St. Mary's Law Journal

Volume 22 | Number 3 Article 4

1-1-1991

Ethics and Due Diligence: A Lawyer's Perspective on Doing Business with Mexico.

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ETHICS AND DUE DILIGENCE: A LAWYER'S PERSPECTIVE ON DOING BUSINESS WITH MEXICO

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I. INTRODUCTION

Attorneys providing legal services and counsel to clients doing business with Mexico confront ethical issues that are similar in many ways to those issues faced by lawyers with clients doing business in

their home jurisdiction. But there are differences too; special ethical problems that the international attorney must resolve because the client's business dealings cross national borders.

Unique tensions arise from the conflicting responsibilities and from the complex legal and business environment of multijurisdictional transactions. Most of these added tensions are present in all cross border transactions, regardless of the countries that are involved. Often, however, there are additional ethical issues related to the specific jurisdictions of the transaction. The focus of this paper is to survey the ethical issues faced by all legal practitioners providing legal counsel in international business transactions, with special attention to those counseling clients who are doing business with Mexico.

Sections II and III of the paper review the basic framework for regulation of lawyers and ethics in international transactions, and summarize fundamental ethical dilemmas that arise in the international context. Section IV describes practical approaches to exercising due diligence in evaluating a prospective foreign client or a client's foreign business partner.

Section V reviews the case law basis of the U.S. lawyer's responsibility for foreign laws and foreign counsel, and proposes practical means for meeting those responsibilities by the effective selection and management of foreign counsel. Finally, section VI raises special ethical considerations in U.S.-Mexico business transactions and reviews selected Mexican and U.S. laws that may impact the ethical conduct of lawyers in U.S.-Mexican transactions.

The paper is not intended to be comprehensive in scope, covering all ethical issues the international practitioner may encounter in the course of assisting a client doing business in Mexico or any foreign country. Rather, it is intended to highlight only those issues that are of particular significance and that raise special difficulties for such a practitioner, and then to provide practical advice on how to avoid ethical problems in U.S.-Mexico transactions. The paper focuses on the ethics of the lawyer who practices in the United States, but who is actively involved in counseling clients or handling transactions outside the United States. It is addressed primarily to U.S. legal counsel of the U.S. client doing business with Mexico, although a few comments relate specifically to the role of the U.S. legal adviser to a Mexican client doing business in the United States.

II. A BASIC FRAMEWORK FOR LEGAL ETHICS IN INTERNATIONAL TRANSACTIONS

A. *Sources of Lawyer Regulation and Discipline*

The ethical principles guiding a lawyer's professional behavior exist to some extent because they are recognized more or less widely as the "right thing to do." In this fundamental context, legal ethics arise out of the laws of moral philosophy.[1] However the force of such principles in a lawyer's daily professional life derives from their embodiment in codes, statutes or common law precedents that underlie a system of professional regulation and discipline of lawyers.

1. Self Regulation: Formal and Informal

Throughout the modern era lawyers have claimed a right to self-regulation based on the highly technical nature of their profession and a long-established tradition of self-regulation.[2] The formal sanctions used in this system of self-regulation are applicable to all practicing lawyers and are tied to both admission to the profession and the suspension or dismissal from it. Courts and bar associations have acted together to impose and enforce these formal sanctions.[3]

Additionally, informal sanctions such as censure (public or private), denial of judicial or bar appointments or simply disapproval of colleagues may be used to force lawyers to conform to written or unwritten rules of behavior.[4]

The principles of professional conduct enforced by courts and bar associations in the United States may be found in case precedents, but are most clearly and coherently expressed in codes of professional conduct adopted by the respective state bar associations. Such rules bring together in a single codification for each state the various ethical principles and rules of professional conduct that were once found only in the holdings of courts or other scattered references. The codes have taken on increased importance in recent years as courts and legislatures have looked to them for guidance in determining matters of attorney regulation and courts have accorded them the force of law.[5]

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1. *See, e.g.*, Romo, *La Logica y la Etica del Abogado*, 19 JURIDICA ANNUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA 389 (1988-1989).

2. C. WOLFRAM, MODERN LEGAL ETHICS § 2.1 (1986).

3. *Id.*

4. *Id.*

5. *See, e.g.*, Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir.), *cert. denied*, 449 U.S. 888

One example of such state codification is the Texas Disciplinary Rules of Professional Conduct (the "Texas Rules"), recently reformulated, effective January 1, 1990.[6]

The American Bar Association has provided additional guidance on the accepted standards of legal ethics and professional responsibility in its Model Code of Professional Responsibility (the "ABA Model Code")[7] and Model Rules of Professional Conduct (the "ABA Model Rules"),[8] both of which have influenced the state codes and have been incorporated in them to a considerable extent.

2. Court-Imposed Formal Regulation

Other types of formal regulation, imposed directly by courts, also have gained importance and now exist alongside the self-regulatory sanctions linked to professional admission, suspension and disbarment.[9]

Sanctions may be imposed on lawyers in legal malpractice suits by courts that grant damage awards to plaintiffs.[10] Juries and plaintiffs assume the role of complainant against the lawyer and the court becomes the disciplinarian in such cases. In other types of litigation proceedings, courts may sanction lawyers for contempt, or award (or withhold) legal fees as a means of lawyer regulation.[11] And finally, courts may settle conflict of interest issues by disqualifying lawyers in cases in which violations of code conflict rules have occurred.[12]

All of these court actions impose sanctions and have the effect of regulating lawyers' behavior without the involvement of voluntary bar

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(1980); Davis v. Superior Court, 580 P.2d 1176, 1179 (Alaska 1978); *In re* Estate of Weinstock, 351 N.E.2d 647, 649 (N.Y. 1976); *see also* C. WOLFRAM, MODERN LEGAL ETHICS §§ 2.1, 2.6.1. (1986).

6. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS (TEXAS RULES OF PROFESSIONAL CONDUCT) (1989) [hereinafter TEXAS RULES]. The rules were formerly the TEXAS CODE OF PROFESSIONAL RESPONSIBILITY. The Texas Rules became effective January 1, 1990. As of this date, the most readily available compilation with comment is *Proposed Texas Disciplinary Rules of Professional Conduct*, 52 TEX. B. J. 1023 (1989). The Texas Rules were adopted as proposed.

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

8. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter ABA MODEL RULES]. In the view of the American Bar Association, the ABA Model Code has been superseded by the ABA Model Rules. WOLFRAM, *supra* note 2, § 2.6.4.

9. *See* WOLFRAM, *supra* note 2, § 2.1.

10. *Id.*

11. *Id.*

12. *Id.*

associations or other peers that are the traditional hallmarks of self-regulation.

3. Transnational Regulation

Lawyers are regulated and disciplined largely within the immediate jurisdiction where they practice. State codes of professional responsibility in the United States have a scope of enforcement extending generally to all lawyers licensed in the territory of the code.[13] This is not a universal rule, however, as at least one regional code has provided that each country's code extends to all lawyers practicing within the territory, whether or not they are licensed there.[14] Alternatively, the Mexican Bar Association[15] has enacted *Código de Etica Profesional*, a Code of Professional Ethics (the "Mexican Bar Code")[16] that is applicable to all members of the Mexican bar. However, the Mexican Bar Code has limited applicability even in Mexico because Mexican lawyers are not required to join the Mexican bar.[17]

Little effort has gone into the development of transnational codes of professional conduct that would supercede local regulation and that might provide welcome guidance for the lawyer engaged in cross-border legal transactions. At least one economically and politically integrated region, the European Community ("EC"), has produced a regional code drafted by the bar associations of the countries within the EC to govern primarily cross-border legal services and professional activities.[18] The EC code is not helpful to lawyers practicing outside its territory, but nevertheless may provide a model for future cross-border professional codes.

Thus far, the only effort that may be called truly international in scope is the International Code of Ethics (the "International Code")[19] drafted in 1956 by the International Bar Association ("IBA").

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13. *See, e.g.*, TEXAS RULES, *supra* note 6, Rule 8.05.

14. *See, e.g.*, Council of the Bars and Law Societies of the European Community, Common Code of Conduct, 25 THE LAW SOCIETY'S GAZETTE art. 2.4 (1989) *reprinted in The Lawyer's Responsibility for Foreign Law and Foreign Lawyers* in A.B.A. SEC. OF INT'L LAW AND PRACTICE COMMITTEE PROGRAM (1990) [hereinafter CCBE Code].

15. Barra Mexicana Colegio de Abogados, Mexico, D.F.

16. CÓDIGO DE ETICA PROFESIONAL DE LA BARRA MEXICANA COLEGIO DE ABOGADOS (Mex. 1948) [hereinafter Mexican Bar Code].

17. *See* letter from Carlos Müggenberg & Jorge Torres B. to Rona Mears (Aug. 22, 1990) (copy on file with St. Mary's Law Journal).

18. CCBE CODE, *supra* note 14.

19. INTERNATIONAL CODE OF ETHICS FOR THE LEGAL PROFESSION (1956).

Although encompassing generally accepted principles of professional conduct for lawyers, the International Code has not been widely cited or accorded the force of law, and is not viewed as particularly valuable in resolving practical ethical questions.[20] At a recent IBA Biennial Conference, a compact (the "IBA Compact")[21] was proposed relating to transnational professional conduct. It was to be submitted for signature by the bar associations of IBA member counties, but it was received with limited enthusiasm and some criticism.[22]

The international lawyer dealing in international business transactions has no overarching transnational regulations to depend upon in resolving ethical issues or determining standards of professional behavior in cross-border legal activities.

B. *Extra-Territorial Reach of Ethical Codes*

If no transnational regulation exists, and therefore no codes purport to supercede local rules and provide guidance for cross-border legal counsel, then the international lawyer must look elsewhere for the source of such regulation and guidance. In the United States, extra-territorial reach is built into the structure of the applicable local code. Thus, it follows the lawyer to foreign jurisdictions whether activities there include coordinating legal work in a foreign country for the U.S. client, or working for a foreign client who is located outside the United States.

1. Effect of Ethical Rules Across National Borders

Most codes provide that the enforcement of disciplinary rules and sanctions derive from a definition of misconduct which includes certain crimes and any violations of the rules of professional conduct.[23] Enforcement extends to any location where the lawyer who is subject

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20. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 520 (1989).

21. COMPACT RELATING TO GUIDELINES FOR THE MEMBERS OF THE LEGAL PROFESSION PRACTICING LAW IN FOREIGN JURISDICTIONS (1988) (hereinafter IBA COMPACT).

22. The International Bar Association Council refused to endorse the Compact at its September 21, 1990 meeting and sent it back to committee for further study. *See generally* Chaterjee, *Lawyers Fail to Win Resolution on Use of Home or Host Rules*, Fin. Times, Oct. 1, 1990, at 15, col. 5. Among other comments, critics pointed out that the jurisdictional principle of the Compact, providing that host country rules apply to lawyers practicing there, is the opposite of the jurisdictional principle of most codes in local jurisdictions. *Id.*

23. *See, e.g.*, TEXAS RULES, *supra* note 6, Rule 8.04.

to such rules commits acts of misconduct.[24]

In Texas, for example, the combined effect of these two Texas Rules—the definition of misconduct and the scope of enforcement—is that the Texas lawyer is subject to discipline under the Texas Rules even if the violation occurs outside Texas. This includes violations anywhere in the United States and also in any foreign country. The Texas Rules, in effect, follow the international lawyer who is a member of the State Bar of Texas to any jurisdiction in which a violation is committed.[25]

The ABA Rules recognize this principle of the extra-territorial reach of local rules, stating that a lawyer may be subject to discipline for a violation of the local jurisdiction's code even if practicing elsewhere.[26] The extra-territorial reach of state professional codes is, interestingly, exactly opposite the approach of the proposed IBA Compact which provides that the standards of professional conduct of the foreign jurisdiction should be applicable to the visitor lawyer who is engaged in occasional advice or practice for a particular transaction in the foreign country.[27]

2. Conflicts of Local and Foreign Rules

If a conflict exists between the professional rules of conduct of the foreign jurisdiction and the lawyer's local rules, the applicable Comment to ABA Rules suggests that principles of conflicts of law should determine which rules apply.[28] At least one commentator observes that in most circumstances the substantial contacts test frequently utilized in conflicts of law would find a greater nexis with the foreign jurisdiction and thus the foreign code of professional conduct would apply.[29] This rule would lead to a result similar to that proposed by the IBA Compact.[30]

The complications of such a result are compounded in jurisdictions such as Mexico where the Mexican Code applies only to members of the Mexican Bar, and Mexican lawyers are not required to be mem-

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24. *See, e.g.*, TEXAS RULES, *supra* note 6, Rule 8.05
25. *Id.*
26. ABA MODEL RULES, *supra* note 8, Rule 8.5; *see also* Goebel, *supra* note 20, at 520.
27. IBA COMPACT, *supra* note 21, art. II(7); *see also* CCBE CODE, *supra* note 14.
28. MODEL RULES, *supra* note 8, Rule 8 comment.
29. Goebel, *supra* note 20, at 520.
30. *See generally* IBA COMPACT, *supra* note 21.

bers of the Mexican Bar to practice in Mexico.[31] A considerable inequity would result from imposing the Code on foreign lawyers who give legal counsel in Mexico only occasionally or in very limited capacities with associated Mexican counsel, when not all Mexican lawyers are required to comply.

As a practical matter, however, it is the lawyer's home jurisdiction that is most likely to pursue a disciplinary course of action against its member lawyer. If no conflict exists with the code of the foreign jurisdiction, the local code would be enforced. Even if a conflict is found, courts or enforcement agencies of a local bar association would be unlikely to determine that the conflicting foreign code governs, and may be inclined to enforce the local code because it is familiar and provides an accessible body of precedent.

In response to such practical considerations, the U.S. lawyer inevitably relies on the local state bar code in the United States to provide guidance for standards of professional behavior in cross-border transactions. Yet in doing so, the international lawyer still faces formidable obstacles to fulfilling such professional standards because of the complex business and legal environment in which cross-border legal work takes place.

In fact, certain key principles of professional conduct raise serious issues for lawyers in cross-border transactions, and in some instances impose ethical dilemmas that are unique to the international lawyer.

C. *Key Ethical Issues for the International Lawyer*

In representing clients in cross-border business transactions, international lawyers who comply with the rules of professional conduct in their local jurisdiction find that several principles of conduct fundamental to a lawyer's duty and commonly found in codes, raise special issues. The Texas Rules, for example, include eight principles that are especially problematic for the lawyer counseling clients engaged in multijurisdictional projects or transactions.[32]

1. Zealous Representation

An attorney must zealously advocate the client's position and ener-

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31. *See* Müggenberg & Torres, *supra* note 17.

32. The reader is cautioned that the principles enumerated are not intended to be inclusive, but rather have been selected to highlight particular problems of the international lawyer; all rules of a relevant state code would be applicable to transactions described in this paper.

getically pursue the client's interests until the mutually agreed upon termination of the project.[33] For the international lawyer, it is the personal involvement and direct participation in a transaction that facilitates zealous representation. Yet such involvement may be difficult to achieve if the locus of the transaction is outside the United States and not only the law but also the customs of business differ from those of the United States.

2. Competent and Diligent Representation

Lawyers must be competent to provide the type of legal advice and representation required by a client, and then must diligently follow through on legal matters to insure that they are satisfactorily concluded.[34] Competence of representation is tied to the rule against unauthorized practice of law,[35] and lawyers are cautioned not to practice in an area of law in which they are not competent, or in a jurisdiction where they are not licensed.

For the international attorney these rules bar the actual performance of most legal tasks in a foreign country since the U.S. attorney is neither competent to practice there nor authorized to do so.[36] Yet in the outbound transactions in which a client is doing business *in* a foreign country, much, if not all, of the legal work must be performed in the foreign country, resulting in a formidable obstacle for the international lawyer who must provide competent representation, or ensure that it is available to the client.

3. Communication

An attorney must communicate fully and regularly with a client to allow the client to participate knowledgeably in the decisions concerning a transaction, and to ensure that the client knows the status of the matter being handled.[37] In a multijurisdictional transaction, if a client, or the client's business partner or foreign co-counsel are located in a foreign country, it is a considerable challenge to fulfill the obligations of full communication. Not only may the other parties speak no

33. TEXAS RULES, *supra* note 6, Preamble.

34. TEXAS RULES, *supra* note 6, Rule 1.01.

35. TEXAS RULES, *supra* note 6, Rule 5.05 comment; *see also infra* text accompanying notes 43-45.

36. *See* Letter from Mariano Soní to Rona Mears (Aug. 24, 1990) (copy on file with St. Mary's Law Journal).

37. TEXAS RULES, *supra* note 6, Rule 1.03.

English, but, even if they do, translation problems, varied word usage and customs of communicating, differences in time or office hours, and lack of equipment and infrastructure may all be deterrents to good communication.

4. Conflicts of Interest

An attorney must avoid representation of a client whose interests are opposed to those of an existing client.[38] A co-counsel must also meet this standard. Frequently, finding foreign counsel free of conflicts in a foreign jurisdiction such as Mexico will raise complex conflicts issues because of the limited number of attorneys in some cities who handle international work or because of the impact of certain transactions involving large numbers of parties.[39] Differences in the customary understanding of what constitutes a conflict, or lack of a developed policy of conflicts resolution in foreign jurisdictions also requires careful communication and education of foreign co-counsel.[40]

5. Supervision Responsibilities

Attorneys must oversee the work of associated lawyers or co-counsel adequately to ensure that the client's needs are met and that competent, zealous representation is occurring.[41] Similarly, the lawyer who is retained by co-counsel to do a portion of the client's project must engage in the matter and pursue it as fully as if serving in the capacity of lead counsel.[42]

The challenge of supervising foreign counsel is compounded by barriers of language, distance and lack of familiarity with local laws or business customs in the foreign jurisdiction. Customs of practice may also make foreign counsel less accustomed or amenable to close supervision by another lawyer.

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38. TEXAS RULES, *supra* note 6, Rule 1.06.

39. Letter from James E. Ritch, Jr. to Rona Mears (Aug. 17, 1990) (copy on file with St. Mary's Law Journal).

40. *Id.*

41. TEXAS RULES, *supra* note 6, Rule 5.01.

42. TEXAS RULES, *supra* note 6, Rule 5.02 (except supervised lawyer not in violation if acting in accordance with supervising lawyer's "reasonable resolution of an arguable question of professional conduct").

6. Unauthorized Practice of Law

It is one of the most fundamental tenets of the legal profession that lawyers are not to engage in or allow the unauthorized practice of law.[43] Lawyers must not practice in a jurisdiction where they are unauthorized;[44] further, they must not allow or cause others who are unauthorized to practice law.[45] This places a burden of inquiry on the international attorney to be certain that foreign associated counsel is authorized to practice in the foreign country.

7. Confidentiality of Information

United States lawyers must not reveal confidential information to third parties, except under strictly specified circumstances.[46] Confidential information is defined broadly as including both privileged information under the state and federal rules of evidence related to attorney-client privilege, and unprivileged client information, which is other information relating to or furnished by a client.[47] Significant differences in confidentiality rules exist in other jurisdictions. These differences often place the lawyer in an environment of uncertainty regarding communications to a client in a foreign jurisdiction and whether the communications would remain confidential under the laws of the foreign country. Because of such potential conflicts, international practitioners are often cautious regarding written communications concerning matters that are sensitive for the client.[48]

8. Client/Lawyer Relationship: Fiduciary Duty

An overarching principle that permeates the Texas Rules, and indeed all of the other standards of professional behavior for lawyers, is the fiduciary relationship of lawyer to client, arising from the ancient doctrine of fiduciary agent.[49] Based on trust and expectations of loyalty, necessitated by the client's vulnerability and need for expertise that only the lawyer can provide, the fiduciary relationship places du-

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43. TEXAS RULES, *supra* note 6, Rule 5.05.
44. TEXAS RULES, *supra* note 6, Rule 5.05(1); *see also id.* at Rule 1.01.
45. TEXAS RULES, *supra* note 6, Rule 5.05(2).
46. TEXAS RULES, *supra* note 6, Rule 1.05.
47. TEXAS RULES, *supra* note 6, Rule 1.05(a).
48. Sharp, *Ethical Considerations in Counseling the Foreign Client*, in STATE BAR OF TEXAS ADVANCED INTERNATIONAL LAW COURSE MATERIALS E-1, E-22 (1990).
49. *See* WOLFRAM, *supra* note 2, § 4.1.

ties on the lawyer greater than those of a mere contracting party.[50] In international transactions, the need and vulnerability of the client arguably are greater even than in domestic transactions, and the duty of the U.S. international lawyer therefore is arguably greater than that of a lawyer counseling a client in domestic transactions. Yet the fulfillment of the international lawyer's fiduciary duties often are complicated by the environment encountered in the foreign jurisdiction.

D. *Are Legal Ethics Universal?*

Having reviewed some of the key principles of professional conduct to which the U.S. lawyer must adhere, it is natural to inquire as to how extensively those principles are found in other jurisdictions. Few systematic studies of comparative ethics in the legal profession have been published to date,[51] and thus, it is a matter of speculation as to whether the ethical principles familiar to U.S. lawyers are followed widely in other jurisdictions. Nevertheless, to the extent that professional standards of legal behavior are based on the philosophy of morality and rules of logic, then it may be assumed that the principles of legal professional codes in various countries are at least somewhat similar.[52]

Practical experience, in addition to a review of the Mexican Code,[53] and recent communications from Mexican practitioners,[54] indicates that the underlying principles of the U.S. and Mexican codes are remarkably similar. This fact provides reassurance to practitioners that conflicts between a U.S. state code and the Mexican Code are unlikely to occur, and a close adherence to the U.S. lawyer's local code is likely to be a workable method for dealing with ethical dilemmas in U.S.-Mexico transactions.

The detailed rules and their application in the U.S. and Mexico varies in practice, however, and thus, universality only goes so far.[55] Combined with differing business practices in other jurisdictions, the U.S. practitioner must deal with numerous tensions and conflicting

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50. *Id.*

51. For one of the few publications that compares international regulatory schemes see Pina, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797 (1988).

52. Romo, *supra* note 1, at 400.

53. *See* MEXICAN BAR CODE, *supra* note 16.

54. *See* Müggenberg & Torres, *supra* note 17; Ritch, *supra* note 39.

55. *Compare* MEXICAN BAR CODE, *supra* note 16 *with* TEXAS RULES, *supra* note 6.

responsibilities in efforts to meet U.S. professional standards while counseling a client doing business in Mexico. This occurs even though the U.S. attorney has co-counsel in the foreign jurisdiction. Beyond the general difficulties of meeting the standards enumerated above, two overarching ethical dilemmas confront the U.S. attorney providing legal services to clients doing business in Mexico, or in any country outside the United States.

III. FUNDAMENTAL ETHICAL DILEMMAS OF INTERNATIONAL ATTORNEYS

Contrary to popular belief, most violations of disciplinary rules or questionable ethical decisions by lawyers are not due to meanness of spirit or even overriding self-interest. They come about because of conflicting responsibilities that are at the heart of law practice. Or, alternatively, they arise out of the complexity inherent in the legal environment in which the lawyer practices. Nowhere is this more evident than in international practice.

A. *Zealousness and Competence*

The conflicting responsibilities that most often arise for an attorney in an international transaction are "zealousness" on the one hand and "competence" on the other. These two principles lie at the heart of a fundamental ethical dilemma for the international lawyer. It is essential to understand this dichotomy and come to a satisfactory resolution of the tension between zealously advocating a client's interests and ensuring at the same time that representation of the client is competent. Lawyers will find this tension to be greatest when representing a U.S. client doing business outside the U.S., as, for example, in Mexico; yet elements of the dilemma also exist when a U.S. lawyer represents the Mexican client doing business in this country.

The twin standards of zealousness and competence are set forth clearly in professional codes. For example, the Preamble to the Texas Rules states that, "as advocate, a lawyer zealously asserts the client's position. . . ."[56] Rule 1.01 of the Texas Rules states, however, "[a] lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's com-

56. TEXAS RULES, *supra* note 6, Preamble at ¶2.

petence. . . ."[57] As a practical matter, the conflict of these two principles creates the dilemma of the U.S. lawyer: how to zealously advocate a client's interest in the cross-border transaction, while delegating matters in the foreign country to another lawyer, so there will be competent counsel there.

It is not possible for the international lawyer to simply abandon one or the other of the companion responsibilities—zeal or competence—by either turning the matter over to foreign counsel or by doing the legal work alone. The international lawyer remains responsible for both zealous and competent representation, whether or not foreign counsel is associated in Mexico. The Texas Rules Preamble directly juxtaposes these two responsibilities:

> In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent.[58]

Therein lies the most direct and profound ethical dilemma of the international lawyer: how to advocate and pursue a client's interests zealously throughout the course of a transaction occurring in a foreign country, while providing competent legal representation there. Similarly, it may be just as difficult to solve the dilemma in an inbound transaction. When the U.S. lawyer is handling a legal matter for the Mexican client doing business in the U.S., it is equally important to understand fully the goals and instructions of a Mexican client in order to zealously and competently handle the U.S. side of the Mexican client's transaction.

B. *A Complicated Context and a Greater Duty*

The basic dilemma of providing zealous yet competent legal representation in the international transaction is further complicated by a second and even more pervasive pair of opposing factors.

The environment, or context of the international transaction, is at least twice as complex as that of a domestic transaction. Many practitioners would assert that the complexities rise geometrically, and thus the addition of a second country more than doubles the legal and business factors to be considered in a business transaction. Communication is complicated. Customs of business vary. Laws differ and

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57. TEXAS RULES, *supra* note 6, Rule 1.01(a).

58. TEXAS RULES, *supra* note 6, Preamble at ¶3; *see also id.* at Rule 1.01.

time and distance create psychological barriers to an integrated approach to the project. The international environment is a complicated context in which the international lawyer must act effectively and meet standards of professional conduct imposed by the home country and written in codes meant to govern professional activities occurring in the simpler context of one jurisdiction.

Countering the complicated context of the cross-border transaction is the vulnerability and greater need for counsel experienced by a client engaged in international transactions. Although particularly true in clients just beginning to do business in Mexico, it is always true to some extent that the U.S. client is disadvantaged when the locus of the business activity is outside the home jurisdiction. Thus, arguably, the fiduciary duty of the international lawyer to a client engaged in international business is even greater than that of a domestic lawyer.

A complicated context in which to act, yet a greater duty to perform; together these factors create the second dilemma the international lawyer faces in meeting ethical standards imposed by the rules of professional conduct.

C. *The International Practitioner's Response*

Most international practitioners resolve the dilemmas of their practice satisfactorily only after years of trial and error. Varied techniques are used to assure that ethical standards are satisfied while the client's needs are fulfilled. To accomplish these goals, international lawyers rely on a practical approach. Most importantly, they:

- exercise due diligence in the acceptance of foreign clients, and in assessing the potential foreign partners of U.S. clients;
- select and engage associated foreign counsel carefully and with attention to numerous criteria;
- manage foreign counsel actively; or participate actively as co-counsel for foreign clients; and
- know and comply with special ethical considerations in the foreign country, and the applicable U.S. and foreign laws that impact the lawyer's duties in the international transaction.

In the sections that follow each of these strategies will be considered in turn. Taken together they provide a practical method for the international lawyer to use in order to fulfill the rules of professional conduct, and to do so in the complex environment of the international transaction.

Of the four strategies proposed, however, it is the careful selection

and assertive management of foreign counsel that is most effective in assisting the U.S. lawyer to meet the conflicting responsibilities in an international transaction. Pursuing a client's project zealously, while not overstepping the bounds of competence by practicing in a foreign jurisdiction is best accomplished by finding excellent foreign counsel who is competent and dependable, who communicates effectively, who hears the articulation of a client's needs and who accepts the U.S. lawyer's continued involvement in the project. Then, once such foreign counsel is found, the U.S. lawyer must stay involved in the project, managing, thinking creatively, asking tough questions, settling for nothing less than prompt, competent and zealous representation by foreign counsel for the client.

Such an approach helps to avoid the two mistakes that are frequent causes of ethical problems in international transactions. The first mistake is for the U.S. lawyer to remain too involved, refusing to take foreign counsel's advice, and trying to handle legal matters directly in a foreign jurisdiction. The second is to abandon the project and client to the total control of foreign counsel without playing any ongoing part as advocate of the client's goals and needs. To abandon zealousness and diligence may be as ethically unsound as it is to abandon competence.

Caveats must of course be added. There are certain situations where the best approach is simply to refer the client to foreign counsel and step out of the way. Conversely, in some instances there are routine inquiries on the state of law or other simple cross-border matters that can be handled without the assistance of foreign counsel. Nevertheless, for the vast majority of cross-border transactions, there will be sufficient complexities to require the association and advice of foreign counsel, and at the same time the continued involvement of the U.S. lawyer to see the project through in the client's interest.

In these situations it is the diligence and care with which the U.S. international lawyer selects foreign counsel, and then works with and manages foreign counsel, that will determine whether the companion ethical responsibilities of zealousness and competence have been fulfilled. It is also the means by which the complicating context is made manageable, and the U.S. lawyer's duties to the client are most likely to be fulfilled.

The first step, however, even preceding the selection of foreign counsel, in the overall strategy of managing an international transaction ethically, is to exercise due diligence in the review and engage-

ment of a new foreign client, or in assisting a U.S. client to review a potential foreign business partner. Such diligent preliminary review may help the lawyer avoid most, if not all, potential ethical problems from the beginning of the engagement.

IV. DUE DILIGENCE

Exercising due diligence during the process of engagement by a prospective Mexican client, or in the review of a U.S. client's prospective Mexican partner, is the foundation for successfully meeting the standards of professional conduct in a U.S.-Mexico transaction. Taking the time to perform a thorough due diligence review at the beginning of either relationship is well worth the effort and expenditure involved for several reasons.[59]

First, it is difficult—sometimes impossible—to zealously and competently represent a client whose background is unknown. The proper legal advice in cross-border transactions, whether in-bound or out-bound, is often based on the overall business and personal financial situation of the parties, and a failure to inquire fully concerning both business and personal background can result in giving improper advice.[60] Secondly, a failure to inquire about a client or business partner can be the avenue to malpractice proceedings or to other civil or criminal liability proceedings if the transaction or parties violate certain U.S. statutes.[61]

Finally, a U.S. lawyer is dependent on the integrity and expertise of a foreign client or partner's professional advisers—lawyers, accountants or bankers—to provide counseling and perform duties in the foreign country in accordance with practices that match the U.S. lawyer's standards of professional conduct. As a result, it is not only the prospective Mexican client or business partner, but also their professional advisers, who should be subject to review.

A. *Representing a Mexican Client in the United States*

Before accepting engagement by a Mexican client or any other foreign client, an initial inquiry should be made concerning the prospec-

59. *See generally* Sharp, *supra* note 48, at E-3 to E-8 (excellent and thorough discussion of due diligence particularly relative to the foreign investor client).

60. *Id.* at E-4 to E-5.

61. *Id.* at E-4 to E-5, E-12 to E-13; *see also infra* notes 134-139 and accompanying text; Ritch, *supra* note 39.

tive client's background and business. The best approach is to make it clear at the outset of an initial conference that preliminary discussions are confidential, but that engagement and thus legal representation, will begin only after certain initial inquiries are completed.[62]

The situation with each prospective client differs and some may be more reluctant than others regarding such inquiries, often for quite legitimate reasons such as political sensitivity. Authorization should be obtained in advance from the prospective client to undertake inquiries, and care must be exercised to ensure that confidentiality is maintained and, if applicable, attorney-client privilege is preserved.[63] If there is complete resistance to any inquiries at all, however, particularly if there is no satisfactory explanation, it is probably best not to accept such an engagement.

1. Initial Inquiry

The initial inquiry should include a request for attorney, accountant and bank references in the client's home jurisdiction, and any comparable references in the United States.[64] Often prospective foreign clients come to the U.S. lawyer as the result of a referral and it is important to talk personally with those who refer prospective clients to determine the extent of their relationship and to obtain confirmation of a positive reference. It is often an unpleasant shock to learn that the person referring a prospective client knows little about the dealings or background of the person being referred.

In addition to professional advisers, a U.S. attorney should request at least one personal or business reference to complete the profile of a prospective foreign client from the perspective of others. Although a seemingly obvious point, it is not enough just to obtain the names of references. The U.S. attorney should contact each reference directly to verify the prospect's background, integrity, and general reputation.

Finally, the prospective client should be asked to describe the history and development of the business related to the prospective transaction and other business dealings. If there are periods of time that are unaccounted for, or questions that are avoided, it should make the

62. *See* Sharp, *supra* note 48, at E-4.

63. TEXAS RULES, *supra* note 6, at Rule 1.05; *see also* Sharp *supra* note 48, at E-20 to E-24.

64. *See* Sharp, *supra* note 48, at E-4 (practical and helpful description of the initial interview with hypothetical prospective client).

U.S. lawyer wary. Often an instinctive response to the prospective client must be relied upon in an initial interview; and such response should not be ignored even if it is simply that "something doesn't feel quite right."

2. Engagement

Once satisfied with the results of an initial inquiry, a written engagement letter should be drafted, delivered and a copy signed and returned by the prospective client to indicate acceptance of its terms and conditions. The engagement letter should include all those provisions usually included in domestic engagements, but also may be expanded to provide a more detailed explanation of matters such as legal fees, charges, billing practices, payment expectations or other administrative details. Special attention should be given to a description of facts surrounding the proposed transaction, and the scope of engagement, including a provision concerning the limits of legal expertise to U.S. and applicable state law, and the means agreed on for handling foreign law matters such as use of foreign counsel.[65] Arrangements for the engagement, supervision and payment of foreign co-counsel should also be specified in detail.[66]

3. Ongoing Diligence

Due diligence regarding a Mexican or other foreign client does not end with the U.S. lawyer's engagement. Throughout the course of a cross-border transaction, the U.S. lawyer must continue to inquire diligently about all facets of the transaction, and any corollary aspects of the client's business, as they may impact the transaction. Often proper tax planning for a cross-border transaction necessitates gathering detailed information about a client's overall business and even personal financial situation.[67]

After a particular cross-border transaction in completed, and an agreement is reached for on-going legal representation, the U.S. lawyer should continue to monitor those aspects of a client's business or finances that may raise issues and impact legal advice. Often foreign clients return to a U.S. lawyer unexpectedly for legal advice that must be delivered quickly, and it is helpful to have relatively current infor-

65. *See id.* at E-6 to E-7.
66. *Id.*; *see also* Ritch, *supra* note 39.
67. Sharp, *supra* note 48, at E-8.

mation available on the client's financial and business status in such circumstances. One international practitioner has devised a form of questionnaire/checklist to assemble and keep such information current.[68] By adapting such a checklist, it can be tailored to the particular client and type of transactions for which the U.S. lawyer is expected to give legal advice.

B. *Evaluating a U.S. Client's Prospective Mexican Associate*

Clients in the United States who are undertaking business dealings in Mexico, often will do so in association with a Mexican national as agent, distributor, joint venture partner, local manager, or in any of a number of other roles. One of the most difficult tasks a U.S. lawyer faces is verifying the background of the prospective Mexican partner, and persuading a U.S. client that it is not just desirable but necessary to do so. Both the client and the practitioner will avoid many business and potential ethical problems by screening Mexican partners through a due diligence review. Although usually more limited than the review described in the preceding section, it is similar in many respects.

1. Review of Relevant Background

The first step in reviewing a potential Mexican partner is usually to persuade the U.S. client that it is advisable to discuss what is known about the Mexican partner in detail, to assemble a profile and chronological account of the Mexican partner's business dealings, and to verify the relevant background and experience. After the client has agreed, the U.S. lawyer should undertake a thorough discussion with the client to see how much is known about the prospective partner and the business, how long the client has been acquainted with the prospect and how well known they are to each other, when and how they first made contact, and whether any professional advisers of the prospective Mexican associate are known to the client or the U.S. lawyer.

One Mexican practitioner commented that too often the major or even sole criteria for selection of a Mexican business associate is that person's English-speaking ability.[69] Although important for good

68. *Id.* at E-7 to E-8; app. A.

69. Letter from Miguel Angel Hernández Romo to Rona Mears (Aug. 20, 1990) (copy on file with St. Mary's Law Journal).

communication—especially for the non-Spanish-speaking client—English-speaking ability is not a sufficient basis to select a partner or build a sound business arrangement. Other practitioners suggest that the client or lawyer inquire about matters such as transactions with affiliates, contracting practices, and auditing procedures as a means of knowing more about the business practices and reputation of the prospective partner.[70]

2. Verification

No systematic means of obtaining useful, reliable credit information is available in Mexico.[71] Nevertheless, references given by lawyers, accountants and bankers should be requested from a prospective Mexican associate, and then should be checked after obtaining the authorization of the U.S. client and prospective Mexican associate. The attorney should encourage the client to do such checking if the client is unwilling to let the U.S. lawyer do so independently. Often, however, it is the U.S. lawyer who may need to verify the credibility of unknown professional advisers given as references through established contacts in Mexico.

3. Communication Assessment

In addition to references, the single most significant factor in the review of a client's potential associate is the assurance of adequate communication between the Mexican associate and U.S. client (or legal counsel or other professionals). As part of the due diligence review, information should be gathered about the English language ability of the associate and advisers, the availability of translators if needed, the access to fax, telex, telephone or courier services, and the habits of communication—promptness, frequency, completeness—that indicate good prospects for open, honest and thorough communication. Such matters of communication take on particular importance in business associations between partners of differing sizes or types of business, in order that they may understand each other's goals and customary business practices.[72]

Although English-speaking ability alone does not make a good business partner, it remains an important factor for the client who

70. *See id.*; Ritch, *supra* note 39.
71. *See* Ritch, *supra* note 39.
72. *Id.*

does not speak Spanish in establishing a sound relationship, and providing the foundation for open, honest, ethical behavior patterns.

No guarantees for a successful relationship are ever provided, even by the most thorough due diligence review by an international lawyer and client. However, the lawyer has strengthened the foundation for the transaction by encouraging or assisting in such review, and has also minimized the prospects for ethical problems that may arise from dealing with a client's foreign associate who is engaged in practices that may compromise the transaction or the other parties.

V. SELECTING, MANAGING, AND WORKING WITH FOREIGN COUNSEL

After completing a due diligence review prior to undertaking representation, the U.S. lawyer next confronts the need to select and manage foreign counsel to assist with legal matters in Mexico. The conflicting demands of zealous advocacy and competent representation must be met within a complex multinational environment.[73] The key to satisfying these demands lies in the careful and diligent selection and management of foreign co-counsel, particularly in the outbound transaction that is centered in a foreign jurisdiction. The U.S. lawyer's responsibilities for foreign law, and for engaging foreign counsel and supervising their work, have been defined by case law,[74] as well as by professional codes.[75]

A. *Case Law and Code Origins of Responsibility for Foreign Laws and Foreign Counsel*

1. Responsibility for Foreign Laws

An early ruling, often characterized as embodying the "ignorance is bliss" theory, held that an attorney was not required to know the law of a foreign state, and thus could not be held responsible for it.[76] But the early rule was not sustained. A later case imposed more responsi-

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73. *See generally supra* notes 56-58 and accompanying text.

74. *See* Graving, *A Plea for Confident Humility: A Commentary to "The Lawyer's Responsibility for Foreign Law and Foreign Lawyers,"* 1 Newsletter of the International Law Section of the State Bar of Texas No. 3 at 2 (1984); Hillman, *Providing Effective Legal Representation in International Business Transactions*, 4 INT'L LAW. 3, 11-17 (1985); Janis, *The Lawyer's Responsibility for Foreign Laws and Foreign Lawyers*, 16 INT'L LAW. 693, 698-703 (1982); Sharp, *supra* note 48, at E-11 to E-12, E-15 to E-16.

75. *See, e.g.*, TEXAS RULES, *supra* note 6, at Preamble, Rules 1.01, 5.01, 8.05.

76. Fenaille & Despeaux v. Coudert, 44 N.J.L. 286, 291 (1882).

bility, arguing that by undertaking to prepare papers for filing in a foreign location, the attorney incurred a duty to be adequately informed. By taking on the task, the attorney in effect, represented an ability to perform.[77] Even more recently, a New York court has held that attorneys are responsible to their clients for proper conduct of a matter for which they are engaged and may not claim they are not required to know the law of a foreign state.[78]

Rule 1.01 of the Texas Rules reinforces and codifies this view of the lawyer's responsibility for foreign law. A Texas lawyer must either handle legal requirements directly and competently [79] or become associated with another lawyer who is competent to handle the matter,[80] i.e. foreign counsel. Presumably, a Texas lawyer must have a fundamental knowledge of the foreign law applicable to the transaction in order to assess whether and to what extent to engage foreign counsel. The responsibility to ensure the association of competent counsel imposes an obligation on the Texas lawyer to know lawyers in foreign jurisdictions and their levels of competence in order to properly associate foreign counsel. Thus, the fundamental concern with selection of foreign counsel becomes not just a practical concern, but an ethical one as well.

2. Responsibility for Foreign Counsel

Standards for selection and management of associated legal counsel in other jurisdictions have been addressed in several cases. It has been held that referral alone, to a foreign lawyer that performs negligently, is an insufficient basis to find the referring U.S. lawyer negligent.[81] However, the same holding required reasonable care in the selection of foreign counsel for referral. Other cases have held an attorney liable for various types of failures to verify the competence of foreign

77. Degen v. Steinbrink, 195 N.Y.S. 810, 814 (App. Div. 1922), *aff'd*, 236 N.Y. 669 (1923).

78. *In re* Roel, 3 N.Y.2d 224, 165 N.Y.S.2d 31, 35 (1957), *appeal dismissed*, 355 U.S. 604 (1958); *see also* Rekeweg v. Federal Mut. Ins. Co., 27 F.R.D. 431, 435-36 (N.D. Ind. 1961), *aff'd*, 324 F.2d 150 (1963), *cert. denied*, 376 U.S. 943 (1964).

79. *See* TEXAS RULES, *supra* note 6, at Rule 1.01(a).

80. *See* TEXAS RULES, *supra* note 6, at Rule 1.01(a)(1). *See generally* TEXAS RULES, *supra* note 6, at Rule 1.01 comment ¶1 (competence is defined as possession of the legal knowledge, skill and training reasonably necessary for the representation).

81. Wildermann v. Wachtell, 267 N.Y.S. 840, 841-42 (Sup. Ct. 1933).

counsel, or failure to provide ongoing supervision.[82] The court concluded in the latter case that the attorney-client relationship "terminates only upon the accomplishment of the purpose for which the attorney was consulted, or upon mutual agreement of the parties."[83]

In addition to the case precedents cited above, the Texas Rules explicitly require that Texas lawyers refrain from assisting or engaging in the unauthorized practice of law,[84] and provide adequate supervision to associated lawyers.[85] Further, the Texas Rules assert jurisdiction over the conduct of Texas lawyers occurring in other jurisdictions, if such conduct is "professional misconduct" under Rule 8.04.[86] Thus, in certain instances, the Texas State Bar has the power to reach across the national border to discipline a Texas lawyer for actions in another country. In this regard, the court held in a 1978 Minnesota case [87] that nothing in the state's disciplinary rules, which proscribed dishonest or fraudulent conduct, indicated that its effectiveness was restricted by geographical or political boundaries.[88] The court concluded that the state rules were intended to regulate conduct of a Minnesota lawyer anywhere in the world, a rule that has been codified explicitly in codes of professional responsibility in other jurisdictions, including Texas.[89]

3. Selection and Management of Foreign Counsel

To fulfill ethical obligations and to meet clients' needs, the lawyer engaged in a cross-border transaction must ensure that competent foreign counsel is provided by engaging in a careful selection process and by supervising such associated counsel diligently until the conclusion of the client's transaction.[90] The following three sections ("B," "C"

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82. *See, e.g.*, Bluestein v. State Bar, 529 P.2d 599 (Cal. 1974); Tormo v. Yormark, 398 F. Supp. 1159, 1173 (D.N.J. 1985).

83. *Tormo*, 398 F. Supp. at 1173.

84. *See* TEXAS RULES, *supra* note 6, Rule 5.05.

85. *See* TEXAS RULES, *supra* note 6, Rule 5.01.

86. *See* TEXAS RULES, *supra* note 6, Rule 8.05.

87. *In re* Scallen, 269 N.W.2d 834 (Minn. 1978).

88. *Id.* at 839.

89. *See* TEXAS RULES, *supra* note 6, at Rule 8.05.

90. *See generally* J. NILSSON, DEALING EFFECTIVELY WITH LOCAL COUNSEL ABROAD (1988); Cogan, *The Role of the International Law Practice and Engagement of Foreign Counsel*, in CONFERENCE ON TRADE AND INTERNATIONAL LAW 10 (1986) (Texas Tech University School of Law and State Bar of Texas International Section); Cogan & Nunes, *What a U.S. Attorney Needs from His Foreign Counsel*, in STATE BAR OF TEXAS INSTITUTE ON INTERNATIONAL FINANCIAL TRANSACTIONS G-2 (1984); Crawford, *Selecting Foreign Counsel*, in 1989

and "D") provide a checklist of practical suggestions for locating, selecting and managing foreign counsel.

B. *Selecting Foreign Counsel*

Ethically, and practically, the goal in selecting foreign counsel is to find a capable professional in the right foreign jurisdiction who will provide competent legal counsel, but also who will allow, and even encourage, the U.S. lawyer to remain involved thus fulfilling ethical responsibilities to the client. The U.S. lawyer should also seek foreign counsel who will facilitate on-going participation in the project; listen well to an articulation of the clients' needs and goals; communicate clearly and regularly; and take a creative, thoughtful role in the legal and business planning for the transaction. To find such foreign counsel, it is necessary to have available many and varied resources.[91]

1. Sources for Finding Foreign Counsel

a. Non-Lawyers as an Alternative Resource

Before commencing the search for foreign counsel, an examination of the transaction and what is required should be undertaken to be sure that a lawyer is needed. In many jurisdictions, a notary, an accountant, a trust company or comparable professional may be the proper adviser to consult, and can perform more cost effectively. Often experience alone will teach when an alternative professional is appropriate, although certain references on the qualification of lawyers and related professionals in foreign countries may be helpful.[92]

ALI-ABA GOING INTERNATIONAL: INTERNATIONAL TRADE FOR THE NONSPECIALIST 809 (1989); Hillman, *supra* note 74, at 18-23; Impert, *Relations with Outside Counsel in Asia Pacific*, 19 INT'L LAW. 29, 30-31 (1985); Murphy, *An Overview: Special Considerations in Representing Clients Abroad*, in STATE BAR OF TEXAS INTERNATIONAL FAIR FOR GENERAL PRACTITIONERS 99, 118 (1977); Vishney, *Employing Foreign Counsel*, in 1989 ALI-ABA GOING INTERNATIONAL: INTERNATIONAL TRADE FOR THE NONSPECIALIST 819 (1989); Wilson, *International Business Transactions: A Primer for the Selection of Assisting Foreign Counsel*, 10 INT'L LAW. 325 (1976).

91. *See generally* J. NILSSON, *supra* note 90, at § 1.06; Cogan, *supra* note 90, at 14-16; Cogan & Nunes, *supra* note 90, at G-4 - G-6; Hillman, *supra* note 73, at 18-19; Impert, *supra* note 90, at 30-31 (each discusses in greater and somewhat varying detail the sources of foreign counsel described in this section of the paper); Murphy, *supra* note 90, at 116-18; Wilson, *supra* note 90, at 326-28.

92. *See, e.g.*, J. NILSSON, *supra* note 90, at Source Materials, Item 1-1 to 1-24.

b. Past Experience

Personal experience is invariably the best source. Lawyers should keep careful, complete, honest, and fully up-dated notes and reference materials regarding every foreign counsel engaged and used, including: dates used, types of matters, specific lawyer, name of firm, address and contact numbers, location of branch offices, areas of specialty, and general comments on performance and any problems encountered.[93] Summaries should be filed alphabetically by country and updated frequently. Many attorneys now store such records in on-line databases for efficient retrieval and updating. An international lawyer's own "directory of foreign counsel" is the most valuable asset available for selecting foreign counsel.

c. Referrals

A referral by another U.S. or foreign attorney whose judgment is trusted is the second best alternative as a source of foreign counsel. Lawyers may contact a foreign lawyer in a country that is nearby or legally related to the target jurisdiction to ask for a recommendation. Alternatively, U.S. international lawyers are often pleased to make recommendations. Passing on new matters to their foreign counsel contacts is good business for U.S. lawyers frequently engaged in cross-border transactions. World-wide accounting or business consulting firms often have contacts with foreign counsel whom they will refer. It is important, however, to get details of the extent of the contact's prior experience with the foreign counsel being recommended and to learn details of experience and practice concerning the counsel being referred.

d. Acquaintances

Foreign counsel encountered personally at conferences, seminars, while traveling, or through mutual acquaintances, comprise a more reliable resource than searching through published directories of names. A well-conducted "social" conversation at an International Bar Association dinner, or during the break at a seminar, can provide a great deal of information about foreign counsel such as: facility in English, demeanor and appearance, areas of experience or expertise,

93. *See, e.g.*, Appendix A of this article for a sample form of lawyer listing used in an in-house foreign counsel directory.

range of firm practice areas, extent of training, location and size of offices. But this resource is only available to the diligent lawyer who documents such contacts, adding critical information from the lawyer's business card and the conversation to a reference list of foreign counsel resources.[94]

e. U.S. Firm's Foreign Offices

Foreign offices of other U.S. law firms or ex-patriate lawyers working in offices abroad may seem to be a more reliable resource than a directory listing unknown foreign counsel. However, they must be examined with the same care as any other foreign contact. In particular, investigate the kind of association the foreign office has with the U.S. firm, and inquire carefully about the local expertise of the foreign office, and the qualification of its lawyers to practice there.

f. Networks of Firms

Networks or consortia of law firms are becoming more common and may be a helpful resource. Just because a firm provides good legal service in one foreign jurisdiction, however, does not mean it will necessarily choose its partner or associated firms in other countries wisely. Nevertheless, compared with a blind selection in a directory, the network associate of a firm that is already known may be the more reliable choice.

g. Other Personal Reference Sources

One last survey of personal contacts who may have direct knowledge about a foreign counsel should always precede use of a directory listing. Consider, for instance, contacting: in-house corporate counsel who have used counsel in the foreign country, an International Bar Association committee chair who works with attorneys in other jurisdictions on bar activities, local law school faculty who have taught foreign alumni, or local accountants whose firms have offices abroad that work with lawyers there.

h. Directories

Directory listings are occasionally an unavoidable last resort. A number of directories of lawyers and other types of lawyer listings are

94. *See id.* (the same form may be used for recording contacts).

available.[95] It is helpful, however, to learn how to use these directories before they are needed by reviewing the listings in each directory to determine which are the most inclusive and informative.

The sources described above are only as effective as the U.S. lawyer makes them through rigorous engagement in the selection process, based on an awareness of both the ethical and practical implications of the choice made. In summary, use direct experience and personal knowledge as resources wherever possible; or use the experience and personal knowledge of someone with proven judgment if direct experience is not an option. Without these alternatives, the next best avenue is knowledge per se; knowing as much as possible about the firm or the lawyer before the first contact.

Finally, before subjecting one or more foreign counsel to a careful evaluation process and final selection, the U.S. lawyer should be sure that a strong list of candidates has been assembled: by taking opportunities to meet foreign counsel; by documenting knowledge and experience with particular lawyers; by relying on contacts for referrals; and by knowing the best published directories to use when other alternatives are not available. Attorneys should consider their diligence in establishing, documenting and updating contacts with foreign counsel, as one of the most important steps they take toward fulfilling their ethical obligations in selecting foreign counsel for clients.

2. Criteria for Selecting Foreign Counsel

Hopefully the resources available will provide several alternative choices of foreign counsel. A careful selection process, to choose one from among those available, involves balancing multiple factors, and then weighing their relative importance in relation to the transaction

95. *See, e.g.*, ASIA-PACIFIC LAWYERS ASSOCIATION DIRECTORY OF MEMBERS (1989-90); BUTTERWORTHS INTERNATIONAL LAW DIRECTORY, 1990 (listing by subscription); I-IV GEVERS INTERNATIONAL CONSULTANTS (1989) (listing by subscription); H. HILL & J. SILKENAT, AMERICAN BAR ASSOCIATION GUIDE TO FOREIGN LAW FIRMS (1988); INTERNATIONAL LAW LIST (1990); INTERNATIONAL BAR ASSOCIATION DIRECTORY OF MEMBERS (1989) (or, as of July 1, 1990, IBA DATABASE); VII MARTINDALE-HUBBELL LAW DIRECTORY (1990). For examples of alumni listings, see, e.g., Southwestern Legal Foundation Academy of American and International Law (1990); Southern Methodist University School of Law Alumni Directory 1988 (the latter two directories have listings by jurisdiction and include foreign counsel alumni of the respective law programs). Certain periodicals provide articles or listings of foreign counsel from time to time, for example, International Finance Law Review.

and the specific legal advice needed.[96]

a. Qualification to Practice

Foreign counsel must be qualified by the appropriate authorities to provide legal services in the foreign jurisdiction. The U.S. lawyer should do whatever is necessary under the circumstances to be satisfied that the foreign counsel is qualified. New contacts in particular should be verified with the local bar association or the appropriate governmental entity as to the lawyer's authority to practice.[97] Qualification procedures and relevant authorities vary widely. In Mexico, for example, lawyers registered with the Ministry of Education as law diploma holders are qualified to practice.[98]

b. Language Ability

English is important, of course, unless the U.S. lawyer is 95% fluent in Spanish, but other languages may be helpful in a truly multinational transaction. Some international lawyers insist on making their first contact with an unknown firm or lawyer by telephone to assess verbal language ability; others prefer an initial fax (with a brief explanation of the type of matter) followed by a telephone conversation. In either case, linguistic ability should be evaluated along with the content of the conversation if it is an initial contact.

c. Communication

Just because foreign counsel speaks English fluently does not insure frequent, prompt and detailed communication. Unfortunately, personal experience may be the only way to assess overall communication ability and sensitivity. Much can be learned about responsiveness, however, by sending an initial fax and requesting that counsel telephone promptly with advice on certain threshold issues.

d. Expertise in the Local Jurisdiction and Experience in Multinational or U.S. Transactions

It is appropriate and usually welcome when the U.S lawyer inquires

96. *See generally supra* note 90 (each reference discusses in varying detail the criteria for selecting foreign counsel).

97. *See generally*, J. NILSSON, *supra* note 90 (qualification and relevant authorities for many countries).

98. *See id.* at Item 1-20; *see also* Soní, *supra* note 36.

about particulars of relevant past experience. Notes and details concerning such experience should become a part of the matter file. The information should be summarized for the U.S. lawyer's reference list of foreign counsel after it is confirmed by direct experience during the transaction.

e. Training and Education

Degrees from United States law schools are often indicators of English language ability, familiarity with U.S. business and law, and realistic expectations about the role of legal counsel.

f. Clearance of Conflicts of Interest

Conflicts may be a formidable barrier in jurisdictions in which only one or two firms exist or handle a particular type of transaction. It may also be difficult to check conflicts initially in a confidential matter, such as a hostile takeover, when threshold issues must be addressed before names can be revealed to a foreign lawyer who may be counsel for the target. All potential conflicts should be described in detail to foreign counsel along with the standards for final clearance of conflicts, and the importance of diligently making the necessary conflict checks. In some jurisdictions, such as Mexico, the concept of conflicts is less well developed, especially in business transactions,[99] making complete discussion of potential conflicts even more critical. Ethical obligations impose a strict obligation on the U.S. lawyer to insure that a foreign counterpart understands the full nature of the conflict clearance sought and that a thorough check and clearance has been performed.[100]

g. Knowledge of Governmental Procedures and Acquaintance With Officials

In certain countries this is an important factor because of the role governmental consents and regulations are expected to play in the transaction and jurisdiction involved. In Mexico this factor still may be perceived as significant, although recent reforms and more routine governmental processes have diminished its importance.

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99. *See* Ritch, *supra* note 39.

100. *See* TEXAS RULES, *supra* note 6, Rule 1.06 and comment.

h. Verify Proper Location and Proximity

Consider local statutory, political and judicial subdivisions that impact the practice of law in a foreign country as states do in the United States. Mexico is a country comprised of states, and other local subdivisions. The Mexican attorney identified should verify an ability to handle matters in the applicable local jurisdictions.

i. Systems and Facilities; Size of Firm

Adequate telephone, telefax, telex and word processing systems, support staff, office and conferencing facilities all contribute to the service a Mexican firm is able to offer. Often larger firms provide better support systems and facilities. However, many small firms do too, and in addition may provide more personal attention, which counterbalances the other factors.

j. Creativity, Problem-Solving, Business Judgment and Independent Thinking

Fortunate indeed is the international lawyer who locates foreign counsel willing to step outside the usual role of scribe and legal servant, and move to the higher plane of innovative counselor. Once identified, such foreign counsel can be a pleasure to work with, always remaining a step ahead of the customary, and providing the "can do" approach that clients demand of their U.S. lawyers but too often fail to find in counsel outside the United States. Business judgment includes the experience and willingness to see the financial consequences of following a particular legal course. Independent thinking produces the fair, neutral, independently reached response to questions or proposals that provides a constant second-tier evaluation for the transaction. Without these qualities in a foreign counsel, the U.S. lawyer may be severely restricted in the legal counseling provided for the client. Many Mexican counsel, particularly in larger business centers, fulfill this role well and are becoming increasingly adept at doing so as U.S.-Mexico business increases and work in tandem with U.S. lawyers becomes more common.

k. Fees and Billing

If the client is a U.S. person or company accustomed to hourly billing, detailed descriptions of legal services, and itemized expenses, foreign counsel should be requested to provide the same. Most of

them can and will comply if asked. However, requirements should be made known in advance and, if there are any doubts, a sample invoice may be sent to foreign counsel as a model to follow.

1. Ethics, Honesty, Integrity

The bottom line is ultimately these three criteria; a U.S. lawyer cannot fulfill ethical responsibilities if using foreign counsel who fall short in this respect.

In the final selection of foreign counsel, the criteria used in making the decision arise directly out of the primary ethical dilemma with which we began this paper. Foreign counsel must provide the competence (training, experience, skill, facilities) to meet a client's needs in the foreign jurisdiction, and at the same time, have the personal and professional attributes to allow and augment the zealous pursuit of the clients' interests by letting the U.S. counsel remain in ultimate control and by entering into the process of creative problem-solving that is at the heart of quality legal counsel to the client.

C. *Engagement and Scope of Representation*

The details of engagement of foreign counsel for a particular matter or client should be set out clearly and in detail in an engagement letter. This letter should be co-signed by foreign counsel and returned to the U.S. lawyer to signify agreement. Following is a checklist of issues customarily included in the engagement letter.[101]

- Detail the fee structure for legal services and expenses, billing and payment procedures and other administrative matters.
- Confirm the foreign counsel's verification that no conflicts exist, including a description of affiliates, related parties and any other potential conflicts that may have been overlooked during initial communications.
- Clarify the scope of engagement; outline what is expected of foreign counsel and specify areas not to be addressed. For instance, tax or competition rules may be excluded. If so, a memo to the file as to why those exclusions were made and how they are to be handled is a prudent practice.
- Certain summary facts about the proposed transaction and its projected course and schedule should be included with some indication

101. *See* Sharp, *supra* note 48, at E-6 to E-7.

of the degree of certainty—or lack thereof—that exists as to the nature or course of the transaction. Specify whether foreign counsel is working for the client or U.S. counsel. Billing and payment must be described accordingly. Often it is wise for the client to pay directly, but arrangements vary widely. The ideal for U.S. counsel is to retain complete control of foreign counsel but have no responsibility to pay.

- Determine whether foreign counsel wants a retainer, and describe such arrangements in the engagement letter with details as to whether it will be used for the final invoice or for initial invoices, and how it will be replenished. With the client's permission, the U.S. lawyer may allocate a portion of the client's retainer that is paid into the U.S. lawyer's account, for payment of foreign counsel. Since the U.S. lawyer has made the contact with foreign counsel, and wants a sound relationship for this transaction and the future, it is good practice to see that a retainer is provided to guarantee payment of foreign counsel's fees.

D. *Managing Foreign Counsel; Engagement as Co-Counsel*

Once competent foreign counsel has been selected and engaged, the U.S. international lawyer shifts to the role of a supervising lawyer and must forge a working relationship with foreign counsel that continues to address the twin needs of competence and zealous representation.

If selection has been done with care and proper diligence, the working relationship with foreign counsel is far more likely to develop quickly and with a minimum of difficulty. Based on the practical advice of lawyers regularly engaged in cross-border transactions, the following practices should be helpful in establishing a sound relationship with foreign counsel and in managing the transaction with sufficient involvement to fulfill the U.S. lawyer's ethical responsibilities to the client.[102]

- Communicate, communicate, communicate; it cannot be said often enough. Describe the project and the client's goals with precision and clarity. Throughout the project refine and reiterate

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102. *See generally supra* note 90 (each reference discusses in more and varying detail the techniques for managing foreign counsel); Joachim, *Selection of and Dealing with Local Counsels in Foreign Jurisdictions*, 4 CORP. COUNS. Q. 111 (1988) (discussion from view of corporate in-house counsel); Smith, *Overseeing Foreign Counsel: The In-House Lawyer's Role*, V INT'L FIN. L. REV. 24 (1986) (special in-house issues of management).

them as often as necessary. Make inquiries, follow-up, and generally use any possible means to enhance communication. Discuss with foreign counsel directly and openly any ethical issues that are of potential concern, being sure that foreign counsel knows the extent of the U.S. lawyer's obligations to the client, and the standards of conduct expected in carrying forward the transaction. Although Mexican rules of professional conduct are similar to those in the U.S., there are differences in approach and emphasis. Whether with regard to legal ethics or the client's business goals, foreign counsel cannot be expected to read minds.

- Know enough foreign law to properly formulate the initial set of issues and questions about the transaction, and to have a general idea of whether the matter is progressing satisfactorily. Treatises and secondary compilations are usually adequate; the U.S. lawyer, however, must take the time to study such sources and do the "homework" required. The U.S. lawyer should be proactive and speak up on assessment of issues, stumbling blocks, and problems to solve. It is appropriate and often helpful for U.S. counsel to make the initial transactional proposal, but terms of the proposal must be viewed flexibly and abandoned if necessary.
- Know the culture, the ways of business and lawyering in the foreign jurisdiction. Pay attention to what is beneath the surface of what foreign counsel is saying. There are very different approaches to the law itself and to the practice of law, that may have a profound effect on the course of a project. Be knowledgeable about these factors.
- Ask tough questions. Then insist on truthful and realistic responses, even if they are unpleasant or unpopular. Often foreign counsel is too eager to please, and must be encouraged to impart bad news about a proposal or particular legal issue.
- Listen carefully to what foreign counsel is advising. Once the tough questions are answered, take foreign counsel's advice seriously and give it careful consideration in the final decision-making process. Remember, however, that ultimately the U.S. lawyer must be responsible for fulfilling the client's needs and providing adequate representation; in most circumstances the decisions rest with the client and the U.S. lawyer.
- Follow-up frequently to keep the matter on schedule and moving forward. A telecopy or telex usually is viewed as an urgent matter and answered immediately by associated counsel. Thus, a

brief fax reminder or inquiry may initiate a remarkable flurry of activity in a project that had been languishing.

- Be sure someone is overseeing the big picture of the client's transaction. In truly multinational transactions, one lawyer or firm must have ultimate control, and even more importantly must be looking at the "forest" instead of the "trees," making sure all the pieces of the transaction or litigation, in whatever country they are occurring, fit together. If the U.S. lawyer or firm cannot take this position, they must ensure that someone is fulfilling this role on the client's behalf.
- Ask for help from foreign counsel in understanding the ethical climate of the business community in the foreign jurisdiction. Then communicate clearly the ethical bottom line to foreign counsel so there is no misunderstanding about what will and what will not be acceptable in the business dealings that are conducted by or on behalf of the client. Also discuss sensitive matters such as confidentiality, disclosures, and reporting requirements so both the U.S. lawyer and the client know the degree to which confidentiality is a realistic expectation.
- When the project is complete, request immediately the final invoice for services from foreign counsel. Otherwise it may appear six months to several years later!

The art of working with foreign counsel may be summed up in the word "involvement." To get the job done effectively, and to fulfill professional and ethical responsibilities, the U.S. lawyer must be more than a conduit of information and requests; rather, the lawyer must be fully involved and manage the project and the work of foreign counsel in a way that ensures the client's interests will be energetically pursued.[103]

Managing foreign counsel also implies the reverse relationship, when foreign counsel contacts an attorney in the United States to provide U.S. legal counsel. In such situations the U.S. lawyer is no longer in the supervisory or overall control position. Instead, the U.S. lawyer is the individual trying to understand the needs and goals of a foreign client through the foreign lawyer's eyes. Because foreign counsel often play a less active role in business counseling than U.S.

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103. Letter from Enrique A. Gonzalez to Rona Mears (Aug. 14, 1990) (copy on file with St. Mary's Law Journal).

lawyers, it may be difficult—or at least take some insistent inquiries—to understand where the project is headed. It is important to inquire anyway, and to be satisfied about the overall approach being taken before moving ahead to give legal advice.

From then on, remember the international lawyer's golden rule: do unto foreign counsel as you would have foreign counsel do unto you. Above all, it is essential to be responsive, even when time is scarce. Nothing is more frightening than the sense of losing contact with a foreign counsel counterpart when the client is dependent on that contact to move a transaction forward. When the U.S. lawyer is foreign counsel to a Mexican client whose project is coordinated by Mexican counsel, it is equally important to see that the Mexican counsel does not turn over the client entirely to U.S. counsel, but continues to be involved, and to articulate the needs and goals of the Mexican client.

VI. SPECIAL ETHICAL CONSIDERATIONS IN U.S. - MEXICO TRANSACTIONS

Fundamentally the principles of legal ethics in Mexico are similar to those in the United States. The sources of lawyer regulation and discipline in Mexico differ from those in the U.S. to some extent, however. To work effectively with Mexican counsel and to understand the legal and ethical environment, it is helpful to review the sources of regulation in Mexico and to identify key principles of ethical conduct that are shared by the U.S. and Mexican bars.[104]

A. *Sources and Enforcement of Lawyer Regulation in Mexico*

Like the United States, regulation and discipline of lawyers is derived from multiple sources. In Mexico the sources include bar association codes, civil and criminal statutes and accepted principles of customary practice.

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104. *See generally* Appendices "B", "C", and "D" to this paper which provide English translations of portions of certain primary Mexican sources cited throughout this section of the paper. Appendix "B" is a translation of section headings and article titles only of the Mexican Bar Code; Appendix "C" is a summary and translation of Mexican Civil Code Articles 2606-2615 on "Rendering of Professional Services," and Article 2589, Appendix "D" is a summary and translation of Mexican Criminal Code Title Nine on "Disclosure of Secrets" and Title Twelve on "Professional Responsibility." Original Spanish texts were provided to the author by Carlos Müggenberg and Jorge Torres B., Creel, García-Cuéllar y Müggenberg, Mexico, D.F., and summarized and translated by Susan E. Murphy, certified translator and legal assistant, International Section, Haynes and Boone, Dallas, Texas.

1. Bar Code

Several bar associations have been established in Mexico. The largest and perhaps most prestigious is the Barra Mexicana Colegio de Abogados (the "Mexican Bar"), which is domiciled in Mexico City, and also acts as a federation of some Mexican state bar associations.[105] The Mexican Bar has promulgated bylaws (the "Bylaws") that include grievance procedures,[106] and the Mexican Bar Code, a code of professional ethics that sets out standards of conduct.[107] Upon receiving notification of allegedly unethical behavior by a Mexican lawyer, the Mexican Bar institutes a grievance procedure. If the Mexican lawyer is found to have acted unethically, the lawyer may be sanctioned, suspended, or even expelled from the Mexican Bar.[108]

Attorneys in Mexico are not required to be members of the bar, and for those who do not affiliate with the Mexican Bar, the Bylaws and Mexican Code in theory do not govern their behavior. However, the rules of legal ethics issued by the Mexican Bar are viewed as proper customary practice. A violation of good custom may be an illegal act under certain civil or criminal statutory provisions, and therefore, at least in theory, the Mexican Bar Code is applicable to all Mexican lawyers whether bar members or not.[109]

2. Civil Code

The Código Civil ("Mexican Civil Code") additionally sets out regulations on "rendering of professional services"[110] which is generally applicable to the attorney-client relationship. Among activities regulated are calculation and billing of fees, allocation of fees among multiple professionals providing services on the same matter, timely notice of withdrawal, and to whom the professional is responsible for services rendered in case of negligence, fraud or inexperience.[111]

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105. Soní, *supra* note 36.

106. ESTATUTOS DE LA BARRA MEXICANA COLEGIO DE ABOGADOS (1945) (published by la Barra Mexicana Colegio de Abogados, Mexico, D.F., April, 1949). The titles of the four sections and 49 articles of the Mexican Bar Code are set out in English in Appendix "B" to this paper.

107. MEXICAN BAR CODE, *supra* note 16.

108. Soní, *supra* note 36.

109. Müggenberg & Torres, *supra* note 17.

110. 9 C.C.D.F. ch. V, art. 2589 10 C.C.D.F. ch. II (Codigo Civil para el Distrito Federal). See a summary English translation in Appendix "C" to this article.

111. 10 C.C.D.F. arts. 2606-2615.

3. Criminal Code

The Código Penal para el D.F. ("Mexican Criminal Code")[112] levies fines or prison sentences for disclosure of secrets or confidential information learned through professional service; for other offenses committed in the exercise of a profession; for making false statements; for assisting opposing parties; for abandoning defense of a client or business without good cause; and for certain additional court related offenses.[113]

Although all of the provisions of the Civil Code and Criminal Code cited above are applicable to lawyers, relatively few cases have been brought to court in Mexico against lawyers for charges based on these statutory provisions.[114]

4. Admission to Practice

The admission process for practicing lawyers in Mexico makes it impossible for most U.S. lawyers to practice law in Mexico on a continuing basis. To act as an attorney in Mexico, the candidate must receive a law degree from a recognized Mexican university and record the diploma with the Ministry of Public Education. Thereafter, the State Courts routinely make a formal notation of the permit to practice law granted by the Ministry. In addition, the non-Mexican lawyer must also obtain an authorization from the Ministry of Interior.[115]

Such restrictions prohibit most U.S. lawyers from practicing law in Mexico, and require establishment of a close liaison with Mexican counsel to meet the U.S. client's needs for legal advice in Mexico. Nevertheless, the active supervisory and planning role properly played by the U.S. lawyer, and the periodic advice given to the client about legal aspects of doing business with Mexico, make it essential that the U.S. lawyer be aware of ethical considerations in the Mexican lawyer's practice and how the Mexican rules of conduct relate to U.S. legal ethics.

B. *Shared Ethical Principles*

Each of the key principles of legal ethics enumerated in section II.

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112. 9 C.P.D.F.; 12 C.P.D.F. (Código Penal para el Distrito Federal). See a summary English translation in Appendix "D" to this article.

113. 9 C.P.D.F. arts. 210-211; 12 C.P.D.F. arts. 228-233.

114. Soní, *supra* note 36.

115. *Id.*

C. of this article[116] are included in some form in the Mexican Bar Code or the Mexican Civil or Criminal Codes. Some, such as confidentiality of information,[117] conflicts of interest,[118] competent and diligent representation,[119] unauthorized practice of law,[120] and client-lawyer relations,[121] are expressed in similar terms, while others, such as communication and zealous representation, are expressed more indirectly.[122]

Distinctions exist, however, between the specific provisions regarding each principle. The fact that prohibitions are provided regarding disclosure of secrets in the Mexican Criminal Code and professional secrecy in the Mexican Bar Code, does not mean that protection of confidential information, as provided in the Texas Rules,[123] will be respected in the same way and to the same degree.

C. *Practical Advice from Mexican Practitioners*

When asked to provide general comments on legal ethics and due diligence in U.S.-Mexico transactions, a panel of six Mexican practitioners gave similar responses, and together offered valuable practical advice to the U.S. lawyer assisting a client doing business with Mexico.[124] All of the practitioners responding have well-established international practices, providing counsel to U.S. clients and their U.S. lawyers for transactions in Mexico, and assisting Mexican clients who

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116. *See supra*, notes 32-50 and accompanying text.

117. MEXICAN BAR CODE, *supra* note 16, at arts. 10-11; 9 C.P.D.F. arts. 210-211.

118. MEXICAN BAR CODE, *supra* note 16, at art. 30; 9 C.P.D.F. art. 232 (I); 9 C.C.D.F. art. 2589.

119. *See, e.g.*, C.C.D.F., *supra* note 110, at art. 232; MEXICAN BAR CODE, *supra* note 16, at arts. 26-40.

120. MEXICAN BAR CODE, *supra* note 16, at art. 24.

121. *See, e.g.*, MEXICAN BAR CODE, *supra* note 16, at arts. 26-40.

122. *Compare* TEXAS RULES, *supra* note 6, Rule 1.03 *with* MEXICAN BAR CODE, *supra* note 16, art. 26. *Compare* TEXAS RULES, *supra* note 6, Preamble at ¶3 *with* MEXICAN BAR CODE, *supra* note 16, arts. 26 and 29.

123. TEXAS RULES, *supra* note 6, Rule 1.05.

124. The author gratefully acknowledges the assistance of the following Mexican practitioners who responded to inquiries and provided comments by letter or telephone conference: Enrique A. Gonzalez, Gonzalez Calvillo y Forastieri, S.C., Mexico, D.F.; Aureliano González-Baz, Bryan, González Vargas y González Baz, Ciudad Juarez, Chihuahua (six other locations throughout Mexico, and New York City); Carlos Müggenberg and Jorge Torres B., Creel, Garcia-Cuéllar y Müggenberg, Mexico. D.F.; James E. Ritch, Jr. (in collaboration with Thomas S. Heather and Thomas Mueller-Gastell), Ritch, Heather y Mueller, S.C., Mexico, D.F.; Miguel Angel Hernández Romo, Abogado, Mexico, D.F.; and Mariano Soní, Bufete Soní, Mexico, D.F.

are doing business in the U.S., often working with associated U.S. counsel. Their practical advice, summarized below,[125] is based on many years of involvement in U.S.-Mexico transactions.

1. Choice of Counsel

In general, all of the practitioners emphasized the strong similarities of the ethical principles guiding Mexican and U.S. lawyers in their practices. Nevertheless, they reiterated the importance of a careful choice of Mexican counsel, based on recommendations if possible. The Mexican lawyer is viewed as a representative of the client, and thus the client who conducts business ethically and with integrity should be assured that Mexican counsel will do likewise. One problem that may arise is the perception that U.S. clients (and their attorneys) are result-oriented, leading some practitioners to engage in behavior that may be ethically questionable, but which leads to fast, definitive results. Expectations must be communicated to the Mexican lawyer at the beginning of the engagement to the effect that results may be highly desirable, but that ethical short-cuts will not be tolerated.

2. Communication

Communication was mentioned repeatedly as the most critical element in establishing a sound relationship with Mexican counsel. In addition to communicating ethical expectations, other subjects mentioned that require extensive communication were: descriptions of potential conflicts of interest and requirements for final conflicts clearance; the need for client communication including transmittal of copies of correspondence (not a customary practice); and requirements for billing and descriptions of legal services. The U.S. lawyer also should educate the U.S. client about differences in doing business with Mexico and particularly Mexican customs of business and legal practice so that misunderstandings and dissatisfaction will be minimized.

3. Management and Sensitivity

Finally, the U.S. lawyer has the responsibility to take an active and

125. The author has combined, summarized, and to some extent elaborated on the comments of the practitioners, *supra* note 124, for purposes of coherence and completeness in this article; the author therefore accepts full responsibility for the views as expressed herein.

ongoing role in the management of the transaction and not to turn things over entirely to the Mexican lawyer. However, in doing so, the U.S. lawyer must be sensitive to the differences in the role played by lawyers in Mexico as opposed to those in the U.S. who are much more actively engaged in business consultations and advice. Success in the alliance of a U.S. and Mexican lawyer in cross-border transactions is attributed primarily to the skill and sensitivity of the lawyers on both sides in knowing the business and legal practices of the other jurisdiction, and treating each other with mutual respect and consideration.

D. *Selected Mexican and U.S. Statutes Applicable to Ethics in U.S.-Mexico Transactions*

Beyond the statutory regimes that impact the substance of an international transaction in each of the jurisdictions, there are additional laws that prohibit or regulate business and professional behavior generally that may effect the activities of business people and their professional advisers in an international transaction. Lawyers who are frequently engaged in cross-border matters must be aware of these laws and ensure that they, their clients and associated foreign counsel know the restrictions the laws impose and comply with them.[126] This brief survey of such laws in the United States and Mexico is not intended to be comprehensive, but rather selective, and illustrative of the types of laws that may overlay substantive legal regulation of such matters and impact behavior more generally.

1. Mexican Laws

The Mexican Civil Code on Rendering of Professional Services[127] and the Mexican Criminal Code titles on Disclosure of Secrets and on Professional Responsibility[128] discussed above[129] directly regulate professional behavior of lawyers in Mexico and form a part of the overall regime for regulating and disciplining attorneys in that country. In addition, each of the States of Mexico have civil and criminal

126. *See generally* Goebel, *Professional Responsibility Issues in International Law Practice*, 29 AM. J. COMP. L. (1981) (an authoritative analysis of professional responsibility of international lawyers related to compliance with U.S. and foreign laws).

127. C.C.D.F., *supra* note 110.

128. C.P.D.F., *supra* note 112.

129. *See supra* notes 110-14 and accompanying text.

laws, some of which have comparable statutes that may effect the lawyer's standards of behavior.

Certain specific actions by lawyers are also prohibited by other statutes. Lawyers may be criminally liable for counseling tax evasion,[130] or for serving as a nominee stockholder for a foreign client.[131] Although not prohibited from doing so, many Mexican lawyers are reluctant to serve as corporate directors for their foreign clients due to the potential liabilities that may be incurred.[132]

Finally, the current governmental regime in Mexico has been enforcing Mexican corrupt practices statutes[133] with increasing regularity in recent years. Such actions should serve as a general caution to business persons and professional advisers that corrupt practices are no longer tolerated as under some previous regimes.

2. United States Laws

In-bound transactions occurring in the United States for the benefit of Mexican clients, or foreign investments made in the U.S. by Mexican nationals will be subject to a number of overarching regulatory regimes that may impact the activities of the parties or the structure of the transaction, and concern in some respect the standards imposed on their behavior.

Monetary transactions are regulated by the Bank Secrecy Act[134] and the Monetary Laundering Control Act of 1986[135] which provide that banks must report currency transactions over $10,000 in cash or monetary instruments (including bearer shares of stock) to the Treasury Department,[136] and individuals must file such reports if they are transporting over $10,000 across a border into the United

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130. *See* C.F.F. article 95, VI, VII (prohibition of assistance in commission of tax crimes). Legal citations and explanatory information for notes 130-131 and 133 provided in Ritch, *supra* note 39.

131. *See* LE PARA PROMOVER LA INVERSION MEXICANA Y REGULAR LA INVERSION EXTRANJERA art. 31 (crime of name lending: the only violation of the Foreign Investment Law constituting a crime subject to imprisonment).

132. *See* Ritch, *supra* note 39.

133. *See, e.g.*, LEY DE RESPONSABILIDADES DE LOS SERVIDORES PUBLICOS (covers criminal liability of public officials generally and establishes asset disclosure requirements).

134. Bank Secrecy Act, 12 U.S.C. §§ 1951-59 (1989); *see generally* Comment, 11 N.C. J. INT'L L. & COMM. REG. 667 (1986).

135. Money Laundering Control Act of 1986, Pub. L. No. 99-70, (codified as amended in scattered sections of 18 U.S.C. and 31 U.S.C.).

136. *See* 31 C.F.R. § 103.22(a)(1) (1990).

States.[137] Civil and criminal sanctions are provided for certain activities specified as monetary transaction and money laundering crimes.[138] U.S. lawyers dealing with in-bound investments, and having suspicions about the origins of the money involved should be concerned about the scope of these statutes. Also of potential significance is the Racketeer Influenced and Corrupt Organizations Act[139] enacted to prohibit money laundering and participation in or profit from racketeering activities.

Treaties and bilateral agreements also have a potential role in affecting business and professional activities. The U.S. has entered into a number of general treaties on mutual assistance in criminal matters, although none exists to date with Mexico. However, the U.S. and Mexico have entered into forty-five bilateral treaties concerning cooperative efforts to control traffic in narcotic drugs,[140] including, among other things, the exchange, collection and analysis of information.[141] Most recently the U.S. and Mexico have entered into a tax information exchange agreement (the "Agreement") effective as of January 18, 1990[142] authorizing the U.S. and Mexican governments to exchange tax information for purposes of administration and enforcement of the federal taxes of each country.[143] The Agreement may, in certain circumstances, have an impact on the business activities and financial transactions of Mexican clients, and the actions of attorneys assisting them in structuring transactions to maintain their anonymity.

Certain U.S. laws have an extra-territorial reach and may extend to the site of transactions in foreign jurisdictions. The Foreign Corrupt

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137. *See* 31 C.F.R. § 103.23 (1990).

138. *See* 31 U.S.C. §§ 5321-22 (1988); 18 U.S.C. § 1956 (1988).

139. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-68 (1988).

140. *See generally* TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1990, at 161-63 (U.S. Department of State) (listing of all bilateral treaties between United States and Mexico relating to narcotic drugs).

141. *See, e.g.*, Agreement for Computerization of Information, Exchange of Letters, Aug. 25, 1978, 30 U.S.T. 1309, T.I.A.S. No. 9253; Agreement for Computerization of Information, Exchange of Letters, Sept. 6, 1977, 29 U.S.T. 2551, T.I.A.S. No. 8955; Arrangement for Direct Exchange of Information, Exchange of Notes, August 5 and October 2, 1930, 9 Bevans 967.

142. Mexico-United States: Agreement for the Exchange of Information with Respect to Taxes, 29 I.L.M. 50 (1990); *see generally* Matthews, *U.S.-Mexican Exchange of Information Agreement Causes Concern Among Mexican Depositors in U.S. Banks*, 2 TAX NOTES INT'L 5 (1990) (background discussion of negotiation and effect of Agreement).

143. *See* Agreement, *supra* note 142, at art. 1.

Practices Act ("FCPA")[144] which prohibits certain types of payments to officials in other jurisdictions to obtain favorable business treatment, should be carefully reviewed if any questionable circumstances arise in dealings by a Mexican client or a Mexican business associate. Further, if a transaction involves circumstances in which the FCPA may apply, its provisions should be reviewed in detail with Mexican counsel and the Mexican client or business associate, to insure that no parties, unintentionally or otherwise, are in violation.

Numerous other U.S. and Mexican laws also may apply generally to activities of business persons and their lawyers in U.S.-Mexico transactions. An additional task of the U.S. or Mexican lawyer serving clients engaged in cross-border transactions is to know and adhere to the many statutory and regulatory regimes—beyond codes of legal ethics—that regulate business activity and legal services.

VII. Conclusion: Ethics as a Practical Matter

The international lawyer counseling clients engaged in cross-border transactions must meet professional standards of ethics imposed by the lawyer's local jurisdiction, yet also be aware of the ethical standards of the foreign jurisdiction, and of the laws of both countries that may directly impact business activity and the standards of professional behavior for lawyers. In addition, a fundamental dilemma must be resolved by the U.S. lawyers: how to provide zealous advocacy of the client's interests and yet insure diligent and competent representation in the foreign country.

For most experienced practitioners, the fulfillment of these tasks is primarily a practical matter and requires:

- exercise of due diligence regarding clients and their business associates;
- careful selection and engagement of foreign counsel;
- active management of foreign counsel and the legal project; and
- familiarity and compliance with applicable laws and regulations of both jurisdictions.

U.S. and Mexican lawyers are fortunate to have many shared principles of legal ethics reflected in their respective codes of professional behavior and statutory regimes. Nevertheless, Mexican and U.S.

144. Foreign Corrupt Practices Act, 15 U.S.C.A. §§ 78a note, 78m, 78dd-1, 78dd-1 note, 78dd-2, 78-ff(c) (1981 & Supp. 1990).

practitioners agree that it requires mutual communication, awareness, respect and cooperative participation to forge a relationship that will meet the client's needs and enable the legal practitioners in both countries to meet the high standards of ethical behavior required of attorneys in Mexico and the United States.

APPENDIX "A"
FOREIGN COUNSEL DIRECTORY - FORM OF LISTING

COUNTRY:
CITY:
FIRM NAME:
TELEPHONE:
TELEX:
TELEFAX:
TIME DIFFERENCE:
MAILING ADDRESS:

ATTORNEY:
DATE OF CONTACT:
SUBJECT:
COMMENT:

ATTORNEY:
DATE OF CONTACT:
SUBJECT:
COMMENT:

ATTORNEY:
DATE OF CONTACT:
SUBJECT:
COMMENT:

SCOPE OF PRACTICE:
BRANCH OFFICES:
RECOMMENDED BY:
GENERAL COMMENTS:
DATE REVISED:

*Legend: LF=Law Firm TC=Trust Company
AF=Accounting Firm OT=Other

Form-Haynes and Boone-1990

APPENDIX "B"

CODE OF PROFESSIONAL ETHICS OF THE MEXICAN BAR[145]

First Section - General Rules

Art. 1. Essence of professional duty
Art. 2. Defense of professional honor
Art. 3. Honor
Art. 4. Abuses of proceedings
Art. 5. Bribery
Art. 6. Acceptance and rejection of matters
Art. 7. Defense of indigents
Art. 8. Defense of accused
Art. 9. Penal charges
Art. 10. Professional secrecy
Art. 11. Scope of professional secrecy
Art. 12. Extinction of obligation to guard secrecy
Art. 13. Formation of clientele
Art. 14. Publicity of pending lawsuits
Art. 15. Use of public media
Art. 16. Direct or indirect incitement to litigate/dispute
Art. 17. Punctuality
Art. 18. Scope of Code
Art. 19. Application of Code

Second Section - Relations of Attorney with the Courts and other Authorities

Art. 20. Duty of attorney to the courts and other authorities
Art. 21. Naming of judges
Art. 22. Extent of two previous articles
Art. 23. Limitations of ex-officials
Art. 24. Help to those not authorized to practice law
Art. 25. Influence over judge

145. Translation of Section and Article headings only, by Susan E. Murphy, Certified Translator and Legal Assistant, International Section, Haynes and Boone, Dallas, Texas. Original Spanish text provided by Carlos Müggenberg and Jorge Torres B., Creel, Garcia-Cuéllar y Müggenberg, Mexico, D.F.

Third Section - Relations of Attorney with Client

Art. 26. Personal attention of attorney to client
Art. 27. Limit of help of attorney to client
Art. 28. Affirmation of successful case
Art. 29. Responsibility of attorney
Art. 30. Conflict of interest
Art. 31. Renunciation of patronage of case
Art. 32. Incorrect conduct of client
Art. 33. Discovery of fraud or mistake during trial
Art. 34. Fees
Art. 35. Base for estimating fees
Art. 36. Agreement of fees
Art. 37. Controversy with client regarding fees
Art. 38. Expenses of lawsuit
Art. 39. Acquisition of monetary interest
Art. 40. Handling of another's property

Fourth Section - Relations of Attorney with his Colleagues and with his Counterpart

Art. 41. Fraternity and respect among attorneys
Art. 42. Chivalry of attorney
Art. 43. Relations with counterpart
Art. 44. Witnesses
Art. 45. Agreements by attorneys
Art. 46. Professional collaboration and differences of opinion
Art. 47. Invasion into another attorney's share of action
Art. 48. Sharing of fees
Art. 49. Partnerships of attorneys

APPENDIX "C"

THE MEXICAN CIVIL CODE[146]
TITLE TEN - CHAPTER II
Rendering of Professional Services

Art. 2606. - One who renders and one who receives professional services may decide on the fee by mutual agreement.

Art. 2607. - If there is no agreement, fees shall be regulated by considering local custom, importance of work done and the case, pecuniary situation of the recipient and reputation of the provider.

Art. 2608. - If a degree is required for professional services, and the person has no degree, he has no right to charge professional fees.

Art. 2609. - Expenses may be included to the extent they are incurred and reimbursement is to be in accord with the terms of the next article plus interest.

Art. 2610. - Payment of fees and expenses shall be at the place of residence of the person who rendered the services immediately on rendering, or after the professional is dismissed or the work is finished.

Art. 2611. - When various individuals contract for services, they are jointly responsible for professional fees and expenses.

Art. 2612. - When various professionals are working on the same matter, they may each charge for services individually rendered.

Art. 2613. - Professionals have the right to require payment regardless of the success of their work, unless agreed otherwise.

Art. 2614. - When a professional cannot continue rendering services, he shall advise the person and is responsible for any damages or prejudice caused by untimely notice. Attorneys will, in addition observe Article 2589.

Art. 2615. - The professional is only responsible to the persons to whom his services are rendered (for negligence, inexperience or fraud.)

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146. Summarized and translated by Susan E. Murphy, Certified Translator and Legal Assistant, International Section, Haynes and Boone, Dallas, Texas. Original Spanish text provided by Carlos Müggenberg and Jorge Torres B., Creel, Garcia-Cuéllar y Müggenberg, Mexico D.F.

TITLE NINE - CHAPTER V

Art. 2589. - A lawyer who accepts representation of one party cannot accept that of a contrary party in the same suit, although he renounces the former.

APPENDIX "D"

THE MEXICAN CRIMINAL CODE[147]
TITLE NINE
DISCLOSURE OF SECRETS

Art. 210. - A fine of five to fifty pesos or two months to one year in prison will be applied to one who, without just cause, with prejudice to someone and without the consent of the person prejudiced, reveals a secret or private information that he/she learned through his/her work, commission or position.

Art. 211. - Sanctions of one to five years in prison, fine of fifty to five hundred pesos and suspension of license for two months to one year will be imposed, when the punishable disclosure is made by a person rendering professional or technical services or by a public official or worker, or when the disclosed or publicized secret is of an industrial nature.

TITLE TWELVE
PROFESSIONAL RESPONSIBILITY
CHAPTER I
GENERAL PROVISIONS

Art. 228. - Professionals, artists or technicians and their assistants, will be responsible for offenses committed in the exercise of their profession in the following terms and without prejudice to the provisions contained in the General Health Law or other rules concerning professional work:

I. In addition to the sanctions set forth for committed offenses, a suspension of one month to two years will be applied in cases of recurrence according to whether they were committed intentionally or by negligence; and

II. Responsible parties will be responsible for damage caused by their own actions, as well as the actions of their assistants when the assistants worked in accordance with their instructions.

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147. Summarized and translated by Susan E. Murphy, Certified Translator and Legal Assistant, International Section, Haynes and Boone, Dallas, Texas. Original Spanish text provided by Carlos Müggenberg and Jorge Torres B., Creel, Garcia-Cuéllar y Müggenberg, Mexico D.F.

[Articles 229 and 230 are not included here because they pertain to medical personnel.]

CHAPTER II
ATTORNEYS, EMPLOYERS AND LITIGATORS

Art. 231. - A suspension of one month to two years and a fine of fifty to five hundred pesos shall be imposed on attorneys or employers and litigators who are not ostensibly sponsored by attorneys, when they commit any of the following offenses:

I. Knowingly declare false facts or inexistent or repealed laws; and

II. Request terms to prove something which manifestly cannot be proven or wouldn't benefit client; work for the suspension of a court case, frivolously submit evidence or cause delays that are obviously illegal.

Art. 232. - In addition to the above-mentioned sanctions, three months to three years in prison may be imposed for the following:

I. For sponsoring or helping opposing parties in the same case or in a related case;

II. For abandoning the defense of a client or business without justified motive and causing damage; and

III. For accepting a case to defend a client or get a client out on bail and then not continuing to work in his defense.

Art. 233. - Public defenders who do not actively defend the accused offender assigned to them will be discharged from their positions. In these cases, the judges will give notice to the chief of public defenders concerning the respective misdeeds.