

An Ethical Dilemma: Fee Splitting with Foreign Lawyers

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In today's global economy, many lawyers who have a business law practice, and in-house corporate lawyers, will find themselves in situations that require knowledge of some foreign legal system. With the globalization of our economy, there is globalization of the legal practice. There are foreign lawyers who travel to the United States, foreign lawyers who offer advice via telephone or facsimile, and foreign law clerks.¹

Laws regulating the legal professional are becoming, and will continue to become, more expansive as global trade and multinational treaties transform the nature of business and the legal profession. The need for competent international legal services will expand not only in the major commercial centers of New York, Paris, London, and Tokyo, but also develop in small towns as local populations benefit from a boom in direct foreign investment and increasing possibilities to export abroad.²

The shift to a more international legal practice creates numerous potential problems with the professional responsibility of lawyers. As one author points out, "[t]here is one area in which the increasing development of transnational law practice will produce greater difficulties: determination of the applicable rules of professional responsibility and conduct."³ This author goes on to say, "For American lawyers, unfortunately, too little attention has been given to this matter. The Code of Professional Responsibility does not address the practice of law outside of the United States by lawyers subject to its rules."⁴

"While the legal system has created conflict of laws principles to control similar dilemmas in other areas of legal practice, these principles have not been applied in the field of legal ethics."⁵ One of the problems that can be created by this evolution of legal practice is that

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1. See Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 *FORDHAM INT'L L.J.* 53 (1992/1993).

2. Andrew Pardieck, *Foreign Legal Consultants: The Changing Role of the Lawyer in a Global Economy*, 3 *IND. J. GLOBAL LEGAL STUD.* 457 (1996).

3. Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 *TUL. L. REV.* 443, 519 (1989).

4. *Id.* at 520.

when relying on foreign legal advice and consultation, the foreign lawyer will expect to be paid for his or her advice. "One of the cardinal rules of the American legal profession is that lawyers are not supposed to split fees with non-lawyers or, in many instances, even with lawyers."⁶ Therefore, under current codes of professional conduct, such a situation may create an ethical problem for U.S. lawyers. This article will address the need for clarification of the rules of professional conduct that regulate fee splitting among lawyers and what is defined as the "unauthorized practice of law." When the current rules were promulgated it appears that no thought was given to the fact that there may be fee splitting with foreign lawyers. Therefore, there are no clear guidelines for lawyers facing this situation.

I. The Current Guidelines

Neither the Model Rules nor the Model Code is clear in situations when a lawyer is involved in fee splitting with a foreign lawyer. Since most states' ethical codes are based on one version of the above rules, with some modifications, the Model Rules and the Model Code will be the reference point.

Model Rule 1.5 states:

Fees

- (e) A division of fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
 - (2) the client is advised of and does not object to the participation of all the lawyers involved; and
 - (3) the total fee is reasonable.⁷

The Model Code states:

DR 2-107 Division of Fees Among Lawyers

- (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
- (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
 - (2) The division is made in proportion to the services performed and responsibility assumed by each.
 - (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.⁸

Both of the above examples make it clear that when there is fee splitting with a lawyer who is not a partner or a member of the firm, the client must approve of the association. This portion is not ambiguous, and should not present a problem. Therefore, in circumstances where the fee may be split, the issue under the Model Rules is that the total compensation must be reasonable, and split on the basis of the amount of work performed by each lawyer.⁹

5. Susanna Felleman, *Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct*, 95 COLUM. L. REV. 1500, 1514 (1995).

6. James M. Fischer, *Why Can't Lawyers Split Fees? Why Ask Why, Ask When!*, 6 GEO. J. LEGAL ETHICS 1, 3 (1992).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983) [hereinafter MODEL RULES].

8. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A) (1983) [hereinafter MODEL CODE].

9. See MODEL CODE DR 2-107(A)(2) & (3).

By using a hypothetical, one can look at the problem that the rules could create. Assume that an attorney licensed in another country lives in New York, and practices there to give legal advice as to his home country's laws. One of his/her clients needs legal advice about New York law, and the out-of-country attorney refers the New York resident to a New York attorney. In this example, there may not be a division of fees between the New York attorney and the referring attorney because there cannot be a division of services since the referring attorney is not licensed to practice law in New York. A Florida opinion states the following in a similar situation:

[t]he fee division provisions of Rule 4-1.5 [which were similar to the rules quoted above] require an attorney to either work on a matter or assume joint legal responsibility in order to receive a portion of a fee. . . . Therefore, in hypothetical scenario . . . the Florida attorney could not divide a fee with the resident non-Florida attorney who refers a case because, . . . the non-Florida attorney cannot practice law in Florida or agree to assume joint responsibility as is required by the rules. A division of fee in such a case would constitute improper fee-sharing with a non-attorney and could constitute aiding in the unlicensed practice of law.¹⁰

This makes it clear that splitting fees with a non-licensed out-of-country attorney is improper¹¹ because it contributes to the unauthorized practice of law within that state.

Therefore, other ethical rules, such as Rule 5.5, will apply in these situations. This rule states:

"A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."¹²

This rule addresses situations where a lawyer is licensed in a state (country) and has affiliate firms in other parts of the world where he or she is not licensed. That lawyer may not give legal advice about the laws of the foreign jurisdiction, or split a fee with a local lawyer that this unlicensed lawyer referred.

This rule seems fairly simple to apply, but the wording and the comment to Rule 5.5 creates a problem because it states, in part: "The definition of the practice of law is established by law and varies from one jurisdiction to another."¹³ Because the statutory and judicial interpretations of what constitutes unauthorized practice vary widely, there is no uniform definition. A survey of cases addressing the issue, however, reveals several tests commonly employed, though none is universally applied.¹⁴ Some courts use a "legal skills" test.¹⁵ Others use a "binding legal rights" test.¹⁶ Still others use a "customarily performed by lawyers" test.¹⁷ Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.¹⁸ "In gen-

10. Fla. Bar Prof'l Ethics Comm., Op. 90-8 (1991).

11. See *also* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 cmt. (3d ed. 1983) (amended 1996) [hereinafter ANNOTATED MODEL RULES].

12. MODEL RULES Rule 5.5.

13. See MODEL RULES Rule 5.5 cmt.

14. See ANNOTATED MODEL RULES Rule 5.5 cmt.

15. See, e.g., Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978).

16. See, e.g., Kennedy v. Bar Ass'n of Montgomery County, Inc., 561 A.2d 200 (Md. 1989).

17. See, e.g., Pope County Bar Ass'n v. Suggs, 624 S.W.2d 828 (Ark. 1981).

18. See ANNOTATED MODEL RULES Rule 5.5 cmt. (emphasis added).

eral, the Rules are violated when a business that is not a law firm holds the lawyer out in his or her capacity as a lawyer, or when the lawyer's services for outside clients include activities that, when performed by a lawyer, constitute the practice of law.¹⁹ This rule does not prevent a lawyer from using a foreign lawyer for legal advice, but only for the jurisdiction where the foreign lawyer is licensed.

II. The Problems Created

In an international context the ambiguity of fee splitting is actually created by Rule 5.5(b)'s use of the words "who is not a member of the bar." That ambiguity is continued in the comment quoted above where it uses the same phrase and emphasizes the reason for that phrase.

The use of the phrase "member of the bar" assumes that all foreign jurisdictions admit lawyers to "the bar" in order to practice. That assumption is not correct. Below are examples of several foreign jurisdictions where attorneys are licensed to practice, but they have not been admitted to what the United States would consider "the bar."

The Republic of Ireland, England, Wales, Scotland, and Northern Ireland, have similar legal systems (the Republic of Ireland does differ slightly). The legal profession falls into two different categories; solicitors and barristers. Each of these legal professionals plays a different role. "Solicitors provide advice and services to clients in all areas of the law, including representation in court and acting in transactions on a client's behalf."²⁰ "Barristers have a particular expertise in the area of advocacy and may not be engaged directly by a member of the public. They are retained through solicitors for the purposes of issuing expert opinions on complex legal matters and acting as advocates for clients, particularly in the higher courts."²¹

There are several ways to qualify to become a lawyer in the U.K.; one is to get a law degree from a university; another is to get a bachelor of arts degree, then take a year of legal studies and pass on to the vocational stage; or persons with law experience may substitute that for the bachelors degree and pass on to the vocational stage. "The vocational stage is the Legal Practice Course for solicitors and the Bar Final Course for barristers."²² After completing one of those requirements, a person is a solicitor and may "be called to the bar." When a person is called to the bar they become a barrister.²³ Under this system, solicitors have not been admitted to the bar, under the U.S. definition of that term.

The other problem is that clients may not hire or instruct barristers directly. They may only have direct contact with solicitors, and solicitors must hire and communicate with barristers.²⁴ The problem created by this system is that the U.S. client with the U.S. lawyer who wants to use a U.K. lawyer must contact a solicitor, and if a barrister is needed, that solicitor hires and pays the barrister. This means that the U.S. lawyer is splitting fees with a lawyer who has not been admitted to the bar.

19. See ANNOTATED MODEL RULES Rule 5.4 cmt.

20. FINDING AND MANAGING FOREIGN COUNSEL 117 (Richard Christow et al. eds., 1994).

21. *Id.* at 118.

22. LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW 51 (Edwin Godfrey ed., 1995) [hereinafter LAW WITHOUT FRONTIERS].

23. See *id.* at 52.

24. See FINDING AND MANAGING FOREIGN COUNSEL, *supra* note 20, at 272.

In France, a lawyer must pass the bar exam to become a lawyer (some exceptions for EU member country licensed lawyers), but some non-lawyers may give legal advice.²⁵ "(A)ccountants are authorized to provide some legal advice in the field of tax and corporate law. Some reserved activities do exist and are carried out by notaries (e.g. sales of real estate)."²⁶ These non-lawyers are practicing law. A U.S. lawyer may hire experts for non-legal advice, but it appears that these professionals are, in fact, practicing law, and by paying them for that service when they are not lawyers, nor have been admitted to a bar, means that the U.S. lawyer is aiding in the unauthorized practice of law.

In Germany, there is a similar problem for U.S. attorneys with notaries and tax advisors. Both have the right to give certain types of legal advice as in France.²⁷

In Italy, lawyers are divided into *avvocato* and *procuratore*. An *avvocato* gives legal advice, and a *procuratore* is one who understands the legal process of the Italian courts.²⁸ In order to practice as a *procuratore*, one must be registered in a professional roll or "Albo."²⁹ To practice as an *avvocato*, there are additional requirements, but they are also only required to be listed on an "Albo."³⁰ In both of these situations the lawyer does not appear to have been admitted to a bar in the U.S. sense.

In Sweden, a lawyer is admitted to the Swedish Bar Association; however, other persons may also practice law.³¹ Although Portugal does have a bar association, "Law professors and assistants may give legal opinions in writing without the need to be registered with the Bar Association."³²

The above is just an example of the various ways to license and regulate lawyers and those who practice law. There are almost three hundred different countries in the world. Each country will have its own rules on how its legal practitioners are licensed, and in what circumstances non-lawyers may practice law. For the U.S. rules to use the terms "member of the bar" is very parochial in today's international marketplace.

As already mentioned, in many commercial centers around the world there has been an influx of foreign lawyers to practice law, often the law of their home country. For example, in Europe, Brussels, London, Frankfurt, Madrid, Paris, and other cities have attracted lawyers and law firms from around the world. These lawyers' job is to provide advice on both EU law and law of their home country. The problem for U.S. lawyers is twofold. First, there is no way, at this point, to be licensed to practice EU law. Therefore, it appears that getting any legal advice on EU law and splitting a fee for that advice is helping someone engage in the unauthorized practice of law. One could argue that since EU law is created by directives that must be adopted by each country before they become law in each country that the lawyer giving the advice is not giving EU legal advice, rather they are giving home country legal advice. That argument is, in fact, the other problem. Under our rules splitting a fee with a lawyer to whom we refer a case in a state that we are not licensed in is also the unauthorized practice of law, since the U.S. lawyer cannot have joint responsibility for that case.

25. See LAW WITHOUT FRONTIERS, *supra* note 22, at 74.

26. *Id.* at 74-75.

27. See *id.* at 84.

28. See *id.* at 94.

29. *Id.*

30. *Id.* at 94-95.

31. See *id.* at 141-42.

32. FINDING AND MANAGING FOREIGN COUNSEL, *supra* note 20, at 227.

A. FOREIGN LEGAL CONSULTANTS

The above problems are compounded by the fact that several states allow a foreign lawyer to be licensed as a foreign legal consultant (FLC).³³ "Domestically, nineteen states and the District of Columbia have recognized this need and have passed laws allowing foreign lawyers to act in the state as 'foreign legal consultants' (FLCs)."³⁴ In addition, the ABA has a set of model rules for licensing foreign legal consultants.³⁵ These rules mean that a lawyer licensed abroad may become a foreign legal consultant in a state in the U.S. and give legal advice to clients as to the laws of the country where he or she is licensed to practice law. In some instances the licensed professionals may become partners in law firms or shareholders in professional corporations.³⁶ With these rules foreign legal consultants may practice individually or, in some instances, in partnership with United States law firms.³⁷ Fee splitting becomes a very real issue since these professionals are not lawyers licensed to practice in the United States, rather they are licensed to practice law in their home country, and licensed here only to give legal advice on their home country's laws. Such a situation raises the same issues covered above, but it also raises some additional issues.

For example, assume that a lawyer licensed in Germany (or any other country) is a licensed FLC in New York and resides in New York. If that licensed FLC refers a client to a licensed New York lawyer, that New York lawyer may not share a fee with the FLC when the New York lawyer is giving legal advice on New York law to that client. The FLC may be able to share a fee with the New York lawyer for giving legal advice on the law of the FLC's home country if the New York lawyer is licensed in the FLC's home country.³⁸ So when neither the FLC nor the local attorney are licensed in each other's jurisdiction they may not split the legal fees for legal advice in each of the respective jurisdictions, since they cannot take equal responsibility for the case. When the FLC is a partner in a law firm, and not licensed in the United States, it must be very clear for what kind of legal advice he or she receives the fee. When an FLC is a partner in a law firm, the risk that the foreign lawyer will split a fee for sending his or her clients to that firm is very real, and must be guarded against. The risk of sharing a fee for giving legal advice as to the laws of a jurisdiction the respective lawyers are not licensed in is also very real and needs to be guarded against.

III. Possible Solutions

In order to solve the problem of "contributing to the unauthorized practice of law" when the foreign jurisdiction does not admit lawyers to "the bar," the ethical rules need to be modified. The rules could say something such as, "licensed and/or authorized by the rules in that lawyer's home country." With such a wording it would be clear that even in countries

33. For a discussion of foreign legal consultants and a list of the states that allow such licensing, see Pardieck, *supra* note 2.

34. *Id.* at 457.

35. See Louis B. Sohn, *ABA Section of International Law and Practice Report to the House of Delegates: Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207, 213 (1994).

36. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 521.4(b)(1)(iii) (1993).

37. For a discussion of this, see Sydney M. Cone III, *FLCs Face Licensing Hurdles in Host Countries*, NAT'L L. J., Oct. 7, 1996, at C2.

38. For a decision on a similar situation, see LAWS. MAN. ON PROF. CONDUCT (ABA/BNA), at 13.

where there is no bar or just one way to become a lawyer, it is still ethical to split a fee with someone who has been properly licensed, or authorized, within that country. That kind of rule would account for the lawyers who don't become members of "a bar," and also for those professionals who are authorized to practice some law, such as accountants and notaries. That may be the intent of the current rules, but that is certainly not clear.

The problem of fee splitting with FLCs would not be changed by the above rewording of the rules. However, there is no need to change that rule, it should remain unethical to split fees with a lawyer in the situation of an FLC.

IV. Summary

In today's global environment, transnational legal practice is very common. The ethical rules, when they were originally written, did not take into account the type of legal practice that exists in today's environment. It is time for our rules to change and adapt to the reality of what is occurring. The change is minor, just a rewording to allow the diverse ways of licensing lawyers to be acceptable. We need to update the rules on what is an "unauthorized practice of law" to reflect the changes in the 21st century

