).

56. *Id.* at 448.

These non-legal considerations are implicated in Rule 2.1, which allows a lawyer to “refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

B. Confidentiality

Confidentiality rules can vary widely between U.S. and foreign jurisdictions. Model Rule 1.6, for example, proscribes American lawyers from revealing “information relating to the representation of a client unless the client consents after consultation.” The rule contains exceptions and, for example, allows American lawyers to reveal confidential information when necessary to prevent a crime or for the lawyer to establish a claim or defense in a controversy with the client. The general duty against revealing confidences, however, continues even after termination of the lawyer-client relationship.⁵⁷

But U.S. firms practicing in China, for instance, may encounter vastly different rules concerning client confidences. At one time, Beijing even sent orders to foreign law offices in China requiring quarterly reports on information usually considered confidential by American lawyers such as “client lists, locations of projects under consideration, affiliations with Chinese law firms, business reference lists, and the value of deals in negotiations.”⁵⁸

By contrast, in predominantly Muslim states, a Muslim client may actually “expect a *higher* degree of confidentiality than [the American] lawyer is accustomed to.”⁵⁹ The international lawyer must anticipate and be able to navigate through these different legal systems.

C. Attorney-Client Privilege

The attorney-client privilege is another example of divergent norms. In the United States, the attorney-client privilege is the oldest evidentiary privilege affecting disclosures in U.S. law.⁶⁰ The purpose of the privilege is to encourage clients to provide full disclosure to the lawyer in order that the lawyer may provide appropriate advice.⁶¹ Within the United States, the privilege applies to both in-house counsel and outside

57. Model Rule 1.6 cmt. 21.

58. Yujie Gu, *supra* note 31, at 186-187 nn.147, 148.

59. M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 TEX. INT’L L.J. 289, 314 (2000).

60. See *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995).

61. *Upjohn*, 449 U.S. at 389.

counsel.⁶²

Outside the United States, however, the rules sometimes distinguish between the application of the privilege when the lawyer is in-house counsel rather than outside counsel.⁶³ As recently as the late 1990s, seven member states of the European Union (Austria, Belgium, France, Italy, Luxembourg, The Netherlands, and Sweden) did not recognize the privilege for communications between in-house counsel and a corporate client.⁶⁴ Nor does the privilege apply to lawyers “not subject to rules of conduct in any EC countries,” which could exclude American lawyers working abroad.⁶⁵

D. Conflicts Rules

Lawyers working transnationally will occasionally encounter conflicting rules governing conflicts of interest, but with little guidance about which set of rules to follow. This may be because “choice-of-law issues have always been among the most difficult legal issues.”⁶⁶ The Model Rules offer little help to the transnational lawyer who must deal with conflict rules. In fact, until very recently, the Comment to Rule 8.5 explicitly stated that the “choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.”⁶⁷ The current Comment now states “The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.”⁶⁸ In most U.S. jurisdictions, this choice of law rule does not apply to foreign lawyers who are in the U.S.⁶⁹

There has been some attempt to create cross-border practice rules.⁷⁰

62. 8 WIGMORE ON EVIDENCE § 2291 at 554 (McNaughton rev. 1961).

63. See generally Daly, *supra* note 10, at 1103.

64. *Id.* at 1103-1194.

65. Frank, *supra* note 52, at 973.

66. Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909 (1991).

67. MODEL RULES OF PROFESSIONAL CONDUCT R. 8.5 cmt. 6.

68. MODEL RULES OF PROFESSIONAL CONDUCT R. 8.5 cmt. 7 (adopted 2002) available at http://www.abanet.org/cpr/mrpc/rule_8_5_comm.html.

69. Cf. Ga. Rule of Professional Conduct 8.5(b)(2004) (“In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:... for any other conduct, the rules of the jurisdiction in which the lawyer or Domestic or Foreign Lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.”) available at http://www2.state.ga.us/Courts/Supreme/amended_rules/6_8_2004_order.htm.

70. See Vagts, *supra* note 54, at 677 n.3.

For example, the European bar organizations created a *Code of Conduct for Lawyers in the European Community*.⁷¹ However, even this attempt to provide a supranational set of rules fails to provide uniform rules in many instances and merely resorts unhelpfully to conflicts of laws solutions.⁷²

E. *Unauthorized Practice of Law (Rule 5.5)*

As noted in the introduction to this article, the regulation of the legal profession in the United States remains, to a large extent, local. Under Rule 5.5, for example, a lawyer admitted in one jurisdiction “may not practice law in another jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.” Section II(B)(3), also touched on whether American lawyers who partner with foreign lawyers are assisting in the unauthorized practice of law in violation of Rule 5.5.

These rules have served the profession well as long as the practice of law has remained a local endeavor. The reality, though, is that the practice of law is increasingly national and international in scope. In recognition of this reality, the ABA Commission on Multijurisdictional Practice adopted amendments to Rule 5.5 in 2002 allowing a lawyer in good standing in one jurisdiction of the United States to provide legal services on a temporary basis in another jurisdiction.⁷³ In addition, the MJP Commission drafted a Recommendation Regarding Adoption of the Model Rule for Temporary Practice by Foreign Lawyers.⁷⁴

V. Conclusion

ABA Formal Opinion 01-423 concludes that it is ethically permissible under the Model Rules for American lawyers to form partnerships or other entities with foreign lawyers, as long as the foreign lawyers are members of a recognized legal profession in the foreign jurisdiction. Persons who are not members of a recognized legal profession do not qualify as lawyers for purposes of Rule 5.4 and are not eligible to form partnerships or other entities with American lawyers. Responsible lawyers in U.S. firms must ensure that any such

71. See generally Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993).

72. Vagts, *supra* note 54, at 678 n.5.

73. See American Bar Association Commission on Multijurisdictional Practice Report to the House of Delegates 201B (August 2002).

74. See American Bar Association Commission on Multijurisdictional Practice Report to the House of Delegates 201J (August 2002).

relationships comply with the laws of the U.S. and foreign jurisdictions in which the firm practices. They must also ensure that the foreign lawyers in the partnership satisfy the requirements of the jurisdiction in which they are admitted and that the arrangement is in compliance with the law of the jurisdictions in which the firm practices. Moreover, matters in the U.S. offices that involve representation in a foreign jurisdiction must be managed in accordance with the applicable Model Rules, and all lawyers in the firm must comply with any other applicable ethical rules.

Overall, the Opinion recognizes the reality of legal practice today by accommodating the needs of clients operating globally and facilitating the export of legal services from the United States without compromising the integrity of the profession.