

MANAGING LEGAL ETHICS INTERNATIONALLY



WORLD DOMINATION

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With the rapid expansion of U.S. law practices to overseas jurisdictions, various ethical questions have been brought to the fore that were hardly of concern in previous decades. Aside from it being highly advisable to know the local language and customs, it is now a matter of competence to be fully familiar with the codes of professional conduct governing transnational practices.

The American Bar Association as well as the European Community's Council of Bars and Law Societies of Europe (CCBE) have formulated rules to bring some semblance of uniformity to what could otherwise be an ethics free-for-all adversely affecting both attorney and client. Let us examine the ABA's professional conduct rules regarding foreign client representation and their European counterpart.

The Transnational Practice

The last couple of decades have witnessed an expansion of U.S. law firms to overseas locations based on both the needs and requirements of clients and the overall market opportunities presented for the practice of law in new markets. The challenges of opening an overseas office are many, including cultural and linguistic differences, notwithstanding the fact that 'the language of business' is still primarily English. But just as a firm's domestic practice is subject to rules of professional conduct, so are their overseas practices. To further complicate matters, while the ABA Model Rules generally apply throughout the U.S. (with local modification at the state level), each foreign jurisdiction promulgates its own ethics rules, which can differ widely from one European or Asian state to another. To competently represent overseas clients, the lawyer must know what rules govern the playing field.

ABA Rules Governing Competency

The ABA's primary rule regarding adherence to local jurisdiction conduct is ABA Model Rule 8.5. It provides, among other things, that when lawyers are admitted to practice in more than one jurisdiction, he or she may be subject to disciplinary action in

each one. As to its effect on the overseas practitioner, it provides: 'A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs... A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.' This has been interpreted to mean that an American lawyer remains subject to the professional code of conduct in a foreign jurisdiction just as he or she would be in the U.S.

Concurrently, ABA Model Rule 1.1 provides that 'A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.' Under this rule, an American lawyer representing a client overseas must be competent in the law of the foreign jurisdiction to satisfy the Model Rule 8.5 ethical obligations as to competency.

Overseas Qualification

Reading Model Rule 8.5 together with Model Rule 1.1 would suggest that to meet the obligation of the competent practice of law; the American lawyer must also meet the qualifications to practice law in a foreign jurisdiction.

Executive Summary

› The Issue

How to satisfy legal ethics requirements when practicing internationally.

› The Gravamen

Adherence to both the ABA's code as well as the European code of professional ethics is essential in order to avoid the pitfall of not competently representing one's client.

› The Path Forward

ABA Model Rules 8.5 and 1.1 should be the starting point for any practitioner considering representing clients overseas.

Although some foreign states recognize a 'Certification in International Law', guidance is lacking as to whether that certification equates to competency in the foreign jurisdiction where the lawyer is practicing. Accordingly, the American lawyer who does not obtain state-specific qualifications overseas may very well find himself in violation of his ABA professional conduct duty of competence, subjecting him to domestic bar discipline.

European Cross-Border Practices

European law firms are also engaged in cross-border practices within the European Union. For the American firm that has partnered with or controls a European office, the issue becomes not only one of a conflict between the American code and a given state's professional conduct requirements but conflicts arising within the EU from state to state. To address this, the CCBE has as one of its main objectives the representation of its member bars on all matters of mutual interest relating to the exercise of the profession of the lawyer, the development of the law, and practice pertaining to the rule of law and the administration of justice.

The CCBE's Model Code of Deontology is the third part of a set of documents that the CCBE has adopted to achieve those objectives concerning deontology (the normative ethical theory of right and wrong.) The three-part documents of the Model Code are:

- ▶ The Charter of the Core Principles of the European Legal Profession, which contains a list of ten core principles that express the common ground which underlies all the national and international rules which govern the conduct of European lawyers;
- ▶ The Code of Conduct for European Lawyers states common rules which apply to all lawyers from the European Union, the European Economic Area, the Swiss Confederation, and the United Kingdom, as well as associated and observer countries, whatever Bar or Law Society they belong to in relation to their cross-border practice. In particular, it aims at defining the applicable rules when the deontological rules of more than one member country are applicable in accordance with their terms; and,
- ▶ The Model Code of Conduct for European Lawyers presents to CCBE members a coherent set of deontological rules.

Putting It All Together

To stay in compliance with both U.S. domestic ethics obligations as to competency, the transnational practitioner must at the same time follow European ethics obligations when representing clients overseas. ABA rules may require that the transnational practitioner be qualified in the foreign jurisdiction but in any event, must adhere to the competent representation of his or her client within the meaning of a broad spectrum of codes of professional conduct.

Action

1 Know Your ABA Rules:

You must be competent in the law of the foreign jurisdiction where you will be practicing or face the possibility of domestic disciplinary action.

2 Overseas Qualification:

The 'safest' way to stay compliant with the ABA's rules on competency is to obtain a qualification in the foreign jurisdiction where you will be practicing.

3 Mind the Gap:

Once qualified in a foreign jurisdiction, be cautious as to the gaps that might exist between your locale of qualification and the cross-border jurisdiction where you could find yourself concurrently practicing.

4 CCBE Codes:

Familiarize yourself with the fundamental documents of the CCBE and how they will govern your European practice.

5 Other Foreign Ethical Rules:

All the above recommendations can be applied with respect to ethical rules promulgated by other countries, keep a mindful eye out for ethics obligations existing at the national and state level while practicing internationally.

Further Reading

1. <https://www.jdsupra.com/legalnews/professional-responsibility-abroad-your-40935/>
2. <https://ir.lawnet.fordham.edu/ilj/vol16/iss1/2/>
3. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_5_disciplinary_authority_choice_of_law/comment_on_rule_8_5/
4. <https://illinoislawreview.org/print/volume-2000-issue-3/ethical-responsibilities-and-the-international-lawyer-mind-the-gaps/>





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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions.

Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



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William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



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