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**REPORT OF THE ASIL TASK FORCE  
ON INTERNATIONAL PROFESSIONAL RESPONSIBILITY**

**GENERAL INTRODUCTION**

Various trends in the practice of international law are raising consciousness about the professional responsibility problems of attorneys engaged in international and transnational practice. More and more business is conducted across national frontiers in this period of so-called globalization and lawyers must provide legal stability and predictability for them<sup>1</sup>. Increasingly, states have allowed lawyers qualified in other jurisdictions to perform limited legal services within their borders. This is true of several states of the United States<sup>2</sup>, the European Union (both with respect to lawyers from other EU countries and non-EU lawyers)<sup>3</sup>, as well as other countries, such as Japan<sup>4</sup>, South Korea<sup>5</sup> and Mexico. In a related vein, national legal professions have grown in membership—most phenomenally the profession in the People’s Republic of China, which has grown from 3,000 members to 125,000 in one

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<sup>1</sup> For a review of these developments in the profession see THE INTERNATIONALIZATION OF THE PRACTICE OF LAW (Jens Drolshammer & Michael Pfeifer eds. 2001).

<sup>2</sup> Apart from the efforts of some individual states, NAFTA has also created some obligation to accommodate attorneys from Mexico and Canada. James Cortés Rocha, *Transnational Practice of the Legal Profession in the Context of the North American Free Trade Agreement (NAFTA)*, 15 AUT INT’L L. PRACTICUM 111 (2002).

<sup>3</sup> EU Directive 998/5, OJL 77/96 (March 14, 1998).

<sup>4</sup> Robert E. Lutz *et al.*, *Transnational Legal Practice Developments*, 39 INT’L LAW. 619, 629n.47 (2005) (“This statute made it possible for foreign lawyers (if registered at the Japan Federation of Bar Associations FBA) to engage in the limited scope of legal affairs, such as those related to the laws of the jurisdictions where the foreign lawyers are qualified to practice.”).

<sup>5</sup> See *Korea poised to admit foreign lawyers with FTA*, [http://www.bilaterals.org.article.php3?id\\_article=6415](http://www.bilaterals.org.article.php3?id_article=6415) (Aug. 11, 2006).

generation<sup>6</sup>. Such groups find it increasingly difficult to guide the behavior of their members without formal legal rules. Implicit understandings about how one practices law, which were adequate when national legal professions were more intimate, provide insufficient guidance for larger and more anonymous bodies. In response, national bar regulations are becoming more formal and detailed, but there is countervailing pressure to set aside certain national regulations that arguably interfere with the full play of competition and trade<sup>7</sup>.

Recently, national bar authorities responsible for regulating lawyers have been taking a broader view of their rule-making functions, taking into account developments in other countries and the special set of problems associated with trans-border practice. Thus, the American Bar Association's Model Rules of Professional Responsibility have taken on some problems arising from transnational practice and have provided special conflict-of-laws rules to address those problems<sup>8</sup>. Similarly, there have been efforts in the European Union to work out rules or standards applicable throughout the Member States<sup>9</sup>.

Meanwhile, judges around the world have been meeting and discussing their common problems, including questions about how they should perform their duties<sup>10</sup>. Information about

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<sup>6</sup> William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China* in EAST ASIAN LAW AND DEVELOPMENT: UNIVERSAL NORMS AND LOCAL CULTURE 182 (Arthur Rose, Lucie Cheng & Margaret Woo, eds. 2002).

<sup>7</sup> In the domestic U.S. context, certain forms of state attorney regulation were deemed incompatible with national law. *See, e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)(lawyer advertising protected by free speech); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)(state bar fee schedule violates antitrust law). These developments have met with some resistance from those in the United States and elsewhere who regard them as undermining the capacity of lawyers to provide independent advice and service to clients. Rolf Stürmer, *Der Anwalt—vom freien Beruf zum dienstleitenden Gewerbe*, 21 NJW 1481 (2004 (the title translates as “The Lawyer—From a Free Profession to a Service Provider”). At the same time there is significant pressure by major international law firms to break down such traditional limitations. Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L & POL'Y J. 751 (2003); Darryl Chiang, *Foreign Lawyer Provisions in Hong Kong and the Republic of China on Taiwan*, 13 UCLA PAC. BASIN L.J. 306, n.171 (1995).

<sup>8</sup> *See* Model Rule (“M.R.”) 8.5.

<sup>9</sup> Wayne J. Carroll, *Liberalization of National Legal Admissions Requirements in the European Union: Lessons and Implications*, 22 PENN. ST. INT'L L. REV. 563 (2004).

<sup>10</sup> Judges have also taken up questions as to how national governments should treat them so as to preserve their capacity to act with independence and integrity. The latter set of problems is beyond the scope of this Report since it does not involve the behavior of judges, rather but the actions of others toward the judiciary.

international judicial interactions is available on specialized websites<sup>11</sup>. Judicial deliberations have tended to identify common principles and standards, such as those represented in the Bangalore Principles of Judicial Conduct<sup>12</sup>. Alongside these efforts, scholars have become more active in analyzing the regulation of judges and lawyers in comparative perspective<sup>13</sup> and in promoting coordinated regulation of lawyers in global legal practice.

Another important trend to consider is the ever-growing body of cases coming before various international tribunals, most conspicuously those established to resolve disputes about the protection to be accorded foreign investment. Increasingly, these tribunals are laying down rules for advocates who appear before them, such as those rules developed by the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia. There have also been efforts to guide and regulate international adjudicators. Several organizations responsible for managing international commercial arbitrations have revised their rules about how arbitrators should conduct themselves, for example, the International Bar Association's Rules of Ethics for International Arbitrators, as supplemented in 2004 by the Guidelines on Conflicts of Interest in International Commercial Arbitration<sup>14</sup>, and the American Bar

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One of the problems besetting national judiciaries is that of the prevalence of corruption, particularly in systems where governments do not pay judges a living wage.

<sup>11</sup> E.g., *Project on International Courts and Tribunals*, a joint undertaking of the Center on International Cooperation at New York University and the Centre for International Courts and Tribunals, University College, London.

<sup>12</sup> *The Bangalore Principles of Judicial Conduct* (2002), [http://www.ajs.org/ethics/pdfs/Bangalore\\_principles.pdf](http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf).

<sup>13</sup> Calls for study and action include W. Michael Reisman, *Nullity and Revision 116-17 (1971)*; Detlev Vagts, *The International Legal Profession: A Need for More Guidance?*, 90 AJIL 250 (1996). Collections of comparative studies of professional rules include RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE (Mary Daly & Roger Goebel eds. 2d ed. 2004); LAWYERS' PRACTICE AND IDEALS: A COMPARATIVE VIEW (John J. Barcelo & Roger Cramton eds. 1991); GEOFFREY HAZARD & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY (2004); see also Felicity Nagorcka *et al.*, *Stranded between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U.L. REV. 448 (2005).

<sup>14</sup> IBA Guidelines on Conflicts of Interest in International Commercial Arbitration published in 9(2) Arbitration & ADR 7 (Oct. 2004).

Association/American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes.

With this much ferment in the field of international professionalism, the American Society of International Law has identified it as an area in which to make a contribution. To that end the Society's President José Alvarez appointed a Task Force to study and report on these issues. Having surveyed the issues, the Task Force has made specific recommendations for "Action Items" that the Society should pursue. The Action Items are set forth as a separate document.

Developing the Action Items required significant research and analysis of the underlying issues. The findings are contained in the following sections. While they are essential background for the Action Items, many of the issues dealt with in them are highly complex and open to significant disagreement and debate. Given temporal and geographic restraints, the Task Force was not able to meet to discuss and debate these various issues as would be necessary to produce a definitive report on them.

In addition, while the Task Force included scholars and practitioners with a range of experiences within different legal systems, it was not able to consider the relevant issues from viewpoints outside of the United States and European perspectives of its members. For these reasons, and as described in more detail in Part I below, the purpose of this survey is limited to providing the essential background and framework for the issues that give rise to the Action Items. It is not intended, however, to be a collective statement of the Task Force members' positions on the issues discussed.

This Survey proceeds in three Parts. The first Part addresses some basic premises and methodological considerations that should be taken into account in undertaking any work in the areas of transnational professionalism. The second Part surveys critical issues regarding the

behavior of international adjudicators and the third Part takes up issues relating to the regulation of international lawyers. A distinction is necessary between international lawyers, those who practice public international law, and transnational lawyers, whose work involves crossing national borders but focuses on national legal systems.

## **PART I: PREMISES AND METHODOLOGICAL ISSUES**

The invisible college of international lawyers of which Oscar Schachter wrote years ago<sup>15</sup> was comprised only of a very few of the lawyers, principally academics and government lawyers, who functioned in the field of public international law. Even within that limited context, the size and shape of the community, to the extent that it can still be called one, has expanded to the point where it barely resembles what Schachter wrote of years ago<sup>16</sup>. Most notably, international tribunals are now generally open to private lawyers representing private parties and international adjudicators are also drawn from developing countries that were less active in those contexts when Schachter wrote. This expansion has generated a range of challenging issues of professionalism that affect international lawyers and lawyers involved in trans-border practices.

Despite the magnitude of these issues, much of the writing in this field has been at a general and hortatory level that provides little guidance for real world problems<sup>17</sup>. Most of it has raised issues rather than making recommendations about them or providing black letter rules. Similarly this Survey does not aim to articulate particular rules, which would be premature and presumptuous. In the near future, it will not be possible for any body to create

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<sup>15</sup> Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW . L. REV. 217 (1977); compare Detlev Vagts, *Are There No International Lawyers Any More?*, 75 A.J.I.L. 134 (1981).

<sup>16</sup> By way of illustration, a recent volume lists some 600 individuals as international lawyers. *Who's Who in Public International Law* (Elihu Lauterpacht ed., 2007)

<sup>17</sup> For a particularly terse version see COUNCIL OF BARS AND LAW SOCIETIES IN EUROPE, CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION.

an overall code of professional responsibility for lawyers world-wide<sup>18</sup>. Indeed the field of transnational professional conduct is so vast and evolving so quickly, it would be unrealistic to even canvas all of the issues in a single report, and we have not attempted to do so.

Against this background, it is important to emphasize the need to avoid the parochialism or elitism that can infect discussions of legal professionalism and ethics. Many scholars have documented the dominance of American lawyers and law firms in global legal practice, and the concentration of attorneys from industrialized nations in positions in international organizations. Moving toward a global vision of professional conduct requires a more global perspective, which must consider the variety of approaches to the regulation of adjudicators and lawyers that are to be found in different parts of the world.

In this Survey, the Task Force has sought to move beyond parochialism. Expanding the range of national traditions considered is important for addressing the issues at a truly global level, but perhaps even more importantly, failure to be inclusive can lead to a crisis of legitimacy or to perceptions of bias. The Task Force encountered significant challenges, however, in seeking to include perspective from countries outside of the United States and Europe. Since no one on the Task Force came from such a country, the only way to take account of other perspectives was through research into other systems' traditions and rules. There is, however, relatively little information available about the functioning of legal professions in such systems.

More importantly, even if more sources were available, academic research alone does not provide a comprehensive or meaningful account of professionalism in national systems.

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<sup>18</sup> Some scholars have advocated such a venture. John Toulmin, *A World-Wide Common Code of Professional Ethics?*, 15 *FORDHAM J. INT'L L.* 673 (1991); Christopher Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 *VAND. J. TRANS. L.* 931 (2001). Two attempts have been made at a multinational code. One was a code of ethics (1988) undertaken by the International Bar Association and the other was a 1988 Europe-wide Code of Conduct for Lawyers in the European Community Produced by the

Actual practice may differ significantly from the written rules that purport to govern it<sup>19</sup>. For example, two recent empirical studies evaluated levels of compliance with conflict of interest rules, one focusing on American lawyers and the other on British solicitors<sup>20</sup>. Although both systems have relatively similar and detailed rules regarding conflicts of representation, a comparison of the two studies suggests, at least according to one scholar, that textual similarity conceals significant divergences in their applications. Such comparison suggests that Americans are rather scrupulous in their efforts to comply with rules about conflicts of representation, even when such adherence is contrary to their business interests. English solicitors, on the other hand, were perceived as more apt to skirt rules that they consider obsolete. Various hypotheses may account for these disparate rates of compliance, including differences in enforcement mechanisms (for example, in the United States, departure from the rule is likely to draw a disqualification motion from opposing counsel), differences in the likelihood of sanctions, in client tolerance, in perception of the possibility of genuine harm, and the like. We do not take a position about the accuracy of these conclusions, nor do we speculate about what factors may account for real or perceived differences. The larger point is that meaningful analysis of global ethical issues requires not only comparison of national black-letter texts, but also of their application and enforcement.

For these reasons, as noted above, the Survey is designed to serve as a starting point for discussion, as opposed to a final analysis. It is also for this reason that the Task Force has

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Council of Bars and Law Societies in Europe. For commentary see Laurel Terry, *An Introduction to the European Community's Legal Ethics Code*, 7 GEO. J. LEGAL ETHICS 1, 345 (1993).

<sup>19</sup> In most countries the rules governing lawyers are set by statute. *See, e.g.*, the French law 71-1130 of Dec. 31, 1971, the German *Bundesrechtsordnung* and the Japanese Practicing Attorneys Act of 1949. In the United States they are ordinarily set by the courts, which tend to follow the models originating with the American Bar Association.

<sup>20</sup> Nancy J. Moore, *Regulating Law Firm Conflicts in the 21<sup>st</sup> Century: Implications of the Globalization of Legal Services and the Growth of the "Mega Firm,"* 18 GEO. J. LEGAL ETHICS 521 (2005), *comparing* JANINE GRIFFITHS-BAKER, *SERVING TWO MASTERS: CONFLICTS OF INTEREST IN THE MODERN LAW*

recommended that, in the event the Society pursues any of the Action Items, it appoint representatives from legal traditions outside the United States and Europe to any future bodies that take up these issues.

## **PART II: INTERNATIONAL ADJUDICATORS AND ARBITRATORS**

This Part takes up the demands laid upon international adjudicators in the performance of their functions. There are distinct differences between (a) judges of permanent international courts and tribunals who are full-time adjudicators, (b) international judges on temporary tribunals such as the International Criminal Court for the former Yugoslavia, who serve full time, (c) judges on the Law of the Sea Tribunal, whose appointments are permanent but not full time, and (d) arbitrators who are selected for specific cases and have other employment the rest of the time. There are further functional differences between such adjudicators, such as that between criminal and civil judges.

With regard to international judges the applicable rules and standards derive from multiple sources. Some fundamental principles of judicial conduct emerge from the concept of adjudication as an impartial decision-making process<sup>21</sup> and other litigants' rights may be implied, either directly or by analogy, from international legal instruments such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. International judges are also subject to the law that created the court on which they serve, the internal law of the international organization of which the court forms a part, and internal rules and protocols that develop in the practice of those tribunals.

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FIRM (2002), *with* SUSAN SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* (2002).

<sup>21</sup> These notions are confirmed in the United Nations Basic Principles on the Independence of the Judiciary as well as the Bangalore Principles of Judicial Conduct. While neither of these is formally binding on international judges, they do articulate an international legal consensus regarding judicial conduct, such as independence and impartiality, which are tied to the concept of adjudication. *See* Study by the UN Special Rapporteur on the independence of judges (<http://www.ohchr.org/english/issues/judiciary/index.htm>.)

With regard to international arbitrators, the sources are quite different. In the first instance, questions of arbitrator behavior are addressed by the rules agreed to by the parties, typically those of some arbitration institution. Those institutions have a responsibility to ensure that their mechanisms do not inherently increase the risks of violating the fundamental rights of litigants. Their rules may, however, be supplemented by the laws of the state within which the arbitration takes place or by non-binding codes or rules of conduct or ethics promulgated by international professional organizations, although the applicability and effect of such sources are still open to significant disagreement. In cases amounting to violations of “public policy,” the issue may be taken up by the court in which enforcement of an award is sought or before which a setting aside action is brought<sup>22</sup>. In fact, the standards used to review international arbitration awards have developed into a relatively robust body of jurisprudence, with the result being that standards for addressing misconduct by arbitrators are more clearly established than related standards are for international judges. Given the range of rules and standards that may be applicable, as well as the remaining ambiguities regarding when they apply, the following is meant primarily to highlight those areas of particular concern regarding the impartiality and independence of international adjudicators.

### *Nationality*

One might jump to the conclusion that a judge’s shared nationality with one of the parties would constitute an interference with his or her ability to reach and express independent judgment. Nationality has been a powerful tie for individuals, particularly in the period when the Cold War sharply divided nations<sup>23</sup>. The actual approach of international law to this problem has been rather the opposite: each party should be assured that a judge or arbitrator of

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<sup>22</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, done at New York June 10, 1958, Art. V.2(b). *See also* Art. VI (d).

its nationality is sitting on the court and could express its views within the councils of the tribunal. The practice began in the period of *ad hoc* tribunals set up by the agreement of the parties; they typically provided for two national judges and an umpire from another state who could break any tie generated by the nationals. For the same reason, the Permanent Court of International Justice and the International Court of Justice (ICJ) have provided for ad hoc judges when no national of one of the parties was on the tribunal. The Law of the Sea Tribunal follows the ICJ pattern of assuring that each party has a national on the court (art. 17). The Statute establishing the International Criminal Tribunal for the Former Yugoslavia deals with the nationality issue simply by providing that no two judges of the Trial Chambers or Appeals Chambers shall be of the same nationality (art. 12). For the most part, defendants before the Tribunal come from only a very few states, none represented on the Tribunal.

Article 31(6) of the ICJ Statute provides that judges ad hoc “shall take part in the decision on terms of complete equality with their colleagues.” The ICJ Rules of Court require that judges ad hoc make the same solemn declaration or oath of office as regular members of the ICJ (art. 81). The declaration is worded: “I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

Still, there are also acknowledgments that nationality can interfere with an adjudicator’s impartiality or independence. This concern is taken into account by article 32(1) of the ICJ Rules of Court, which calls for the president not to exercise his or her powers when his or her country is a party to a pending case<sup>24</sup>. Similarly, the drafters of the rules for the World Trade Organization Appellate Body require that panel members not be nationals of a party to the dispute. It reinforces that clause with another saying “Panelists shall serve in their

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<sup>23</sup> Assigning a judge’s nationality can raise issues. Art. 3(2) of the ICJ Statute provides that a dual citizen shall be “deemed to be a national of the one in which he ordinarily exercises civil and political rights.”

individual capacities and not as government representatives nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel” (art. 8.9).

Some of these issues reassert themselves in the context of international commercial arbitration tribunals. Here again, tradition has called for the presence on a panel of a person appointed by each party who therefore is sometimes thought of as being predisposed to favor the party who appointed him or her. Very often the party-appointed arbitrator shares the nationality of the appointing party. The assumption, however, is that the chair of the tribunal will not share a nationality with either party. This assumption is made explicit in certain rules such as ICC Rules 9.5 and 9.6, which require that a sole arbitrator or chair “shall be of a nationality other than those of the parties,” except in “suitable circumstances and provided neither party objects within the time limit fixed by the [ICC International Court of Arbitration].” Similarly, the Japanese Commercial Arbitration Association rules require that the Association give consideration to a request submitted by either party that the Association shall appoint as such arbitrator a person of a different nationality from those of the parties<sup>25</sup>.”

Given these mixed precedents, it is fair to say that while nationality can raise concerns about impartiality and independence, there is no international consensus as to how that concern should translate into the constitution of international tribunals. Even if the parties and experts remain concerned about nationality, empirical study of the behavior of ad hoc and regular

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<sup>24</sup> SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 1111 (4<sup>th</sup> ed. 2004).

<sup>25</sup> Rules of the Japanese Commercial Arbitration Association, Rule 25.3 (for appointment of a sole arbitrator) and Rule 26.5 (for appointment of a chairperson).

judges in cases involving their governments has not necessarily borne out the assumption that they have a strong tendency to support the home country.<sup>26</sup>

### ***Prior Involvement***

Another issue is how impartiality may be affected if an adjudicator has publicly taken a substantive position regarding either the facts or legal issues involved in the case. Different systems have varying standards about when a judge should be disqualified in these circumstances. International precedents are ambiguous, but the Statute of the ICJ in art. 17.2 provides:

No member may participate in the decision of any case in which he has taken part as agent, counsel or advocate for one of the parties, or as member of a national or international court, or of a commission of enquiry, or in any other capacity.

In theory, the dangers to objectivity that can be caused by involvement as an advocate in a case are rather obvious. There is a highly developed body of jurisprudence and scholarship in various contexts regarding lawyer-advocates who have previously represented interests conflicting with their current client's interests. The dangers seem less apparent when the prior involvement was as a disinterested investigator, but the tendency to cling to asserted positions may affect the capacity of an individual to conduct an open minded examination of issues that have already been considered. Examples of practice from the ICJ have included recusal of a judge who had been a member of a national committee of inquiry into the subject of the litigation and another who had been a member of the panel that issued the award under

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<sup>26</sup> See Adam Smith, "Judicial Nationalism" in *International Law*, 40 TEXAS INT'L L.J. 197 (2005); Stephen M. Schwebel, *National Judges and Judges Ad Hoc*, in MÉLANGES EN L'HONNEUR DE NICOLAS VALLICOS, *DROIT ET JUSTICE* 319 (1991); Stephen M. Schwebel, *National Judges and Judges Ad Hoc of the International Court of Justice*, 48 I.C.L.Q. 889 (1999); Eric A. Posner, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005); Eric Voeten, *Judicial Behavior in International Courts: the European Court of Human Rights*, at \*19-\*21 (unpublished ms.2005), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=705363](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=705363); Ro Suh, *Voting Behavior of National Judges on International Courts*, 63 AJIL 224 (1969).

attack<sup>27</sup>. On the other hand, two judges sat on the Rights of Nationals of the United States in Morocco (Fr. v. U.S.) Case, although they had been legal advisers of their governments during early stages of the dispute. A complex situation was produced by the recusal of Judge Higgins in the *Lockerbie* case brought by Libya against the United Kingdom. Britain was allowed to appoint an ad hoc judge. In an identical case against the United States, an American judge remained in place. Thus, Libya found itself bringing two identical cases before courts that differed in composition<sup>28</sup>. The Law of the Sea Tribunal has its own disqualification provision. It disqualifies from sitting on a particular case a member who has “previously taken part as agent, counsel or advocate for any of the parties, or as a member of a national or international court or tribunal or in any other capacity.”<sup>29</sup>”

Rather similar challenges emerge in international commercial arbitration. In an extreme case, a noted French comparative lawyer was challenged as an arbitrator because he had drafted the commercial code of the state that was party to the contest<sup>30</sup>. Some observers and judges find that challenges are often overplayed and reflect the determination of litigants to undo results that displease them<sup>31</sup>. These are issues that can be avoided or at least diminished by disclosure regarding prior involvements so that disqualification decisions can be made in advance of participation in the proceedings. There is relatively limited agreement internationally, however, about precisely what information must be disclosed.

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<sup>27</sup> 1989-90 ICJ YB 57. The case was Case Concerning the Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal). *See also* Case concerning Certain Property (Liechtenstein v. Germany), 2005 ICJ Rep. 6 (Judge Bruno Simma of Germany recusing himself. Germany then chose Carl-August Fleischhauer, who served as an ICJ judge from 1994 to 2003 to sit as judge ad hoc in the case).

<sup>28</sup> Stephen Mathias, *Book Review*, 100 A.J.I.L. 967, 969 (2006).

<sup>29</sup> United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 UNTS 397, Annex VI, art. 6(1).

<sup>30</sup> *Imperial Ethiopian Government v. Baruch-Foster Corp.* 535 F.2d 334 (5<sup>th</sup> Cir. 1976).

<sup>31</sup> *See* *Positive Software Solutions, Inc. v. New Century Mort. Corp.*, 476 F.3d 278 (5<sup>th</sup> Cir. 2007)(rejecting claim that arbitrator’s having participated with counsel for opposing party in prior unrelated litigation constituted grounds for challenge). A Belgian court recently rejected a complaint that an arbitrator in an arbitration under a bilateral investment treaty was disqualified on account of prior interactions with the opposing party’s law firm. *Investment Treaty News*, Jan. 17, 2007.

### *Activities Incompatible with an Adjudicator's Role*

It is generally expected of judges that they will refrain from activities that will involve them in controversy, particularly activities of a political character. Similarly, there are limitations on a judge taking public stands on issues that will likely come before him or her for decision. A particularly significant issue is that of an adjudicator's communications with counsel in the absence of counsel for the other party. Ex parte communications raise issues about the duty of judging impartially. These issues are more complicated, however, in the case of arbitrators who are party-appointed. From some perspectives, such an arbitrator serves as a representative of the appointing party, making sure that the party's voice is heard by the panel, thus supplementing the efforts of that party's counsel. On such a reading of the role of a party-appointed arbitrator, it may be appropriate for there to be communications between the two. From another perspective, the party-appointed arbitrator is different only in the way he or she is chosen and thereafter is subject to the same obligations as the neutral member<sup>32</sup>. These issues may implicate the applicable arbitral rules, as well as separate ethical codes that may be applicable through the parties' agreement. There are separate, less problematic, issues about a party-appointed arbitrator communicating with the party with respect to his or her own appointment and perhaps with regard to the selection of the chair.

Both the ICJ and the LOS Tribunal have provisions about incompatible activities. The ICJ Statute in Article 16 simply says: "No member of the Court may exercise any political or administrative function or engage in any other occupation of a professional nature." A UN document of 1998 states that the ICJ "has interpreted the provisions of Article 16 as

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<sup>32</sup> For authorities see Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 2 (2003); Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 363 (2002). For earlier discussion see Andreas Lowenfeld, *The Party Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEXAS INT'L L.J. 59 (1995); James H. Carter, *Living with the*

prohibiting judges of the Court from maintaining or exercising any political or administrative function, whether international, national, or local, whether commercial or otherwise, engaging in the practice of law, maintaining membership in a law firm or rendering legal or expert opinions, or holding a permanent teaching or administrative position in a university or faculty of law,” but “as not debaring a limited participation of judges in other judicial or quasi-judicial activities of an occasional nature, as well as scholarly pursuits in the sphere of international law as members of learned societies or as occasional lecturers” and “permitting acceptance of occasional appointments as arbitrators<sup>33</sup>.” The LOS version is more specific: “No member of the Tribunal may exercise any political or administrative function or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed.” It goes on to say: “No member of the tribunal may act as agent, counsel or advocate in any case.<sup>34</sup>” The European Court of Human Rights treaty provides that “During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.”(art. 21.3)

With part-time adjudicators it is difficult to apply rules about incompatible activities except when they fall within the prohibition on conflicts of interest. However, the International Court of Justice has adopted a Practice Directive VII that advises parties to refrain, when choosing an ad hoc judge, from nominating persons who are acting as counsel in another case before the court or have so acted in the preceding three years. By the same token there can be

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*Party Appointed Arbitrator: Judicial Confusion Ethical Codes and Practical Advice*, 3 AM. REV. INT’L ARB. 153 (1992).

<sup>33</sup> Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice, Report of the Secretary-General, UN Doc. A/C.5/53/11 at 12 (Oct. 6, 1998).

an awkward situation when a jurist is chosen as an ad hoc judge in a case before the ICJ while simultaneously acting as agent or counsel in other, cases even though they are not related.<sup>35</sup> Some objections have been raised in international arbitration cases about the rotation of the roles of counsel and arbitrator, which occurs quite frequently in the closely knit world of international arbitration. There is generally tolerance of the practice in international commercial arbitration, but it has become a more prominent issue in international investment arbitration, where arbitrators' decisions in one case might arguably be precedent for their positions as counsel in subsequent cases. While there is no clear consensus about the issue, there has been at least one case and increasing commentary about the so-called "revolving door" between counsel and arbitrators in the investment context.<sup>36</sup> In any case, an adjudicator ought not to take on other commitments which interfere with the obligation to be ready to perform his or her obligations to hear cases with promptness and continuousness.

#### ***Adjudicator Involvement in Mediation or Settlement***

There has been an increasing emphasis on the benefit of voluntary settlement of conflicts as opposed to their final adversarial determination. Settlement can save enormous amounts of time and effort both for courts and for contesting parties. Parties may be reconciled more easily because they have not fought to the bitter end. This has led judges to attempt to encourage litigants before them to settle their differences. For all of the advantages of such efforts, they also raise concerns that they may undermine the adjudicator's capacity to decide

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<sup>34</sup> United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 UNTS 397, Annex VI art. 7(1).

<sup>35</sup> Pieter Bekker, *Correspondence*, 90 A.J.I.L. 645, 646 (1996).

<sup>36</sup> See Luke Eric Peterson, *Dutch Court Finds Arbitrator in Conflict Due to Role of Counsel to Another Investor*, INVEST-SD: INV. L. & POL'Y WEEKLY NEWS BULL, Dec. 17, 2004, available at [www.iisd.org/pdf/2004/investment\\_investsd\\_dec17\\_2004.pdf](http://www.iisd.org/pdf/2004/investment_investsd_dec17_2004.pdf); Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 61-APR DISP. RESOL. J. 60 (2006); Howard Mann et al., ICSID's International Investment and Sustainable Development Team, Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration," December 2004 at 4.6, available at [www.iisd.org/pdf/2004/investment\\_icsid\\_response.pdf](http://www.iisd.org/pdf/2004/investment_icsid_response.pdf).

the case fairly if negotiations break down. The adjudicator may be left with feelings of antagonism towards a party that has insisted on its right to full vindication of its legal claims. The adjudicator may obtain information from the parties which he or she cannot disregard when the procedure again becomes adversarial. It may seem natural to communicate separately with each of the parties, but that raises questions of propriety for a judge or an arbitrator<sup>37</sup>.

### III. ADVOCATES AND LAWYERS

Advocates and lawyers who work in the international or the transnational arenas have normally been subjected to the professional rules and the professional discipline of the national or local bars in which they are enrolled. As international practice became more and more significant strains began to appear. It seems inappropriate and impractical to subject lawyers who appear before international tribunals to the rules of their home states. For one thing such an allocation of functions might produce situations in which the lawyers representing the two sides to the controversy are subject to different rules, possibly disadvantaging one of the parties. The classic example is the situation in which one lawyer is required by an obligation to represent clients zealously to interview all potential witnesses in the litigation, whereas the other lawyer is constrained not to interview them because that would interfere with the ability of the court to obtain access to a fresh version of the witnesses' stories<sup>38</sup>.

Ideally, international tribunals would lay down rules for those who appear before them. but to date only a few have done so. International courts face practical complications: their disciplinary power over attorneys is generally limited to reprimanding them or disqualifying them from appearing before them again. The latter remedy is meaningless in the case of ad hoc

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<sup>37</sup> CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS: DESIGNING PROCEDURES FOR EFFECTIVE CONFLICT MANAGEMENT* (1996).

<sup>38</sup> For authority see Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 3 n.8 (2003).

tribunals. Another complicating factor is that attorneys who represent sovereign parties before public international tribunals can be said to be government officials for the purpose of the case in which they appear and oversight over their behavior might imply oversight over the sovereign litigant.

It is uncertain in international arbitration whether and subject to what rules private arbitrators have the power to sanction attorneys for misconduct or to disqualify them for conflicts of representation. To date there has not been much effective coordination between international tribunals and national bar associations, which clearly have expansive powers to discipline lawyers who are licensed through them.

Lawyers who practice international or transnational law at their desk rather than before a court are faced with a different problem; particularly if they are admitted to the bars of two countries and practice in an office that is not physically located in their home state, two jurisdictions may have claims to govern their activities. The American solution as represented by Rule 8.5 of the Model Rules of Professional Responsibility is to make the resolution dependent on “the place in which the lawyer’s conduct occurred or if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction”<sup>39</sup>. Other nations’ professional systems prefer the place of the office where the behavior takes place<sup>40</sup>.

A possible improvement might be the coordination of enforcement between bar authorities. National bar associations have less of a motivation (and perhaps inadequate resources) to regulate the conduct of their members abroad, but the jurisdiction where the alleged misconduct occurs may also have a reduced incentive to sanction foreign lawyers. The Task Force is aware of the American Bar Association’s Commission on Multi-Jurisdictional

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<sup>39</sup> The older version of MR 8.5 did not purport to be applicable to international, as distinguished from interstate, problems.

Practice formed in 2000 to deal with multi-jurisdictional issues among the various states of the United States. There is no similar project at the trans-national level.

### ***Effective Representation***

That the lawyer should faithfully and effectively represent the client is a generality that seems more or less universally accepted<sup>41</sup>. But the issue becomes more complex when one tackles the particulars. The obligation to the client comes up against limits when the client wishes to have the lawyer's help in disobeying the law, including the laws of other countries and international law. It is less clear what the lawyer is to do when the client's desires to do something that, though not illegal, runs afoul of the lawyer's concepts of morality or professionalism. There is a suggestion in the concept of the lawyer as an "officer of the court" or as a member of an independent profession<sup>42</sup> that the lawyer has some freedom of movement here. It is likely that the lawyer will be able to withdraw from the engagement if that could be accomplished without harming the client's interests. Continuing in the case but disregarding the client's wishes is highly problematic. A subtler variation of the problem emerges when the lawyer is called upon to make a decision as to which the client has given no specific instruction. The American rules provide that the lawyer must seek instructions about such decisions as accepting a settlement, deciding whether to initiate a case, making a plea in a criminal case and deciding whether or not to testify in a criminal case (M.R. 1.2(a)). Lawyers in other countries might take the view that they are entitled to make those decisions on their own.

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<sup>40</sup> The conflicts issues are explored in Detlev Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 689 (2000).

<sup>41</sup> It is beyond the scope of this Survey to investigate the rules of national law establishing attorney liability for malpractice or the conflict of laws rules determining which law governs such claims.

<sup>42</sup> See John Leubsdorf, *The Independence of the Bar in France in Lawyers' Practice and Ideals: A Comparative View* 275 (John Barcelo & Roger Cramton eds. 1991).

Virtually all systems impose on lawyers obligations to act with care. That involves knowing what the applicable law is. For international lawyers that includes knowing not only the law of one's own country, but that of other states that can claim to govern the transaction, as well as rules of international law. In some situations, to reduce or eliminate professional risks that may arise if an attorney attempts to do all of that alone, a lawyer in state X may associate a lawyer from state Y on the assignment. The selection of such co-counsel and coordination with counsel so chosen must be done with care<sup>43</sup>.

### *Attorneys Fees*

National legal systems have long imposed restraints on the amounts attorneys can charge their clients. Many countries have maintained schedules setting those charges. As economic analysis has become more prevalent in thinking about the profession, the view has become prevalent that the market should set legal fees and that the setting of fees by professional organizations amounts to restraint of trade<sup>44</sup>. Still, there are market imperfections in this "industry," in particular where individual clients (and not large, perhaps multinational, corporations) are involved. Thus even the American system provides in M.R. 1.5 that fees shall not be "unreasonable", thus giving the authorities the power to cut down charges they regard as excessive. There are separate issues regarding the clear disclosure and explanation of fees to the client in advance, which are particularly important where the client comes from a country other than the lawyer's and is not familiar with practices there<sup>45</sup>.

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<sup>43</sup> See Robert E. Lutz, *American Perspectives on the Duty of Competence: Special Problems and Risk in Advising on Foreign Law*, in RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 81 (Mary Daly & Roger Goebel eds. 2d ed, 2004).

<sup>44</sup> See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). *But see* *Arduino v. Compagnia. Assicuratrice RAS Spa*, [2002] E.C.R.1529 (letting stand the Italian rules on lawyers fees as basically government-dictated).

<sup>45</sup> *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986), set aside parts of a German judgment for attorneys' fees on the ground that the German schedular fee system had not been adequately explained to the American client.

National systems differ as to the appropriateness of fees that are contingent, meaning that the attorney's compensation depends on the success achieved. In some countries, there is concern that such fees may distort the lawyer's judgment and motivate the lawyer to bring doubtful cases and press them beyond the point which disinterested professional judgment would find appropriate. Some of those countries are considering relaxing their prohibition of contingent fees.<sup>46</sup> Defenders of the U.S. system, on the other hand, argue that such fees align the lawyer's interests alongside the client's and furthermore make possible the representation of the indigent. One must take into account the fact that in nearly all countries outside of the United States fees have a contingent aspect in the sense that who ultimately pays them is contingent on the outcome because fees are shifted from the winning party to the losing party.

### ***Protecting Client Secrets***

One of the most basic of a lawyer's duties is to maintain the confidentiality of the client's secrets. This obligation has two branches. The first is the lawyer's duty to maintain confidentiality that arises from the rules of the legal profession such as M.R. 1.6 in the United States. The other is the lawyer's duty and ability to resist even government attempts to obtain that information if it takes the form of communications between attorney and client. This is referred to in Anglo-American law as the attorney-client privilege. However, it was found by the Court of Justice of the European Communities in the *AMS* case that the privilege was to such an extent recognized by the legal systems of Europe that it had to be regarded as part of

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<sup>46</sup> In 2007 the Dutch government authorized the national bar association to start experimenting with a "no-win, no-fee" system whereby the number of billable hours a lawyer can charge to the client may depend on the outcome of the lawsuit (except that such arrangements remain prohibited in personal injury cases).

the EU body of law so as to protect the client's communications<sup>47</sup>. In French law, the privilege is regarded as a matter of such basic public policy that the client may not waive it<sup>48</sup>.

There are limits to attorney-client confidentiality. In some form or another, legal systems will either permit or require the attorney to break secrecy in cases where the client is preparing to commit a wrong against third parties, most dramatically a deadly assault or murder<sup>49</sup>. This is particularly true if the client is involving the lawyer in the commission of the wrong. On the other hand, in most systems, a client's confession of past wrongs is protected as being necessary in order to ensure that the client may, by frankly revealing past misdeeds, obtain advice from the lawyer that is based on full information as to the circumstances.

### ***Respect and Honesty Toward Tribunals and Non-Clients***

While a lawyer's obligations may run chiefly to the client, there are certain duties of respect and honesty toward those with whom the lawyer comes in contact during the representation of the client. This is particularly true with respect to the tribunals before which they practice. Stating a falsehood to the judge clearly cannot be justified by referring to one's duties of loyalty to one's client<sup>50</sup>. But that does not necessarily mean that the lawyer must disclose all facts known to him or her which are relevant to the case that may do harm to the client's interests. Most acute is the problem facing defense counsel in criminal cases who are aware of facts showing that the client is clearly guilty, but wishes to give testimony to the contrary. In a meaningful sense, counsel is presenting false testimony to the court. That is particularly true in common law courts where counsel presents the accused's testimony by

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<sup>47</sup> AM & S Europe v. Commission, [1982] E.C.R. 155. The case troubled American lawyers because it restricted the privilege to lawyers licensed in the EU and excluded in-house counsel.

<sup>48</sup> RAYMOND MARTIN, DÉONTOLOGIE DE L'AVOCAT 294 (3d ed. 1998).

<sup>49</sup> The U.S. rules on this point have changed drastically. What has remained constant is that lawyers were given discretion as to reporting client's criminal intentions. At one point this extended to all crimes. That was narrowed to crimes endangering life and limb and then expanded to include serious financial crimes. M.R. 1.6. German law by contrast has obligated the lawyer to report the intention of a client to commit certain criminal acts. This obligation comes from provisions of the Criminal Code §§ 138-39, which apply to non-lawyers as well.

questioning him or her. It is somewhat less true in civil law systems where the accused's testimony is elicited primarily by the court. Still, a lawyer may abet perjury by incorporating a client's falsehoods into their arguments to the court. One possible escape for counsel is to terminate the representation, but that may be unfair if it comes at a time when termination would prejudice the client, particularly one accused of crime<sup>51</sup>.

Even outside the courtroom, there are issues regarding attorney obligations to deal honestly with third parties and to avoid misrepresenting facts in the course of such negotiations or other contacts. There are also obligations in most systems about avoiding communications with third parties whom they know to be represented by a lawyer and about overreaching with a third party who is not represented by counsel, in particular in obtaining from them a release of liabilities. National bars differ in the degree to which they insist on lawyers being courteous to judges, other lawyers and lay persons.

### ***Conflicts of Interest and Representation***

National systems regulating lawyers give prominence to the avoidance of conflicts of interest and representation. The rules may be terse and highly abstract, or long and highly detailed. The American rules have moved from the terse version in the first Canon of Ethics of 1908 to the five black-letter rules with accompanying comments of the latest version of the Model Rules. The reasons for forbidding conflicts of representation are various. First, it is difficult for a lawyer to give full devotion to carrying out the purposes of one client if that interferes with giving full service to another client. Second, there is the danger that information entrusted to the lawyer by one client will be used against that client's interests to the benefit of another. Third, the public perception of the particular lawyer involved and of the legal profession as a whole may be tainted by the belief that a lawyer's services will be used against

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<sup>50</sup> See ICTY Rules art. 13; International Criminal Court Rules art. 25.

one client's interest to the benefit of another. There are, on the other hand, concerns that the rules against conflicts can be carried too far. There are other interests that are threatened by sweeping disqualifications. On the one hand, clients are denied the counsel of their choice. In some localities and in some areas of specialized practice, there are not many good choices and disqualification can seriously injure clients' interests.

Some lawyers have raised specific complaints about disqualification. One such category are lawyers who wish to move from one firm to another but who may find themselves unwelcome because they bring with them disqualifications developed from work done in their prior firm. The German constitutional court has found that this may violate German constitutional principles on the right to the development of one's career<sup>52</sup>. The effect of disqualification rules may be mitigated by other rules that permit a representation if the clients concerned, after full disclosure by counsel, give their consent.

Several varieties of conflict can be distinguished. There are direct conflicts, as where a lawyer represents client X in lawsuit 1 and seeks to represent a different client against X in lawsuit 2. An indirect conflict occurs, for example, when a lawyer seeks to represent two defendants in a criminal case even though they have somewhat different situations calling for different approaches by counsel<sup>53</sup>. There are simultaneous conflicts and those where a lawyer takes on an assignment that runs against the interests of some client he or she no longer represents. There are conflicts that involve the activities of a single lawyer as compared with those where one client is represented by lawyer 1 and another client by lawyer 2, both lawyers being with the same firm.

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<sup>51</sup> See International Criminal Court Rules art. 18.

<sup>52</sup> 108 BVerG 150 (July 3, 2003).

<sup>53</sup> See International Criminal Court Rules art. 16. The American M.R. 1.7, Comment 23, says that a lawyer should ordinarily decline to represent plural criminal defendants. The German rule is more categorically negative.

It may not always be clear whether the arrangements between lawyers in fact constitutes a firm. Lawyers in different countries have structured “alliances” or “networks” which attempt to offer the advantages of a multinational firm in that they are used to working with each other but do not share profits or have the other characteristics of a firm. Law firms have also sought to avoid vicarious disqualification issues by erecting “screens” or “firewalls” between offices or specialist groupings.

The new global legal practice system poses new problems for the rule-makers. A recent case illustrated these difficulties. The Brussels office of a large and geographically widespread American law firm (X) did some work for the European aircraft manufacturer Airbus. Airbus and Boeing were involved in a battle over allegations of subsidies being furnished by Europe and the United States to their protégés. Law firm X through its Washington office later undertook to assist Boeing in this matter. Proceedings began before a panel of the World Trade Organization. The parties thereto were not Boeing and Airbus, but the United States and the European Union, each of which were represented by their own counsel.

The questions presented by this fact situation are various. Did the work done in Brussels overlap with the work done in Washington so as to give X (and Boeing) an advantage? Was information from Brussels actually conveyed to Washington? Should there be a presumption that information held by one office in a “firm” is available to another office in another country? Should it be a matter of proof? Who should set the rules that govern this—the WTO? The bar authorities in Washington? The authorities in Brussels? How should those rules be enforced? One notes that Boeing is not actually a party to the WTO proceeding and its lawyers do not appear before it. At this point, the WTO Appellate Body has expressly declined

to develop a code of conduct to govern counsel who appear before it, and instead defers attorney regulation to the Members whom those counsel represent<sup>54</sup>.

### *Attorney Advertising and Client Choice*

According to some scholars, all forms of personal solicitation are “prohibited everywhere by similar rules<sup>55</sup>.” In the not too distant past, there was similar worldwide consensus that lawyer advertising was generally impermissible. Such national bans were usually justified on the ground that advertising or solicitation by lawyers could encourage unfounded litigation, promote misleading claims about lawyer competence, unduly influence a client’s selection of counsel, and most importantly damage the image of the legal profession. In the 1970s, this position began to crumble, starting with decisions of the Supreme Court of the United States that held that lawyer advertising is commercial speech and thus entitled to the protection of the First Amendment. European states have also begun to allow advertising, but in a more limited manner than permitted in the United States<sup>56</sup>. In other parts of the world, however, bans against advertising remain in place. For example, in India “there is an absolute bar on attorney advertising that would preclude Indian attorneys from being listed on a referral website”<sup>57</sup>.

Even though U.S. and European approaches seem to be converging significant differences remain<sup>58</sup>. One important reason is that the flexibility in the United States is largely

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<sup>54</sup> For commentary critical of this WTO decision, see Priscilla McCalley, *The Dangers of Unregulated Counsel in the WTO*, 18 GEO. J. LEGAL ETHICS 975 (2005).

<sup>55</sup> See GEOFFREY HAZARD JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 142 (2004)(citing prohibitions in the United States, Italy and Japan).

<sup>56</sup> See, e.g., Louise L. Hill, *Publicity Rules of the Legal Professions within the United Kingdom*, 20 ARIZ. J. INT’L & COMP. L. 323 (2003)(“historically, the legal professions in European countries frowned on or prohibited advertising by lawyers...[today] many EU member states [have] abandoned their traditional rules prohibiting lawyers advertising in favor of permitting some form of advertising by lawyers.”).

<sup>57</sup> Michael A. Gollin, *Answering the Call: Public Interest Intellectual Advisors*, 17 WASH. U. J. L. & POL’Y 187, 209 (2005).

<sup>58</sup> Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT’L L. 477 (2004); Stefano Agostini, *Advertising and Solicitation: A Comparative Analysis of Why Italian and American Lawyers Approach their Professions Differently*, 10 TEMPLE INT’L & COMP. L.J. 329 (1996).

attributable to a uniquely expansive view of free speech implicated in the First Amendment<sup>59</sup>. The nature and extent of free speech rights and particularly their extension to commercial speech like attorney advertising, are more recent and more attenuated in other countries. For example, the European Court of Human Rights (ECHR) found that a Spanish decree prohibiting nearly all lawyer advertising was consistent with Article 10 of the European Convention on Human Rights. In reaching this conclusion the ECHR recognized that Spain and other European countries were groping for new solutions<sup>60</sup>.

The different national approaches to attorney advertising appear tied to inherently national conceptions of free speech protections. International human rights standards are evolving in the area of free speech, but it seems unlikely that they will soon evolve to a universally recognized international standard for protection of lawyers' commercial speech. In this area, therefore, it appears that the work to be done is in developing choice-of-law rules and reciprocal enforcement arrangements. Meanwhile, international trade has pushed to make regulation more permissive. For example, the opening of attorney advertising in China is largely attributed to its accession to the WTO<sup>61</sup>. Similarly, as GATS presses for greater practice rights for foreign lawyers, it is likely that it will expand the rights of foreign attorneys to advertise their services.

A separate but related issue is attorney solicitation. The potential dangers of attorney solicitation was nowhere better demonstrated than in the behavior of American tort lawyers in Bhopal, India. After the escape of poisonous gases from the pesticide factory partly owned by

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<sup>59</sup> Protection of lawyer advertising in the United States is not without limits. Most significantly it does not apply to face to face solicitation by lawyers which is thought to present a danger of overreaching by counsel. The Supreme Court has qualified its earlier rulings by allowing Florida to prohibit solicitation of accident victims and their kin within thirty days of the episode. *Florida Bar v. Went for It Inc.*, 515 U.S. 618 (1995).

<sup>60</sup> *Casado Coca v. Spain*, Series A, No. 2885, 18 E.H.R.R. 1 (1994).

<sup>61</sup> Jane J. Heller, *China's New Foreign Law Firm Regulations: A Step in the Wrong Direction*, 12 PAC. RIM L. & POL'Y J. 751 (2003); Darryl D. Chiang, *Foreign Lawyer Provisions in Hong Kong and the Republic of China on Taiwan*, 13 UCLA PAC. BASIN L.J.306n.171 (1995).

Union Carbide, American attorneys equipped with English language release forms, persuaded unsophisticated victims to sign up as plaintiffs in tort actions to be brought in the United States. One attorney claimed to have signed contingent fee arrangements with more than 7,000 plaintiffs within five working days of the gas leak—approximately one agreement every 60 seconds<sup>62</sup>. Although charges were never brought in India, this conduct presumably violated Indian rules against attorney advertising and solicitation described above. Despite a widespread assumption that the U.S. rules were also violated, there were no reported instances of sanctions against the attorneys in the United States. At the time of the disaster, M.R. 8.5 expressly did not apply to international activities, so there may have been questions about the regulatory authority of U.S. bar associations.

Another area where attention and coordination is needed is the context of internet advertising<sup>63</sup>. Even in domestic contexts, regulators have not kept up with the issues raised by this medium<sup>64</sup>. Conflict of laws issues about advertising, which are generally uncertain, become even more so when the advertising takes place on the internet. In sum, issues of attorney advertising are important to protect the interests of both clients and attorneys, but they are also delicate and complex.

## CONCLUSION

This Survey attempts to present an overview of some of the important issues confronting adjudicators and arbitrators in the world of international law. It is hoped that this

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<sup>62</sup> David T. Austern, *Is Lawyer Solicitation of Bhopal Clients Ethical?*, LEGAL TIMES, Jan. 21, 1985 p. 16.

<sup>63</sup> See Michael Loudenslager, *E-Lawyer, The ABA's Current Choice of Ethics Law Rule & the Dormant Commerce Clause: Why the Dormant Commerce Clause Invalidates Model Rule 8.5(B)(2) When Applied to Attorney Internet Representations of Clients*, 15 WM. & MARY BILL RTS. J. 587 (2006).

<sup>64</sup> Brian G. Gilpin, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. MARSHALL J. COMP. & INFO. L.697 (1995). A related problem is the proliferation of “online discussion forums in different countries, ordinary people pose specific legal questions and

Survey and the Action Items proposed by the Task Force will assist those who work on specific problems in the world of practice and inform lawyers from the United States and other national systems about the complexities and conflict that await them when their work crosses national boundaries.

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both ordinary people and lawyers answer them.” See Peter B. Maggs, *Free Legal Advice on the Internet*, 34 INT’L J. LEGAL INFO. 483 (2006).

**AMERICAN SOCIETY OF INTERNATIONAL LAW**  
**TASK FORCE ON GLOBAL PROFESSIONAL RESPONSIBILITY**  
**Proposed Action Items**

Whereas, the American Society of International Law is a nonprofit, nonpartisan, educational membership-based organization founded in 1906 and chartered by Congress in 1950, which has 4,000 members from nearly 100 nations, including attorneys, academics, corporate counsel, judges, representatives of governments and non-governmental organizations, international civil servants, students and others interested in international law;

Whereas, the mission of the Society is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice through the sponsorship of meetings, publications, information services and outreach programs;

Whereas, the expansion of international commerce, the proliferation of international law and international tribunals and the increased mobility of legal professionals have highlighted the need for additional discussion, debate and concrete guidance regarding the professional conduct and responsibilities of participants in international and transnational legal practice and international dispute resolution;

Whereas the Society's President José Alvarez appointed this Task Force on Global Professional Responsibility to consider how the Society can contribute to a greater understanding of issues of professional responsibility and, where necessary, the development of professional standards, rules of conduct and enforcement mechanisms to guide and regulate adjudicators and lawyers involved in international and cross-border practice:

Whereas the Task Force conducted extensive research to serve the issues relating to the professional responsibilities of adjudicators and lawyers who operate in global, cross border and international contexts and presented a report of that research to the Executive Council;

Therefore, the Task Force hereby recommends that the Society adopt the following Action Items:

1. To host or facilitate small working groups, potentially in conjunction with other regional and international organizations, comprised of international, national court judges, international arbitrators and representatives from international arbitral institutions for the purpose of addressing specific topics confronting the international tribunals, such as what effect nationality could or should have in the composition of international tribunals, when prior involvement with legal issues or facts involved in a case could or should result in disqualification of an international adjudicator and when and to what extent it is permissible for international adjudicators to act as mediators or to encourage settlement of claims outside of ordinary adjudicatory processes;

2. To make available a forum, either at the Society's Annual Meeting or otherwise, for representatives from international or national bar associations, and other interested international law societies, to come together to discuss and work toward developing international consensus about (a) issues involving international, transnational and internet attorney advertising, and (b) issues that affect cross-border regulation of attorneys, including conflict of laws, extraterritorial enforcement of national professional regulations, and cooperation and coordination of enforcement activities among national bar associations.

3. To sponsor or co-sponsor continuing legal education programs for attorneys engaged in international or cross-border practice, and law students preparing for such

practice, to educate them about such issues as professional competence in international practice, conflicting national professional rules that may apply if they travel to foreign countries or appear before foreign or international tribunals, confidentiality issues in comparative and international perspective, the varying definitions and consequences of conflicts of interests in multinational law firms, and international and transnational attorney advertising and internet advertising.

4. To build into the Society's website and web-based resources a section that gathers resources relating to professional responsibility issues affecting international adjudicators and lawyers.

5. To ensure that discussions of global legal ethics and the international legal profession, either as recommended above or otherwise, include representation of geographically diverse experts and practitioners who can contribute a full range of perspectives to ensure that studies, conclusions and proposals adopt a truly international and global viewpoint.

6. When the time is ripe, to contribute to the drafting of guidelines, standards or codes covering appropriate aspects of international legal practice.

In all of these endeavors, the Society should act with full awareness of the activities in the field of professional responsibility being conducted at both international and national levels and should avoid wasteful duplication and overlapping of such work.

Pieter H.F. Bekker  
Mary C. Daly  
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