

Estates, Gifts and Trusts Journal

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Ethical Considerations in International Estate Planning

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INTRODUCTION

International estate planning raises a number of unique professional responsibility issues. Legal professionals have traditionally been subject to regulation and discipline from the highest authority within each jurisdiction in which they are licensed. However, with the rise of the global economy, many clients and their assets do not easily fit into a single jurisdiction. International estate planners must adapt to an increasing number of different, and even inconsistent, ethical standards. Many of these standards may be vague or uncertain. Failure to adhere to applicable rules may subject an attorney to professional discipline, including investigation, the loss of fees, suspension, and disbarment. Collateral consequences may include civil malpractice liability and, in certain situations, criminal prosecution. Potential ethical issues raised by international estate planning include the increased risk of unauthorized practice of law, whether to obtain the assistance of foreign counsel or consultants (including

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partnership and fee-splitting rules), permissible advertising in foreign jurisdictions, and how to avoid aiding clients in carrying out fraudulent or criminal activities.

UNAUTHORIZED PRACTICE OF LAW

Inadvertent unauthorized practice of law poses one of the foremost risks to any form of international legal practice. Often, a client or assets may be located in a jurisdiction in which the lawyer has not received a license. Most jurisdictions have statutes or rules that prevent individuals from practicing law if they have not obtained authorization from the appropriate licensing authority.¹ Practicing law in a foreign jurisdiction without a license may also violate the rules of the jurisdiction in which the lawyer is licensed.

Unauthorized practice of law can trigger undesirable consequences. Attorneys may be denied fees for the work they have done,² enjoined from future practice in the jurisdiction³ (which can pose special problems to growing firms), endanger their malpractice coverage,⁴ or have their pleadings (or even estate planning documents) rendered void.⁵ Jurisdictions may charge local attorneys with aiding and abetting the unauthorized practice of law.⁶

Attorneys may seek to minimize the problem by relying on a narrow definition of the phrase "practice of

¹ See, e.g., Model Rules of Professional Conduct R. 5.5(a) & cmt. 1 [hereinafter MRPC].

² See, e.g., *Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct.*, 949 P.2d 1, 11 (Cal. 1998).

³ See, e.g., *In re Roel*, 3 N.Y.2d 224, 227 (1957).

⁴ 1 Schoenblum, *Multistate and Multinational Estate Planning* §5.02 (2009 ed., 2008).

⁵ Nilsson, "Are Living Trusts Void When Commercially Formed through the Unauthorized Practice of Law?" *Fla. B.J.*, 29-30 (Apr. 1995); cf., e.g., *N.C. Nat'l Bank v. Va. Carolina Builders*, 299 S.E.2d 629, 632 (N.C. 1983) (holding plaintiff's remedy was to move to strike an answer filed by an out-of-state attorney).

⁶ See *Bluestein v. State Bar*, 529 P.2d 599, 607 (Cal. 1974).

law.”⁷ They may also count on authorities not sanctioning them for isolated instances of unauthorized practice.⁸ But relying on such techniques may be risky if there is no rule, statute, or case law guaranteeing their success.

Another strategy is for an attorney to seek authorization to engage in limited practice of law in a foreign jurisdiction on a temporary basis. This solution may be of limited use because such *pro hoc vice* admission is typically limited to a specific matter and authorities may not extend it to include general estate planning business.⁹

An international estate planning attorney may attempt to limit advice to non-local matters while he or she is present in a foreign jurisdiction. As shown by case law in New York, this strategy is not foolproof, because there is a possibility that such advice may implicate matters of local law in which the attorney is not licensed.¹⁰ Another strategy is for international estate planning attorneys to render advice from jurisdictions in which they are licensed and simply not practice law in foreign jurisdictions. This solution may be difficult to carry out, especially if the needs of particular clients require an attorney to leave the jurisdiction to meet with a trust’s settlors, trustees, or beneficiaries, examine property, or negotiate or collaborate with foreign counsel.¹¹ An attorney may also be subject to ethical sanctions despite the lack of physical presence in a jurisdiction.¹²

One possible solution is for a law firm to establish a foreign presence with the use of licensed, foreign professionals. This goal presents its own practical and ethical issues. It is likely necessary that locally licensed professionals conduct the practice of law in such offices. Non-local attorneys may carry out some transitory professional activities incidental to a firm’s out-of-state operations if the attorneys carry out such activities in a coordinating-supervisory capacity.¹³ Otherwise, local law will likely prohibit foreign attor-

neys from practicing law in the jurisdiction. Law firms seeking to expand themselves across international borders also need to be mindful of different rules that apply to lawyers abroad, including different legal structures, systems segmenting the legal profession, requisite and prohibited local affiliations, and supranational regulations.

On August 12, 2002, the American Bar Association House of Delegates adopted nine recommendations contained in the Final Report of its Commission on Multijurisdictional Practice (MJP).¹⁴ Though not a panacea, the work of the MJP goes a long way to guiding practitioners in this area. The MJP website has an excellent page with numerous helpful links — such as, a “Chart on State Implementation of MJP Recommendations.”¹⁵

EMPLOYMENT OF FOREIGN COUNSEL AND LEGAL CONSULTANTS

It may be necessary for the international estate planner to seek the assistance of foreign attorneys or legal consultants. Attorneys have a general duty to provide clients with competent representation, including appropriate knowledge, skill, thoroughness, and preparation for a matter.¹⁶ Competent representation may require association or consultation with another attorney,¹⁷ including one licensed in a foreign jurisdiction. The attorney may also need to retain experts on foreign law or collaborate with foreign counsel if property is located abroad. In such situations, the attorney is likely responsible for ensuring that foreign co-counsel act in a competent and ethical fashion.¹⁸ The local attorney likely must remain responsible for foreign matters.¹⁹ Firms employing foreign counsel should be careful not to include prohibited information in their letterhead, business cards, or other promotional materials, including impermissible claims that a foreign attorney practices law in the local jurisdiction²⁰ or that such attorney has specialties not rec-

⁷ 1 Schoenblum, above, fn. 4, §5.06.

⁸ *Id.* §5.07.

⁹ ABA Comm. on Ethics, ABA Model Rule on *Pro Hoc Vice* Admission §I(B)(1) (8/12/02) (requiring that a particular proceeding be pending before the court to allow *pro hoc vice* admission).

¹⁰ *In re Roel*, 3 N.Y.2d 224, 228–30 (1957) (holding that a Mexican attorney who advised clients about Mexican law while located in New York committed unauthorized practice of law despite providing no advice as to New York law). *But see El Gemayel v. Seaman*, 533 N.E.2d 245 (N.Y. 1988) (distinguishing *Roel* and holding that a Lebanese attorney who called New York clients to advise them about Lebanese law did not engage in unauthorized practice of law because of the attorney’s incidental contacts with New York).

¹¹ 1 Schoenblum, above, fn. 4, at §5.13.

¹² *Id.*

¹³ *Fla. Bar v. Savitt*, 363 So. 2d 559, 560 (Fla. 1978).

¹⁴ ABA, “Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice” (2002), available at http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_121702_2.pdf.

¹⁵ Committee on MJP, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html (last visited July 18, 2011).

¹⁶ MRPC R. 1.1.

¹⁷ *Id.* R. 1.1 cmt. 1.

¹⁸ Am. Bar Found., *Annotated Code of Professional Responsibility* 136–39 (1979).

¹⁹ See ABA Comm. on Prof’l Ethics, Formal Op. No. 263 (1944).

²⁰ See *id.*

ognized by the local licensing authority.²¹ Local attorneys should also be careful to avoid assisting foreign attorneys in conducting the unauthorized practice of law in the local jurisdiction.²²

The American Bar Association has issued an opinion authorizing U.S. attorneys to form legal partnerships with attorneys licensed to practice law in foreign jurisdictions.²³ The local attorney has a duty to ensure that foreign lawyers who are party to such an arrangement are qualified under the standards of their home jurisdictions and to ensure that the partnership is managed in an ethical fashion.²⁴

Employing foreign counsel may raise questions about the ethics of fee-splitting. The Model Rules of Professional Conduct allow lawyers from different firms to split legal fees if (1) the division is proportional or each lawyer assumes joint responsibility for the representation, (2) the client agrees in writing, and (3) the total fees are reasonable.²⁵ Attorneys generally may not share legal fees with non-attorneys.²⁶ But the rules may consider a foreign attorney an "attorney" for fee-splitting purposes, despite lacking a license in the domestic jurisdiction.²⁷ While past decisions have tended to focus on U.S. attorneys sharing fees with attorneys licensed in other U.S. states, a similar rationale should apply to non-U.S. attorneys if a foreign jurisdiction subjects such attorneys to regulations and standards of professionalism beyond those of a layperson.²⁸

²¹ See *id.*; Model Code of Prof'l Responsibility DR 2-105(A) [hereinafter MCPR]; MRPC R. 7.4(d) (setting standards for communicating specialization other than patent or admiralty law).

²² MCPR DR 3-101(A).

²³ ABA Formal Ethics Op. No. 01-423 (2001); see also New York State Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 646 (1993) (stating that a member of the New York bar could enter into a partnership with a Japanese attorney if doing so did not interfere with the New York lawyer's ethical requirements and the attorneys complied with all substantive and legal requirements of both nations).

²⁴ ABA Formal Ethics Op. No. 01-423.

²⁵ MRPC R. 1.5(e). Similarly, the MCPR permits attorneys to divide fees with other attorneys regarding a particular matter if the client consents following full disclosure, the division is proportional to the attorneys' services, and the total fee is reasonable. MCPR DR 2-107(A).

²⁶ MCPR DR 3-102(A).

²⁷ See *Dietrich Corp. v. King Res. Co.*, 596 F.2d 422, 424-26 (10th Cir. 1979) (holding that a lawyer licensed in Illinois may split fees with attorneys licensed in Colorado consistent with the MCPR) (citing ABA Comm. on Prof'l Ethics, Op. No. 316 (1967) ("A lawyer admitted in one state for the purpose of the canons of ethics is a lawyer everywhere.)); ABA Comm. on Prof'l Ethics, Informal Op. No. C-723 (approving a fee division between a Texas attorney and a Louisiana law firm).

²⁸ Cf. ABA Comm. on Prof'l Ethics, Op. No. 316 ("A non-lawyer who undertakes to handle legal matters is not governed as

ADVERTISING IN FOREIGN JURISDICTIONS

Traditionally, the American Bar Association and licensing authorities have exhibited hostility towards advertising by legal professionals. In Informal Opinion 513, the ABA Committee on Professional Ethics explained that it was unethical to solicit legal employment through advertisements and personal communications not warranted by personal relations.²⁹ This prohibition had equal application to advertisements in foreign publications.³⁰ It is doubtful that this opinion survives *Bates v. State Bar of Arizona*, in which the U.S. Supreme Court held that the right to free speech guaranteed by the First Amendment to the U.S. Constitution protected the right of attorneys to advertise their services in a non-misleading fashion.³¹ Legal professionals may now advertise their services in an appropriate manner,³² subject to reasonable time, place, and manner restrictions.³³ Thus, it is likely permissible for an attorney to advertise his or her services internationally if the attorney discloses where the attorney is licensed, that the attorney only provides representation regarding the jurisdictions where the attorney is licensed, and the location of the attorney's offices is clearly indicated.³⁴ While the Model Code of Professional Responsibility states that an attorney may advertise in the geographic regions where the lawyer resides, has an office, or a significant part of the lawyer's clients reside,³⁵ the Model Rules of Professional Conduct omit any clarification of where attorneys may advertise.³⁶ The advertising should make it clear that any local attorneys are responsible for local representation and that any non-local attorneys are not admitted to practice law in the jurisdiction.³⁷

AVOIDING ASSISTING INDIVIDUALS IN FRAUDULENT AND CRIMINAL ACTIVITIES

All estate planning attorneys need to be concerned about avoiding participation in criminal or fraudulent

to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards.").

²⁹ ABA Comm. on Prof'l Ethics, Informal Op. No. 513 (1962).

³⁰ *Id.*

³¹ 433 U.S. 350, 382-83 (1977).

³² MRPC 7.2(a), (c); MCPR DR 2-101(B).

³³ *Bates*, 433 U.S. at 384.

³⁴ ABA Comm. on Prof'l Ethics, Informal Op. No. 181.

³⁵ MCPR DR 2-101(B).

³⁶ See MRPC R. 7.2.

³⁷ *Id.*; ABA Comm. on Prof'l Ethics, Informal Op. No. 182.

activity. Attorneys who violate the Bankruptcy Code³⁸ or state fraudulent transfer laws³⁹ may be subject to both disciplinary sanctions and criminal proceedings. International estate planners must be especially vigilant because of the possibility that clients may be assisting drug trafficking, terrorism, or other individuals or entities using international asset transfers to fund their operations or conceal them by laundering funds traced to illegal sources. Attorneys should engage in due diligence before accepting international estate planning clients — particularly where asset protection and secrecy are client goals — screening them so as to avoid participation in activities that may violate the lawyer's ethical or legal obligations.

The Model Code of Professional Responsibility prohibits lawyers from assisting clients in known illegal or fraudulent conduct.⁴⁰ While the rule only proscribes knowingly aiding and abetting criminal or fraudulent activities, an attorney must further investigate if the attorney receives facts from the potential client suggesting that the representation may aid or perpetrate a crime or fraud.⁴¹ An attorney's affirmative duty of competent representation also includes a duty to engage in adequate preparation,⁴² which may make it difficult for an attorney to sidestep his or her ethical duty by remaining ignorant of a client's fraudulent and criminal activities.

Similarly, the Model Rules of Professional Conduct forbid a lawyer from counseling a client to engage in criminal or fraudulent activity or assisting a client in such conduct.⁴³ But a lawyer may advise a client regarding the legal consequences of such conduct and counsel or assist the client in a good faith attempt to determine "the validity, scope, meaning or application of the law."⁴⁴ The rules distinguish between the proper analysis of criminal or fraudulent conduct and the improper recommendation that a client engage in such conduct.⁴⁵ If representation of a client will violate ethical rules or some other law, the attorney must withdraw from representation.⁴⁶ If an attorney discovers that conduct that once seemed legitimate is problematic, the attorney may be required to withdraw

from representation or even act to repair damage caused by the attorney's assistance.⁴⁷ Attorneys must comply with applicable law before withdrawing from representation,⁴⁸ but typically may withdraw to avoid aiding criminal or fraudulent activity.⁴⁹ Commentary to the Model Rules points to special duties to third parties that may be especially relevant to estate planning attorneys, such as in situations in which a client perpetrates tax fraud⁵⁰ or is a fiduciary to third-party beneficiaries.⁵¹ If an attorney knows that a client expects representation in violation of these rules, the attorney must consult with the client regarding the attorney's professional limitations.⁵² Of course, attorneys must carefully balance such responsibilities against their obligations to current or potential clients, including the duty of confidentiality.⁵³

CONCLUSION

The risks in this business are ever more grave given the ruling in *Pasquantino v. U.S.*⁵⁴ In that case, the Supreme Court considered "the taboo against enforcement of foreign tax law" based on the common law revenue rule, which dates back to the decisions of courts in 18th century England.⁵⁵ Despite this deeply entrenched legal concept, the U.S. Department of Justice in 2003 reached beyond its usual jurisdiction and prosecuted a team of liquor smugglers for violating a Canadian excise tax law.⁵⁶ The question in *Pasquantino* was whether the United States could prosecute U.S. persons under the federal wire fraud statute for executing a plan to defraud Canada of excise taxes. The Court stated that prosecution for international tax fraud in a U.S. court was possible under the federal wire fraud statute. The fine line the Court drew was its declaration that the revenue rule is not implicated by a criminal wire fraud prosecution because such a prosecution seeks to vindicate the United States' sovereign interest in punishing criminal conduct in this

⁴⁷ *Id.* R. 1.2 cmt. 10.

⁴⁸ *Id.* R. 1.16(c).

⁴⁹ *Id.* R. 1.16(b)(2), (3).

⁵⁰ *Id.* R. 1.2 cmt. 12.

⁵¹ *Id.* R. 1.2 cmt. 11.

⁵² *Id.* R. 1.2 cmt. 13.

⁵³ See MCPR EC 4-2; MRPC R. 1.6(a). *But see* MRPC R. 1.6(b) (providing confidentiality exceptions).

⁵⁴ 544 U.S. 349, 360-67 (2005).

⁵⁵ Lowther, "Pasquantino v. United States: The Supreme Court's Misstep in Prosecuting International Tax Fraud under the Wire Fraud Statute — A Bruise and a Band-Aid," 7 *Hous. Bus. & Tax L.J.* 332, 333 (2007).

⁵⁶ *Pasquantino*, 544 U.S. at 353.

³⁸ See, e.g., 18 USC §§2, 152.

³⁹ See, e.g., Cal. Penal Code §531.

⁴⁰ MCPR DR 7-102(A)(7).

⁴¹ ABA Comm. on Ethics and Prof'l Resp., Informal Op. No. 1470 (1981).

⁴² MCPR DR 6-101(A)(2).

⁴³ MRPC R. 1.2(d).

⁴⁴ *Id.*

⁴⁵ *Id.* R. 1.2 cmt. 9.

⁴⁶ *Id.* R. 1.16(a)(1). The mere suggestion by the client of illegal activity is insufficient; there must be a demand for illegal or unethical conduct. *Id.* R. 1.16 cmt. 2.

country, not the foreign government's interest in revenue collection.⁵⁷

The policy problems this case creates for tax practitioners and clients alike will only grow in gravity as governments across the globe become more aggressive in their tax and information gathering activities, such as the EU Gatekeeper Initiative. To wit, it is not hard to imagine the crafting of a planning structure that is perfectly fine for U.S. tax purposes, but which may exceed the boundaries of a foreign law (and in many parts of the world, running outside those boundaries is commonly accepted practice for the citizenry). But not only does the case increase the technical risks tax practitioners face in cross-border situations, it also causes the thoughtful practitioner to worry about ethics principles. For, with the advent of the *Pasquantino*

mindset, the U.S. practitioner that counsels non-citizens on estate planning must not inadvertently violate domestic law and ethics principles, by being a cog in the machine of the client's extra-U.S. non-compliance.

We have very tough jobs, and they are getting tougher every day. Between the demands of and our duties to the clients, the demands of and duties to the various governments involved, ethics rules, and so forth, the proper balance is hard to find. In the 17th century, Scottish castles had few windows. The reason was not to strengthen defensibility, but to avoid taxes — there was a luxury tax in those days, measured by the size of the windows in the taxpayer's home. Accordingly a windowless or near-windowless castle represented slick tax planning . . . but the fewer windows, the more the inhabitants lived in darkness.

⁵⁷ *Id.* at 360.

Statement of Ownership

Tax Management Estates, Gifts & Trusts Journal (publication number 753-810), published Bi-Monthly (6 issues annually) at 1801 South Bell St, Arlington, VA 22202-4501 and having headquarters and general offices at 1801 South Bell St, Arlington, VA 22202-4501. The annual subscription price is \$537.00.

Publisher, The Bureau of National Affairs Inc., 1801 South Bell St, Arlington, VA 22202-4501; Executive Editor, George R. Farrah, CPA; Managing Editor, Robert G. Herman

Owners: Beverly S. Beltz, Washington, DC; Donald A. Boone, Washington, DC; Stanley E. Degler, Arlington, VA; Julius E. Eittington, Rockville, MD; Paul D. Finney, Bethesda, MD; George J. Korphage, Mitchellville, MD; Ruby I. Muhlstein, Silver Spring, MD; Leonard L. Silverstein, Washington, DC

Issue Date for circulation data below: 07-14-2011

	Average No. Copies Each Issue During Preceding 12 Months	No. Copies Of Single Issue Published Nearest To Filing Date
A. Total Number of Copies (Net Press Run)	2,975	2,850
B. Paid Circulation (By Mail and Outside the Mail)		
(1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	2,549	2,414
(2) Mailed In-County Subscription Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	0	0
(3) Paid Distribution Outside the Mails including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	63	104
(4) Paid Distribution by Other Classes of Mail through the USPS (e.g. First-Class Mail®)	3	3
C. Total Paid Distribution (Sum of 15b(1), (2), (3), and (4))	2,615	2,521
D. Free or Nominal Rate Distribution (By Mail and Outside the Mail)		
(1) Free or Nominal Rate Outside-County Copies included on PS Form 3541	0	0
(2) Free or Nominal Rate In-County Copies included on PS Form 3541	0	0
(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g. First-Class Mail)	0	0
(4) Free or Nominal Rate Distribution Outside the Mail (Carrier or other means)	111	116
E. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3), and (4))	111	116
F. Total Distribution (Sum of 15c and 15e)	2,726	2,637
G. Copies not Distributed (See Instructions to Publishers #4 (page #3))	249	213
H. Total (Sum of 15f and g)	2,975	2,850
I. Percent Paid (15c divided by 15f times 100)	96%	96%

Publication Statement of Ownership will be printed in the 09/08/11 issue of this publication.

I certify that the statements made by me above are true and complete. (signed) Jesse E. Copeland, Supervisor, Mailing Services, 10/01/2011