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Ethan S. Burger

ESSAYS

INTERNATIONAL LEGAL MALPRACTICE: NOT ONLY WILL THE DOG EVENTUALLY BARK, IT WILL ALSO BITE

ETHAN S. BURGER*

* Adjunct Professor at Georgetown University Law Center and Scholar-in-Residence at American University's School of International Service. A.B., Harvard University; J.D., Georgetown University Law Center. Burger has practiced law for more than fourteen years, specializing in international transactions and foreign direct investment. He has taught in fields including international practice, ethical dilemmas, and comparative corporate governance. He has published numerous articles on legal ethics and international practice. He is a member of the District of Columbia Bar Rules of Professional Conduct Review Committee and the Association of Professional Responsibility Lawyers. He is also the founder of International Legal Malpractice Advisors, L.L.C. (http://www.ilma.us).

I. INTRODUCTION

A. *A Globalized Economy*

Corporations[1] that do business on a global scale invariably use accountants, lawyers, and other professionals on a worldwide basis. The internationalization of the legal practice presents numerous issues to lawyers, such as obtaining qualifications to practice law in foreign jurisdictions and developing the necessary knowledge and practical experience to represent their clients in these locales. Inevitably, different, and possibly conflicting, notions of standards of care and professional responsibility will arise.[2]

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1. The term "corporation" is used in this Essay to describe large, hierarchical legal entities that produce goods or render services for profit. In contrast, the word "company" denotes smaller, privately held business organizations. Of course, this distinction is not universal. For example, in both Great Britain and India, both types of commercial entities are referred to as "companies."

2. *See* Ethan S. Burger & Frank A. Orban III, *International Legal Malpractice in a Global Economy: A Growing Phenomenon*, 29 INT'L LEGAL PRAC. 157, 159-60 (2004) (dis-

One would expect that these varying notions would lead to increased attorney-client tensions and even malpractice.[3] If one accepts this view, public manifestations of this situation, such as lawsuits, should be identifiable. Yet it does not appear that this has occurred. This Essay examines institutional and other reasons why the growth of legal services on a global basis apparently has not resulted in an explosion of legal malpractice claims in the U.S.

Globalization[4] is widely regarded as the principal driving force in international[5] economic and political relations.[6] Some experts may contest this statement as premature. Indeed, nationalism,[7] relig-

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cussing the increased risk of malpractice as lawyers overlook or mishandle matters where foreign or international law must be taken into account).

3. *See id.* (addressing some of the concerns over the potential for increased malpractice in international transactions).

4. *See* Sarah C. Schreck, *The Role of Nongovernmental Organizations in International Environmental Law*, 10 GONZ. J. INT'L L. 252, 256 (2007) (defining globalization "as the denationalization of political, economic, and social structures that have traditionally been controlled by sovereign nations").

5. For the purposes of this Essay, the term "international" refers to both multinational and transnational (e.g., cross-border) transactions.

6. *See* Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1058 n.2 (1997) (describing the effects of globalization on technology, politics, and economics).

7. *See* Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations*, 72 FORDHAM L. REV. 1761, 1764 n.10 (2004) ("'Nationalism is the desire among people who believe they share a common ancestry and a common destiny to live under their own government on land sacred to their history. Nationalism expresses an aspiration with a political objective.'" (quoting ROBERT H. WIEBE, WHO WE ARE: A HISTORY OF POPULAR NATIONALISM 5 (Princeton University Press 2002))).

Economic nationalism is indeed a powerful force. The outsourcing of jobs is a key component driving down wages in some countries. *See* John Reed, *S Africa Retailers Hit by 'Imports Treason' Claim*, FIN. TIMES (UK), Sept. 12, 2006, at 11, *available at* 2006 WLNR 15826161 (discussing the efforts of South African trade unionists to discourage retailers from buying inexpensive imports from China instead of products produced in South Africa); *see also* Matt Bai, *The New Boss*, N.Y. TIMES, Jan. 30, 2005, § 6, at 38 (discussing the Service Employees International Union President Andy Stern's view that labor must organize globally to protect workers' interests).

Outsourcing also can occur in the practice of law. Many law firms allegedly outsource routine tasks for cost reasons to places such as India. *See, e.g.*, Craig Ball, *10 Ways to Cut E-Discovery Costs*, N.Y.L.J., Oct. 24, 2006, at 5, 5 (listing outsourcing to India as one of ten ways to lower costs for e-discovery); *Overseas Savings*, INSIDE COUNSEL, Feb. 2007, at 57, 57 (discussing some of the routine legal tasks that are being outsourced to India). Such tasks include: copying of documents from paper or hard disk to other format during discovery, discovery tasks, etc. *See, e.g.*, Craig Ball, *10 Ways to Cut E-Discovery Costs*, N.Y.L.J., Oct. 24, 2006, at 5, 5 (explaining that outsourcing e-discovery tasks provides cost-saving benefits); *Overseas Savings*, INSIDE COUNSEL, Feb. 2007, at 57, 57 (listing document review as a commonly outsourced project). Problems may arise with respect to competence, con-

ious extremism,[8] and disease[9] may be more important engines of human activity. Globalization may be merely a component of these forces rather than a separate occurrence to be viewed in isolation.

Nonetheless, globalization is the buzzword of the moment even though it is difficult, if not impossible, to identify all of its aspects or predict its worldwide consequences.[10] Certainly the lives of large segments of the world's population are impacted by factors that often originate from beyond their country's borders and cannot be easily controlled by their ruling governments. On the other hand, the simultaneous day-to-day routines of billions of people are largely unaffected by the dynamic forces of technological and attitudinal change, often attributed to globalization.

From the standpoint of the organization of business activity, there are a myriad of ways to assess the impact of globalization. For example, one can (1) track the rate of change in international trade and attempt to identify its consequences; (2) observe how business organizations have altered the methods used in conducting their activities and analyze changes in the goods produced and services rendered by such entities; (3) study changes in the manner and volume of portfolio and foreign direct investment and seek to understand the consequences of these developments; or (4) examine how peoples' attitudes, consumption, entertainment, and information sources have changed. Globalization, irrespective of

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fidentiality and qualifications (actual and jurisdictional). *See, e.g.*, *Outsourcing to India: An In-House Counsel's Perspective*, METROPOLITAN CORP. COUNSEL, Nov. 2006, at 26, 26 (discussing the concerns that arise when legal work is outsourced to another country). The question arises at what point and in what manner the client must be informed. Hence another potential source of international malpractice arises.

8. *See, e.g.*, Lynn Lee, *Signs of Rapid Growth in Egypt 'Obvious': Singapore Leader Highlights Economic Development in His First Trip to Cairo Since 1960,* STRAITS TIMES (Singapore), Nov. 17, 2006, *available at* 2006 WLNR 19927976 (reporting the Singaporean President's statement that religious extremism is everywhere).

9. *See, e.g.*, Abigail Curtis, *Health Expert to Speak About Bird Flu*, BANGOR DAILY NEWS, Aug. 2, 2006, at 2, *available at* 2006 WLNR 13346074 (noting the worldwide effects of a possible bird flu pandemic); John Donnelly, *And Now for the Good News: Progress Is Being Made in the Fight Against AIDS in Africa, Thanks in No Small Part to the President's Aid Program*, BOSTON GLOBE, Aug. 20, 2006, at D1, *available at* 2006 WLNR 14720157 (criticizing the United States' policy on Africa and AIDS and noting the impact of AIDS on African cities).

10. *See generally* JOSEPH STIGLITZ, MAKING GLOBALIZATION WORK (W.W. Norton & Co. 2006) (providing an excellent contribution to the existing literature of what seems to be an unnecessary proliferation of books of uneven quality dealing with globalization).

how it is defined, has unquestionably contributed to the specialization of the work force with respect to both knowledge and skills.[11] Concomitantly, globalization has increased the demand for specialized accounting and legal services connected with cross-border activities.[12]

B. *Uncertain Corporate Nationality and the Issues Raised*

A brief visit to the website for the MINI automobile provides a useful illustration. The website indicates that the MINI can be purchased through dealerships located in at least 52 countries.[13] The "Classic Mini," the original version of the modern MINI, was produced by British Motor Corporation in 1959.[14] The Classic Mini was later retooled as the "Mini Cooper" by the famous British race car driver John Cooper of Great Britain's John Cooper Motor Works.[15] The rights to the automobile ultimately have been acquired by Germany's Bavarian Motor Works Group (BMW).[16] Although BMW management saw various benefits to continuing the vehicle's assembly in Great Britain, most of the component parts (approximately 2,500 made by nearly as many different suppliers)

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11. *See* Anthony M. Santomero, President, Fed. Reserve Bank of Philadelphia, Preparing for the 21st Century Economy, Presentation Before the National Commission for Cooperative Education Corporate Symposium at Drexel University (June 22, 2004) (transcript available at http://www.philadelphiafed.org/publicaffairs/speeches/santomero/2004/06-22-04_natl-comm-coop-education.cfm) (discussing the impact of globalization on international trade and the workforce and explaining the increase in specialization and training necessary for success) (on file with the *St. Mary's Law Journal*).

12. *See, e.g.*, PricewaterhouseCoopers Operating Globally, http://www.pwc.com/extweb/challenges.nsf/docid/19BD6290896C14EC8525701300588A00 (last visited Apr. 2, 2007) (explaining that "operating globally generates a wide variety of practical, legal, HR[,] and finance issues") (on file with the *St. Mary's Law Journal*).

13. *See* Welcome to MINI Websites, http://www.mini.com/mini_worldwide/mini_worldwide.html (last visited Apr. 2, 2007) (offering links to versions of the MINI website for different countries) (on file with the *St. Mary's Law Journal*).

14. Mini USA: Mini History, http://www.miniusa.com/#/contactFaq/faq/history-i (last visited Apr. 2, 2007) (on file with the *St. Mary's Law Journal*).

15. *See id.* (explaining the history of the MINI); *see also* MINI.com – John Cooper Works, http://www.mini.com/com/en/john_cooper_works (last visited Apr. 2, 2007) (discussing John Cooper, John Cooper Motor Works, and the history of the Mini Cooper) (on file with the *St. Mary's Law Journal*).

16. *BMW Acquires Rights to John Cooper Works Brand Name*, FORBES, Dec. 12, 2006, http://www.forbes.com/business/feeds/afx/2006/12/12/afx3246400.html (on file with the *St. Mary's Law Journal*).

are produced in other European Union countries, and some parts are manufactured as far away as Brazil or Japan.[17]

In a sense, the multitude of localities[18] associated with the car's production process make it complex when discussing the MINI's "nationality." Are we concerned with where the vehicle is produced, where the legal entity engaged in the automobile's assembly is registered, or where the output is used and/or consumed? Or is the ultimate ownership of the corporation the critical bit of information that must be appreciated in order to properly serve the client? If it is the latter, it would be difficult, if not impossible, to determine the nationality of BMW Group's owners as the corporate shares are bought and sold globally.[19] Certainly, issues such as corporate governance, labor questions, currency matters, production standards, tax problems, and legal liability would also arise from the MINI's multinational[20] character. Furthermore, a purchaser of a MINI in one country may use it exclusively in another country in which the manufacturer has no dealerships, but the use arguably would be governed by the consumer protection laws of the latter country.

The corporation could handle these issues in a variety of ways. It could probably perform most of the routine tax and legal work itself. It would have the option to retain a single law firm to manage most or all of its legal work. Such a law firm might perform the relevant work itself or retain local counsel in each location on behalf of its client. Alternatively, the corporation may hire separate counsel in each country where it has a permanent presence, where

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17. *See Small Wonder*, GEOGRAPHY IN THE NEWS, Mar. 2, 2005, http://www.geographyinthenews.rgs.org/news/article/?id=330 (discussing the diverse origins of the MINI's components) (on file with the *St. Mary's Law Journal*).

18. *See generally id.* (explaining that the vehicle's approximately 2,500 parts come from multiple countries across the world); Welcome to MINI Websites, http://www.mini.com/mini_worldwide/mini_worldwide.html (last visited Apr. 2, 2007) (offering links to versions of the MINI website for more than fifty countries) (on file with the *St. Mary's Law Journal*).

19. *See generally* BMW Group, http://www.bmwgroup.com/e/nav/index.html?. ./o_o_www_bmwgroup_com/home/home.html&source=overview (last visited Apr. 2, 2007) (displaying current stock information for BMW AG common stock) (on file with the *St. Mary's Law Journal*).

20. *See* BLACK'S LAW DICTIONARY 1015-16 (6th ed. 1990) (defining a "[m]ultinational corporation" as "a firm which has centers of operation in many countries in contrast to an 'international' firm which does business in many countries but is based in only one country").

it is engaged in commercial activities, or even where its products and services are ultimately consumed, rendered, and/or used. Thus, although lawyers are becoming increasingly specialized in particular areas of the law and are expected to be qualified within a particular jurisdiction to legitimately practice, it may be necessary to have some understanding of how their services relate to other legal matters that may have an impact on the multinational client. The question then becomes, how do lawyers determine the degree of familiarity that is expected within one or more multinational jurisdictions?[21]

C. *Corporate Codes of Conduct*

Throughout the world, corporations (irrespective of variety or ownership) dominate the world economy. This is true even though they may not employ more individuals or generate greater revenues than other entities (e.g., governments, individuals, limited liability companies, partnerships, etc.). The largest corporations, however, are transnational or multinational in structure,[22] although they are usually centrally managed within one country. They pursue foreign sales and rely on raw materials and other inputs produced or extracted abroad to operate in a cost-effective manner. They are also the principal engine of organizational and technological innovation. In addition, they attract the greatest amount of investor capital and exercise greater influence on governments and international organizations than other economic players.

It is only appropriate at this point to examine whether current ethical standards and their actual enforcement adequately protect the public and enhance confidence in the manner in which governments function. The last ten years have produced numerous corpo-

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21. Rule 5.5 of the American Bar Association (ABA) Model Rules of Professional Conduct seems to envision the differentiation of lawyers into transactional lawyers (solicitors in British parlance) and litigators (barristers) to reflect that lawyers frequently practice outside the jurisdiction in which they are licensed to practice, but are often undeterred from violating the rules because they are largely not enforced, at least within the United States. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 (2006), *available at* http://www.abanet.org/cpr/mrpc/rule_5_5.html (last visited Apr. 2, 2007) (discussing the unauthorized practice of law and multijurisdictional practice of law).

22. *See* Fortune Global 500 2006: Full List, http://money.cnn.com/magazines/fortune/global500/2006/full_list/ (last visited Apr. 2, 2007) (listing the top five hundred global companies in 2006, including the top five: (1) Exxon Mobil, (2) Wal-Mart Stores, (3) Royal Dutch Shell, (4) BP, and (5) General Motors) (on file with the *St. Mary's Law Journal*).

rate scandals.[23] At times, it seems that new investigations are undertaken everyday.[24] Large segments of the public have become increasingly concerned about the failure of corporate governance systems, inadequacies in the regulatory authorities, and the consequences of corruption, both within the public and private sectors.[25] Ironically, in recent years there has also been a proliferation of corporate codes of conduct promulgated by corporations and organizations.[26] These codes establish good governance standards, the purpose of which is to improve the manner in which both individuals and corporations conduct themselves.[27]

Although some of the codes of conduct are corporation specific, other models have been developed to be adapted to the particular circumstances of other organizations.[28] These codes of conduct

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23. *See generally* Nancy Browning, *Developments in Corporate Scandals in 2004*, 24 ANN. REV. BANKING & FIN. L. 223 (2005) (examining recent corporate scandals, such as those involving ENRON, Adelphia, WorldCom, Tyco, and Martha Stewart); William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders*, 8 STAN. J.L. BUS. & FIN. 69 (2002) (discussing several of these recent scandals and the history that led to them); Kevin Allison, *US Probes Add to Strife at Dell and HP*, FIN. TIMES (UK), Sept. 12, 2006, at 23 (discussing federal investigations into Dell and HP).

24. *See, e.g.*, Kevin Allison, *US Probes Add to Strife at Dell and HP*, FIN. TIMES (UK), Sept. 12, 2006, at 23 (noting that federal prosecutors are investigating these two prominent computer makers for transactions dating back to 2002).

25. One of the consequences of the failure in corporate governance has been the desire to "deputize" attorneys—that is, to make them serve as agents of the government. Many lawyers and judges oppose this development as being incompatible with obligations to their clients. *See* Rutheford B Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 31-32 (2004) (arguing that lawyers owe duties to the legal entity and shareholders, but not management); William E. Mathews, et al., *Conflicting Loyalties Facing In-house Counsel: Ethical Care and Feeding of the Ravenous Multi-headed Client*, 37 ST. MARY'S L.J. 901, 902-05 (2006) (discussing how certain provisions of the Sarbanes-Oxley Act of 2002 led to some amendments to the ABA's Model Rules of Professional Conduct, although it remains to be seen how successful these modifications will be in practice); Lynnley Browning, *Ex-Officials of Justice Dept. Oppose Prosecutors' Tactic in Corporate Criminal Cases*, N.Y. TIMES, Sept. 7, 2006, at C-4 (noting dissatisfaction with the Justice Department's policy of increasing prosecution of companies that refuse to cooperate with government demands to disclose information usually protected by the attorney-client privilege); Lynnley Browning, *Justice Department is Reviewing Corporate Prosecution Guidelines*, N.Y. TIMES, Sept. 13, 2006, at C-3 (discussing the Justice Department's defenses to criticism of this policy).

26. *See* ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 298-305 (Blackwell Publishing 3d ed. 2004) (considering that although there is not a "'one size fits all' standard," the codes can offer "a set of guiding principals" for companies).

27. *See id.* (discussing various examples of governance standards, including those addressing shareholder responsibilities and corporate conduct).

28. *See id.* (providing details on both types of governance standards).

share common features: (1) delineating the rights of the owners (shareholders); (2) defining the proper way for management to function; (3) determining the responsibilities of boards of directors; and (4) increasing corporate transparency and public disclosure of information.[29]

D. *Level of Awareness in American Law Schools*

In addition, American law schools are becoming increasingly sensitive to the legal consequences of globalization.[30] For example, at its annual meeting in 2006, the Association of American Law Schools held a workshop on integrating transnational legal issues into the first year law school curriculum.[31] This sort of discussion represents an important step—the recognition by segments of academia that future American lawyers must be better prepared to function in the world as it is today, not as if the United States was a legal island.[32] It is important to monitor over time to see how this

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29. *See id.* at 300 (explaining that these common features of the codes of conduct provide at least "minimum acceptable standards for companies and investors around the world"). *See generally* YADONG LUO, GLOBAL DIMENSIONS OF CORPORATE GOVERNANCE (Blackwell Publishing 2007) (noting that as firms globalize, their corporate governance and risk management concerns grow—placing an increased burden on their officers, directors, and lawyers); *see also* ORGANIZATION FOR EUROPEAN COOPERATION AND DEVELOPMENT, OECD PRINCIPLES OF CORPORATE GOVERNANCE 17-22 (2004), *available at* http://www.oecd.org/dataoecd/32/18/31557724.pdf (describing in detail the principles outlined by the OECD as a reference for policymakers and corporations when developing codes of conduct).

30. *See generally* Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 280 (2006) (emphasizing the importance of having adequate ethics courses that address concerns in the practice of international law).

31. *See* Association of American Law Schools Annual Meeting, Workshop on Integrating Transnational Legal Perspectives into the First Year Curriculum (Jan. 4, 2006), recording available at http://www.aals.org/am2006/program/transnational/index.html (discussing the need to update first year law school curriculum to address transnational legal issues) (on file with the *St. Mary's Law Journal*).

32. *See generally* Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 280 (2006) (emphasizing the importance of including international professional responsibility courses in law school curriculum). *See also* Association of American Law Schools Annual Meeting, Workshop on Integrating Transnational Legal Perspectives into the First Year Curriculum (Jan. 4, 2006), recording available at http://www.aals.org/am2006/program/transnational/index.html (creating a forum for discussing the need to update law school education to include international legal ethics) (on file with the *St. Mary's Law Journal*).

"new" general awareness translates into practice. Will transnational/international/comparative law become a required course, will it be covered within the confines of existing courses, or will students be required to study abroad?

E. *International Ethical Standards for Lawyers*

In the last quarter decade, many law firms have increasingly "tak[en] on the characteristics of their corporate clients,"[33] yet the manner in which law is practiced frequently dates back to an earlier era. Competent and responsible lawyers cannot practice law on an international level without a thorough understanding of the local law and regulations, which requires, among other things, knowledge of the local language.[34]

In many cases, translations are often inadequate.[35] For example, the misuse of a single word can change an entire provision of a

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33. Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 274 (2006); *see* Ethan S. Burger, *Who is the Corporation's Lawyer?*, 107 W. VA. L. REV. 711, 725-26 (2005) (discussing how neither corporations nor law firms can be regarded as unitary actors when assessing law firm-corporate client relations). For example, many law firms employ general counsel—a position commonly found in corporations. *See* Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer*, 53 U. KAN. L. REV. 835, 835-36 (2005) (stating that law firms are increasingly employing general counsel); *see also* Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 53 U. KAN. L. REV. 805, 806-07 (2005) (demonstrating the high number of law firms that appoint a general counsel and how this phenomenon "is still evolving").

34. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (2000) (stating "lawyer[s] must be competent to handle . . . matter[s], having the appropriate knowledge, skills, time, and professional qualifications"). *See generally* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (Thomson West 2006) (noting that in an emergency, lawyers may give advice or assistance to clients when they lack the ordinary skill required; however, this consultation would generally be improper if the purpose was for translation).

A related issue is the concept of attorney self-regulation. In specialized areas of the law, such as international law, lawyers may be less capable of regulating their own activities, particularly where ethical norms and applicable standards expected of lawyers vary. *See, e.g.*, Michael S. Frisch, *No Stone Left Unturned: The Failure of Attorney Self-Regulation in the District of Columbia*, 18 GEO. J. LEGAL ETHICS 325, 325 (2005) (noting general ABA concerns about attorney self-regulation).

35. *See* Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 270 (2006) (indicating that terms have different meanings in different legal systems).

contract or alter its meaning under the law.[36] A missing "not" may lead to unanticipated consequences. Suppose that a managing partner of a major American law firm's Moscow office did not know the Russian language. To compensate for her lack of language capacity, the partner relied on Russian-speaking associates or translators, most of whom had little experience practicing law in a market economy.[37] The following question is thus raised: how does the partner respond with confidence to client inquiries on questions of Russian substantive law, sign opinion letters, or oversee the performance of due diligence?

The above discussion strongly suggests that as the number of American attorneys working abroad increases, the likelihood is that legal malpractice will also increase. Unfortunately, publicly available data supporting this theory is lacking.[38] This situation, however, may not be a source of pressing concern to law firms or their clients for some of the reasons discussed below:

(1) Law firms have instituted management systems, recruited competent personnel, found competent local counsel or refrained from taking on matters likely to lead to legal malpractice.
(2) The problem of increased malpractice exists, but remains at manageable levels. Thus, the issue is not a prominent topic discussed within academia or the professional press. Insurance companies risk

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36. *See id.* (referring to these problem words as "false friends"); *see also* Gerald Erichsen, *Obvious . . . But Wrong: False Friends Often Lead to Mistakes*, ABOUT, http://spanish.about.com/cs/vocabulary/a/obviouswrong.htm (last visited Apr. 2, 2007) (explaining the confusion created by false friends and providing a list of common mistakes between English and Spanish) (on file with the *St. Mary's Law Journal*); *False Friends/Falsche Freunde: German-English False Cognates*, ABOUT, http://german.about.com/library/weekly/aa030199.htm (last visited Apr. 2, 2007) (discussing the issue of false friends between German and English and providing a list of commonly misused words) (on file with the *St. Mary's Law Journal*); French Language: French-English False Friends, http://www.orbilat.com/Languages/French/Vocabulary/French-English-False_friends.html (last visited Apr. 2, 2007) (providing a list of false friends between the English and French languages) (on file with the *St. Mary's Law Journal*).

37. *See* Ethan S. Burger & Frank A. Orban III, *International Legal Malpractice in a Global Economy: A Growing Phenomenon*, 29 INT'L LEGAL PRAC. 157, 160 (July 2004) (explaining that senior attorneys who lack language capacity rely on local attorneys that may be far less experienced).

38. Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 277 (2006); *see also* Ethan S. Burger & Frank A. Orban III, *International Legal Malpractice in a Global Economy: A Growing Phenomenon*, 29 INT'L LEGAL PRAC. 157, 158 (2004) (discussing the lack of available data supporting the theory that international legal malpractice is rising).

management efforts and underwriting policies have prevented major crises for law firms and individual lawyers.
(3) Legal malpractice arising from the consequences of globalization and the growing importance of foreign and international law remains below the public's "radar screen" because clients are not pursuing potential claims for various reasons or the claims that arise are settled outside the court system through private arbitration or mediation.

It is the thesis of this Essay that the best description of the current situation falls within the third premise. As law firms grow in size, open offices abroad, and enter into relationships with foreign lawyers, their standards as to professional responsibility may not be as high as in the United States, and thus the risk of malpractice grows. Although some law firms and individual lawyers have taken steps to reduce the risk of legal malpractice, these precautions have not eliminated the problem.[39] As the clients' activities become more complex, the likelihood of lawyers mishandling problems, missing deadlines, failing to monitor legal developments, or simply providing incorrect advice multiplies. The question at hand is not whether these unfortunate events will occur, but when and to what extent a law firm with a global practice will experience a substantial loss attributable to complex legal issues governed by foreign law.

II. GLOBALIZATION

Lawyers assist their corporate clients in numerous areas. As an analytical tool, it might be helpful to classify these areas as (1) operations, (2) transactions, and (3) disputes. Operations can include incorporation, corporate governance, human resources and labor, regulatory compliance (including obtaining electricity, heat, water, and similar items for which there will be an ongoing need), taxation, and qualifications to engage in a particular activity (e.g., licensing).

Transactions usually consist of one-time or time-specific relationships with customers, subcontractors, suppliers, etc. A key element of transactions is that aspects of the relationship are negotiated and

39. *See generally* Carlyn Kolker, *Coudert Isn't Going Gently Into the Night*, LEGAL TIMES, Nov. 20, 2006, at 22 (indicating that international legal malpractice played a role in perhaps the oldest international law firm in the United States).

usually relate to the corporation's business activities. Some transactions, however, involve the formation of joint ventures, which may take the form of cooperation in specific endeavors or, alternatively, the formation of new legal entities.

Disputes typically indicate that issues have arisen in the corporation's performance of its operations or transactions. They are not necessarily a sign that something has gone wrong. They may simply indicate that the need for or the nature of a relationship has changed. Disputes can be resolved informally or formally. They may proceed without the involvement of the government (e.g., negotiations, mediation, private arbitration), or through administrative proceedings or adjudication.

In addition, particular matters may fall exclusively in one area or encompass two or all three. Schematically, this concept may be conceptualized as three intersecting circles. Although it is desirable, it may not always be possible to predict the types of matters that may arise as issues change over time or may involve actors that previously did not have contact with the corporate client.

Generally, for every area of corporate activity, a corresponding area of the law exists. Different jurisdictions establish rules for the corporations organized or conducting activities within their territories. It is essential that all lawyers working on matters for corporate clients engaged in activities abroad have at least a general familiarity with the issues their clients may need to address.[40] Perhaps the field of law that is most closely tied to globalization is "conflicts of laws"—a subject that can prove complex and often confusing. This field, in a nutshell, concerns (1) which jurisdic-

40. *See generally* INTERNATIONAL LAWYER'S DESKBOOK (Lucinda A. Low et al. eds., ABA Section of International Law and Practice 2d ed. 2003) (providing a valuable overview of some of the most common legal issues with contributions by some of the leading practitioners in their respective fields).

tions[41] may have authority for a particular matter, and (2) which substantive or procedural law applies.[42]

In handling matters for corporate clients involved in cross-border operations, lawyers must determine the scope of their responsibilities, must be proficient within that scope, or must be able to obtain guidance in areas with which they are not familiar.[43] Lawyers must not merely be competent in handling certain types of legal matters. They must have sufficient knowledge to spot potential problems as well as areas that require the assistance of experts.

Irrespective of the areas in which the lawyers' activities may fall, they must guard against unintended consequences of their actions in other areas. In other words, a person working on an operational matter must appreciate that their decisions may affect seemingly unrelated transactions or may create factors that could adversely affect a dispute (e.g., the inability to enforce a contract or obtain damages).

In all realms of the practice of law, it is critically important that attorneys, as an initial task, determine the precise identity of their client. This can be a straightforward endeavor in developed countries where lawyers can easily research a prospective client with a limited geographic scope of activities. Performing conflict checks, however, may be difficult because the structures of many corpora-

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41. This could involve more than one political unit within one country or within more than one country. For the purposes of this Essay, such a political unit is referred to as a "jurisdiction." *See* BLACK'S LAW DICTIONARY 867 (8th ed. 2004) (defining "jurisdiction" as "[a] geographic area within which political or judicial authority may be exercised"). Sometimes the relevant jurisdiction decides to apply the law of another jurisdiction rather than apply its own substantive laws. *See* Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309, 318-26 (2006) (discussing the potential complexity of conflicts of laws issues).

42. The applicable law may be that of one or more jurisdictions, as well as the rules established by one or more of a jurisdiction's components such as agency, department, ministry, or service.

43. *See generally* Thomas W. Brooke, *The Perils of Globalism*, THE METROPOLITAN CORP. COUNSEL, June 2006, at 5, 5 (discussing how globalization has affected the practice of law in various areas, including the rights to intellectual property, the role of insurance companies, and the difficulty in determining what country's rules, with respect to standards of care, are to be applied). Some specialized bars have their own rules governing the ethical conduct of lawyers. Such rules may play a role in international malpractice cases. *See generally* Timir Chheda, *A Handy List: Comparison of the ABA Model Rules of Professional Conduct with the Patent Rules of Ethics*, 5 J. MARSHALL REV. INTELL. PROP. L. 476 (2006) (highlighting a large number of ethical issues that are particular to those who practice in one area of intellectual property).

tions are complex. Furthermore, information on the prospective client may not be available from third parties, widely available published sources, or private consulting firms. For example, the prospective client might be engaged, through a subsidiary, in a joint venture whose principal client's largest shareholder is a bank from which the law firm earns large legal fees for issuing loan opinion letters.

Typically, lawyers prepare more detailed contracts for less cost-adverse corporate clients, particularly where the time for performance of the transaction involves more than several days, and the transaction involves a high monetary value. Common law legal systems usually permit the parties greater freedom to determine the terms of an agreement than civil law countries, as the civil codes of the latter systems often establish mandatory provisions that are "read into" the contract.[44] As a general rule, contracts to be executed in civil law countries are significantly shorter than in common law jurisdictions.[45] Because common law lawyers can exercise greater discretion in structuring deals, they also have greater opportunities for mistakes that could amount to malpractice.

After lawyers have completed due diligence on the client and have adequate knowledge of both the substantive law and the condition of the country in which they will be working, they must watch for common, though frequently overlooked, pitfalls, such as the actual meaning of words within specific contexts.[46] The meaning of words can change over time and may vary with respect to particular topics.[47] The mere fact that one's client, or counterpart, may be using a particular word does not guarantee that the word means what the lawyer intends; it may connote a meaning in one

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44. *See, e.g.*, Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words?*, 79 CHI-KENT L. REV. 889, 912-15 (2004) (addressing contracts in the German civil law system and discussing the many standardized solutions written into the law itself).

45. *See, e.g.*, *id.* at 889, 897 (2004) (commenting how German contracts are much shorter than American contracts and concluding that, in general, this observation applies to most civil law countries).

46. *See* Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 270 (2006) (indicating that terms have different meanings in different legal systems).

47. *See id.* (discussing the problem of the uncertainty of the meaning of terms in international transactions).

country that is inconsistent with its meaning in another.[48] This confusion can be significantly reduced by including in contracts a long list of mutually defined terms.

Another pitfall is the existence of false friends (*faux amis*).[49] A word, particularly a technical term, may have a specific meaning in one language, but a completely different meaning in another language.[50] Negotiators, and the lawyers that are memorializing the negotiated agreements, may believe they have crafted a workable solution to a particular issue when in fact neither side has the same understanding of the agreement.[51]

In many circumstances a contract serves not as a blueprint for each side to perform, but rather it is similar to a constitution—a framework that forms the basis of an agreement to work together. In most cases where parties differ as to what each must do, they can negotiate amicably to resolve their differences. If they cannot agree, the parties may engage a trained mediator who may help them craft a mutually satisfactory solution either to continue the relationship or to amicably terminate the original project.

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48. *See id.* (stressing that "there is always the risk that a particular term possesses a particular meaning in the different country's legal system").

49. *See id.* (explaining that "[t]his raises the issue whether law will always retain a local component").

50. *See* Gerald Erichsen, *Obvious . . . But Wrong: False Friends Often Lead to Mistakes*, ABOUT, http://spanish.about.com/cs/vocabulary/a/obviouswrong.htm (last visited Apr. 2, 2007) (explaining the confusion created by false friends and providing a list of common mistakes between English and Spanish) (on file with the *St. Mary's Law Journal*); *False Friends/Falsche Freunde: German-English False Cognates*, ABOUT, http://german.about.com/library/weekly/aa030199.htm (last visited Apr. 2, 2007) (discussing the issue of false friends between German and English and providing a list of commonly misused words) (on file with the *St. Mary's Law Journal*); French Language: French-English False Friends, http://www.orbilat.com/Languages/French/Vocabulary/French-English-False_friends.html (last visited Apr. 2, 2007) (providing a list of false friends between the English and French languages) (on file with the *St. Mary's Law Journal*); *see also "False Friends" in English and Finnish*, http://www.cs.tut.fi/~jkorpela/suomi/false-friends.html (last visited Apr. 2, 2007) (providing a list of false friends between the English and Finnish languages) (on file with the *St. Mary's Law Journal*).

51. *See, e.g.*, *False Friends/Falsche Freunde: German-English False Cognates*, ABOUT, http://german.about.com/library/weekly/aa030199.htm (last visited Apr. 2, 2007) (explaining, for example, that the German word "Billion" means "trillion" when translated into English) (on file with the *St. Mary's Law Journal*); French Language: French-English False Friends, http://www.orbilat.com/Languages/French/Vocabulary/French-English-False_friends.html (last visited Apr. 2, 2007) (providing the example that the French word "compréhensif" means "understanding" in English) (on file with the *St. Mary's Law Journal*).

Alternatively, parties may resolve their disputes through non-institutional arbitration. Typically, parties determine in advance the rules governing the arbitration, the locale for the arbitration, and the applicable law. Arbitrators need not be concerned with the strict application of the relevant law, which can lead to harsh results for one side.[52] It is the nature of arbitration to achieve some "just solution" that takes into account the merits of the dispute, but does not result in a zero-sum game outcome.

Arbitrations can also take place under the auspices of established organizations, such as the International Chamber of Commerce in Paris,[53] the Arbitration Institute of the Stockholm Chamber of Commerce,[54] and the American Arbitration Association,[55] to name a few. If the parties agree to abide by the arbitral award, it is usually possible to keep the dispute, or at least the details of the dispute, secret.[56]

Parties do not always agree with the decision of the arbitrator. If the losing party refuses to comply with the arbitral award, the winning party can attempt to have the award enforced by a court. Unfortunately, an enforcement proceeding in open court eliminates the benefit of an otherwise confidential arbitral award.[57] Most economically prominent countries are parties to the 1958 United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[58] The New York

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52. *See, e.g.*, W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 298 (2006) (explaining that under the Texas General Arbitration Act, "'[a] mere mistake of fact or law is insufficient to set aside an arbitration award'" (quoting Nuno v. Pulido, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ))).

53. International Chamber of Commerce, http://www.iccwbo.org (last visited Apr. 2, 2007) (on file with the *St. Mary's Law Journal*).

54. Arbitration Institute of the Stockholm Chamber of Commerce, http://www.sccinstitute.com/uk/Home (last visited Apr. 2, 2007) (on file with the *St. Mary's Law Journal*).

55. American Arbitration Association, http://www.adr.org (last visited Apr. 2, 2007) (on file with the *St. Mary's Law Journal*).

56. *See, e.g.*, CAMCA (Commercial Arbitration and Mediation Center for the Americas) Mediation and Arbitration Rules, American Arbitration Association art. 36, http://www.adr.org/sp.asp?id=22092#priv (last visited Apr. 2, 2007) (requiring that "[u]nless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award") (on file with the *St. Mary's Law Journal*).

57. *Cf. id.* (requiring that the results of arbitration remain secret).

58. *See* United Nations, Convention of the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1958, 330 U.N.T.S. 3, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (creating an international agreement for the

Convention requires courts in participating jurisdictions to enforce arbitration awards.[59] Under these circumstances, the victorious party in the arbitration may take advantage of the New York Convention and enforce the award in a country that will honor the arbitral award and in which the losing party has assets.[60] Despite the New York Convention, foreign trial courts may use procedural or other grounds (e.g., that the decision was against public policy) in order not to enforce the arbitrator's decision.[61]

In crafting dispute resolution clauses, lawyers must be more than mere scribes: they must write agreements that protect their clients' rights and provide enforceable remedies. If an agreement lacks

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enforcement of arbitral awards across international borders); *see also* UNCITRAL: United Nations Commission on International Trade Law: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the "New York" Convention, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited Apr. 2, 2007) (describing the purposes of the agreement and noting that "[t]he Convention is widely recognized as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate") (on file with the *St. Mary's Law Journal*).

59. UNCITRAL: United Nations Commission on International Trade Law: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the "New York" Convention, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited Apr. 2, 2007) (on file with the *St. Mary's Law Journal*); *see* United Nations, Convention of the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1958, 330 U.N.T.S. 3, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (creating an international agreement for the enforcement of arbitral awards across international borders).

60. *See* Pelagia Ivanova, *Forum Non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards Under the New York Convention*, 83 B.U. L. REV. 899, 900 (2003) (explaining that the New York Convention "guarantees finality and reliability of international arbitration awards presented for recognition and enforcement in foreign states"); *see also* United Nations, Convention of the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1958, 330 U.N.T.S. 3, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (creating an international agreement for the enforcement of arbitral awards across international borders). *See generally* Erica Smith, *Vacated Arbitral Awards: Recognition and Enforcement Outside the Country of Origin*, 20 B.U. INT'L L.J. 355 (2002) (addressing how Germany, France, and the United States apply the New York Convention in vacated arbitral awards). There are, however, sometimes difficulties in having another country enforce the arbitration award. *See* William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L. L. 805, 813-16 (1999) (discussing comity for annulments and the practical problems in obtaining the recognition and enforcement of international arbitral awards despite the terms of the New York Convention).

61. *See* William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L. L. 805, 813-16 (1999) (discussing that despite the New York Convention, practical problems sometimes prevent obtaining the recognition and enforcement of international arbitral awards).

remedies, who should be held accountable? The answer will depend on the specifics of the situation. Winning an arbitration on the merits may have no tangible significance to a client if the award cannot be enforced--in enforcement there is often a divergence between black letter law and practical realities.[62]

III. GLOBALIZATION AND CERTAIN POTENTIAL CONSEQUENCES FOR THE LEGAL PROFESSION

The principal concern of most corporations is maximizing shareholder value.[63] Some corporations aim to benefit their stakeholders: creditors, suppliers, consumers, employees, etc. Promoting stakeholders' interests is most common where the corporation is a major supplier, customer, taxpayer, or employer of one or more shareholders.

Some corporations seek to maximize their market share, which in turn will maximize their profits in the future. Furthermore, if a corporation is a shareholder in and also a supplier to another corporation, the shareholder first will want to maximize its own profits, as its primary income is derived from its own business and not from the dividends of the second corporation. For example, if a tire manufacturer owns part of a car manufacturer, the tire manufacturer will want to maximize the number of tires sold to the car manufacturer irrespective of the profitability of the car company because the tire manufacturer's primary profit-making activity is selling tires, not earning dividends on its investments in other entities.

Others corporations, while concerned with maintaining profitability, are also concerned with being good "corporate citizens": that is, acting in a "socially responsible" manner.[64] Sometimes this concern is disingenuous; management may consider good corporate citizenship merely to be a public relations gimmick, unless it

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62. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(3) & cmt. c (2000) (discussing when counsel may address social, political, business, and other issues that are not strictly legal); *id.* § 96 (noting some of the special features of representing an organization as a client).

63. *See* Ian B. Lee, *Is There a Cure for Corporate "Psychopathy"?*, 42 AM. BUS. L.J. 65, 66 (2005) (noting that corporations are "guided solely by the aim of maximizing the stockholders' profits").

64. *See id.* at 72 (explaining that corporations usually act socially responsible because of profit-oriented motives).

leads to greater profits. There are companies that initially placed a high premium on being good corporate citizens and found, at least for a while, that this was a good business strategy. Ben & Jerry's Homemade Ice Cream[65] and The Body Shop[66] are prominent examples of such organizations.

Rule 1.13 of the American Bar Association (ABA) Model Rules of Professional Conduct[67] concerns representing an organizational client.[68] The Rule follows the corporate governance model most common in the United States and envisions that the lawyer's fiduciary obligations are owed to the organization (i.e., the owners of the entity).[69] But that model is not necessarily the only system that exists where boards of directors and management, as well as the lawyers working for the corporations they are responsible for, need to take into account the entity's stakeholders.[70]

When lawyers represent corporations whose objectives are not maximizing shareholder value, but benefiting the corporations' stakeholders—as is the case in some other countries such as Germany—to whom do the lawyers owe their fiduciary duty? What

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65. *See* Ben & Jerry's—Our Mission, http://www.benjerry.com/our_company/our_mission/index.cfm (last visited Apr. 2, 2007) (describing the company's social mission as "operat[ing] the company in a way that actively recognizes the central role that business plays in society by initiating innovative ways to improve the quality of life locally, nationally[, and] internationally") (on file with the *St. Mary's Law Journal*).

66. *See* The Body Shop: Values, http://www.thebodyshop.com/bodyshop/values/index.jsp (last visited Apr. 2, 2007) (explaining the company's values as "against animal testing," "support[ing] community trade," "activat[ing] self esteem," "defend[ing] human rights," and "protect[ing] our planet") (on file with the *St. Mary's Law Journal*).

67. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2006), *available at* http://www.abanet.org/cpr/mrpc/rule_1_13.html (last visited Apr. 2, 2007) (describing a lawyer's professional responsibilities when representing an organizational client).

68. *Id.*; *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 (2000) (discussing a lawyer's responsibilities when their client is an organization); *see also* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 475–528 (Thomson West 2006) (emphasizing the "entity theory" that is the United States' standard where, with a few exceptions, the government requires lawyers to act as gatekeepers as part of their fiduciary duties).

69. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2006), *available at* http://www.abanet.org/cpr/mrpc/rule_1_13.html (last visited Apr. 2, 2007) (explaining that an attorney retained by an organizational client "represents the organization acting through its duly authorized constituents").

70. *See* Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 826 (2003) (suggesting that "[c]orporate law can encourage directors and executives to more regularly and earnestly consider stakeholders without imposing on them a legal duty to always act in stakeholders' interests").

are the implications for the lawyers if the interests of the various stakeholders are not compatible? These are complex questions without clear answers. If lawyers favor one stakeholder, or group of stakeholders, at the expense of others, have they committed legal malpractice? Are they required to withdraw? Given the difficulty of anticipating the circumstances of such situations, is it realistic to establish rules in advance?

Unfortunately, the ABA Model Rules of Professional Conduct do not provide sufficient guidance in this area.[71] Some scholars who have examined these legal ethics issues often treat them as falling within the rubric of general business ethics.[72] Others see legal ethics as distinct from business ethics and distinct from the moral codes of other professions.[73]

IV. THE MYSTERY OF THE GLOBALIZATION AND MANAGEMENT CONTROL OF LAW FIRMS

A. *Changes with Lawyers and Law Firms*

In recent years, the practice of law has undergone dramatic changes, the scope of which would be difficult to describe except in a cursory fashion. Many of these changes reflect the "corporatiza-

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71. *See, e.g.*, Matthew J. Rossman, *The Descendants of* Fassihi*: A Comparative Analysis of Recent Cases Addressing the Fiduciary Claims of Disgruntled Stakeholders Against Attorneys Representing Closely-Held Entities*, 38 IND. L. REV. 177, 178 (2005) (noting the confusion and lack of guidance in the Model Rules for attorneys who represent closely-held entities).

72. *See, e.g.*, Ian B. Lee, *Is There a Cure for Corporate "Psychopathy"?*, 42 AM. BUS. L.J. 65, 89-90 (2005) (contending that "[b]oards of directors enjoy considerable legal freedom to act responsibly and to appeal to shareholders' ethical judgment when communicating with them if they believe the shareholders will be receptive"); *see also* Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 830 (2003) (noting that many states have "stakeholder statutes" that create a legal basis for corporate behavior that does not focus only on shareholders' interests, such as sometimes exists with respect to the rights of shareholders during hostile takeovers); Matthew J. Rossman, *The Descendants of* Fassihi*: A Comparative Analysis of Recent Cases Addressing the Fiduciary Claims of Disgruntled Stakeholders Against Attorneys Representing Closely-Held Entities*, 38 IND. L. REV. 177, 205 (2005) (concluding that the ABA Model Rules of Professional Conduct concerning the representation of organizations and other factors reduce the exposure of lawyers to claims of breach of fiduciary duty to stakeholders).

73. *Cf. generally* Jeffrey M. Lipshaw, *Law as Rationalization: Getting Beyond Reason to Business Ethics*, 37 U. TOL. L. REV. 959 (2006) (comparing how, for example, the rules governing professional conduct for accountants and those for lawyers use language concerning probability in different ways).

tion" of the practice of law.[74] Law firms have "taken on [many of] the characteristics of their corporate clients."[75] For example, Tower C. Snow, Jr., a partner with one of the largest law firms in the world (in excess of 1,000 lawyers), gave a presentation at the 2006 Spring Meeting of the ABA's Section of International Law concerning the likely direction of the legal profession in the next twenty years.[76] In his closing remarks he observed, "[i]f law firms and their management wish to understand where the profession is going, they should look to their clients. Unlike law firms, they operate with a view to the future."[77]

Law firms have become increasingly profit-driven.[78] Lawyers have become increasingly mobile.[79] In the past, it was not unusual

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74. *See, e.g.*, Niki Kuckes, *The Short, Unhappy History of How Lawyers Bill Their Clients*, LEGAL AFFAIRS, October 2002, *available at* http://www.legalaffairs.org/issues/September-October-2002/review_kuckes_sepoct2002.msp (discussing how the increased pressure of billable hours requirements reflects the corporatization of the legal field); Bill Myers, *Lateral Hiring Finds Favor in Chicago Firms*, CHICAGO DAILY L. BULL., April 18, 2005, *available at* http://kellogg.northwestern.edu/news/hits/050418cdlb.htm (explaining that "[b]etween 1998 and 2003, Chicago law firms made 3,301 lateral hires" and discussing how this is a sign of "the corporatization of the legal market").

75. Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 274 (2006); *see* Ethan S. Burger, *Who is the Corporation's Lawyer?*, 107 W. VA. L. REV. 711, 725-26 (2005) (discussing how neither corporations nor law firms can be regarded as unitary actors when assessing law firm-corporate client relations).

76. *See The ABA's Section of International Law 2006 Spring Meeting: A Look at the Practice of Law in 2025*, THE METROPOLITAN CORP. COUNSEL, May 2006, at 28, 28 (discussing Mr. Snow's predictions about the future of the practice of law).

77. *Id.* (quoting Tower C. Snow, Jr. of Clifford Chance LLP).

78. *See* Niki Kuckes, *The Short, Unhappy History of How Lawyers Bill Their Clients*, LEGAL AFFAIRS, October 2002, *available at* http://www.legalaffairs.org/issues/September-October-2002/review_kuckes_sepoct2002.msp (commenting that "[t]he relentless pressure to turn time into money has robbed the legal practice of many of its joys and satisfactions").

79. Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 723 (1995); *see also* Bill Myers, *Lateral Hiring Finds Favor in Chicago Firms*, CHICAGO DAILY L. BULL., April 18, 2005, *available at* http://kellogg.northwestern.edu/news/hits/050418cdlb.htm (explaining that in the Chicago market alone more than 3,300 lateral hires were made between 1998 and 2003); *Lateral Hiring Continues at a Strong Pace*, NALP BULL., March 2006, *available at* http://www.nalp.org/content/index.php?pid=367 (explaining that in 2005 lateral hiring increased by nineteen percent from 2004); *Lateral Hiring up for the Second Year in a Row*, NALP BULL., March 2005, *available at* http://www.nalp.org/content/index.php?pid=255 (determining that in 2004 the lateral hiring increased about fifteen percent from 2003).

for lawyers to move from law firms to government, in-house positions, or public interest organizations. Far less common was the movement of lawyers from one firm to another. Movement from one firm to another, however, has become commonplace.[80] The tenure of associates at law firms has decreased in recent years.[81] Similarly, partners have increasingly moved from one law firm to another in large part for financial reasons.[82]

This has created a change of culture in many law firms, principally the larger ones. With the evolution of technology, firms grew in size,[83] expanded the number of jurisdictions in which they maintained offices, and began to establish offices abroad. Most law firms restructured to become limited liability entities.[84] As law

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80. Bill Myers, *Lateral Hiring Finds Favor in Chicago Firms*, CHICAGO DAILY L. BULL., April 18, 2005, *available at* http://kellogg.northwestern.edu/news/hits/050418cdlb.htm (discussing the large number of lateral hires in Chicago law firms).

81. *See generally* RONIT DINOVITZER ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 53-54 (2004), *available at* http://www.abf-sociolegal.org/NewPublications/AJD.pdf (discussing the high mobility of recent law graduates after conducting a nationwide survey). Although most of the survey respondents had been out of law school for less than three years, excluding judicial clerkships, more than a third had already made one job move, and eighteen percent had already changed jobs two or more times. *Id.* at 53. Further, forty-four percent of respondents plan to change jobs within two years, and twenty-two percent plan to make a change in less than one year. *Id.*

> Respondents in large firms are less likely than anyone else to have changed jobs since law school . . . but over half of them . . . state that they are planning to change jobs within the next two years. On the other hand, lawyers in the smaller firms, who tend to have experienced more job changes than those in other settings, are relatively less likely to report that they are planning to seek another job in the coming years.

Id.

82. *See* ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 37-39 (Thomson West 9th ed. 2005) (explaining that, because of financial motivations, partners are more likely to change firms).

83. *See id.* (discussing how the typical "large firm" in the 1950s and 1960s had about thirty attorneys versus the second largest American law firm that had 1,700 attorneys in 2004); *see also* Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization and Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 272-75 (2006) (discussing how technology and the increase in law firm size present ethical problems to lawyers who become increasingly aware of the divergence of their own personal interests and that of their employers).

84. *See* Ethan S. Burger, *The Use of Limited Liability Entities for the Practice of Law: Have Lawyers Been Lulled into a False Sense of Security?*, 40 TEX. J. BUS. L. 175, 176-79 (2004) (describing the impetus behind the movement of permitting lawyers to organize into limited liability entities and contending that many lawyers cannot be confident that they can avoid liability for their colleagues' malpractice).

firms became increasingly profit-driven, lawyers with a diminishing sense of job security increasingly sought higher levels of compensation. This reduced the ability of law firms to retain lawyers during slower times.

The growing focus on billable hours led to increased job dissatisfaction on the part of associates.[85] This emphasis tended to lessen the length of time they might stay at one firm,[86] producing a number of consequences. Law firms had a decreased incentive to train attorneys or encourage them to engage in non-billable work. The likelihood that associates would join a law firm and remain until they made partner decreased.[87] This occurred in part because partners and other equity holders in the firms who lacked their own clients were encouraged to find new jobs.[88]

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85. *See generally* Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171 (2005) (discussing the consequences of the high emphasis law firms place on maximizing billable hours); Deborah Rhode, *Profits and Professionalism*, 33 FORDHAM URB. L.J. 49 (2005) (discussing the negative consequences of law firms' focus on profits). *See also* Lisa G. Lerman, *Lawyers' Ethics in an Adversary System: A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847, 886-87 (2006) (asserting that despite clients' frequent complaints about overbilling, lawyers who overbill seldom suffer the severity of punishment one might expect).

86. *See* Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 184 (2005) (explaining that "'[n]umerous studies show that attorneys flee law firms because they believe that firms' high billable hours requirements prevent them from balancing their work and their personal lives'" (quoting Joan Williams & Cynthia Thomas Calvert, *Part-Time Progress, Letting Lawyers Cut Back Can Save Money and Retain Talent—If Firms Do It Right*, LEGAL TIMES, Oct. 22, 2001, at 60)). *See generally* RONIT DINOVITZER, ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 53-54 (2004), *available at* http://www.abf-sociolegal.org/NewPublications/AJD.pdf (discussing the high mobility of recent law graduates and the number of times they change jobs within the first few years of their law careers) (on file with the *St. Mary's Law Journal*).

87. *See* RONIT DINOVITZER ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 53-54 (2004), *available at* http://www.abf-sociolegal.org/NewPublications/AJD.pdf (discussing that an overwhelming number of recent law school graduates have changed jobs within three years after law school or have plans to change within the next two years).

88. *See* ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 40 (Thomson West 9th ed. 2005) (discussing the decreased job security of partnership positions).

> In the 1960s an associate who "made" partner could expect to spend the rest of his productive career with the firm so long as he continued to be reasonably productive. In the 1990s, . . . [i]f a partner was not a substantial producer he was usually told he must leave.

Technology changed the manner in which law was practiced. Word processors, photocopiers, e-mail, and databases such as LexisNexis and Westlaw increased the potential productivity of attorneys. These innovations were frequently accompanied by a decrease in non-fee-generating support staff, and as a result, lawyers increasingly had to perform tasks that in the past were performed by non-lawyers.[89] In addition, many tasks that attorneys formerly performed could now be assigned to paralegals because the profit generated by a paralegal's time could be higher than that of a junior associate.

With the expansion of the Internet and legal databases, the sources of information increased. Cell phones, personal data assistants, and the decreased costs of laptop computers contributed to the lack of distinction between lawyers' work and home lives. Despite these technological advances, it was not clear that the quality of legal work had improved, only that it became easier to generate briefs, memorandums, and complaints and to expand the scope of discovery.

B. *Law and Accounting*

The globalization of the world's economy has further blurred the dividing line between the practice of accounting and the practice of law.[90] The world is not artificially divided into discrete academic

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Id.

89. The flipside to this is that these innovations may be to blame for part of the reason that new associates have difficulty meeting their billable hours' requirements, as they are conducting work that was once conducted by non-lawyers.

90. *See* Ethan S. Burger et al., The Graying Line Dividing "Legitimate" Business Activity and Illicit Conduct: An Examination of the Case of KPMG, 31 J. LEGAL PROF. (2007) (noting, for example, that both "[m]ajor international law and accounting firms have for many years been promoting the establishment of tax shelters for their clients") (forthcoming publication on file with the *St. Mary's Law Journal*). In situations where there is official wrongdoing or loss of business due to malpractice, it is typical that the regulator or the party harmed will seek compensation from those with the deepest pockets. Often this means pursuing claims against entities with malpractice insurance coverage. Nonetheless, according to some observers, law firms have been successful in minimizing their financial exposure (at least publicly), sometimes paying fines without admitting any wrongdoing. *See* Carrie Johnson, *Look Who's Left Standing: Legal Penalties in Frauds Are Seldom Paid by Legal Advisers*, WASH. POST, Aug. 31, 2006, at D-1 (discussing how financial institutions and accounting firms have paid out huge sums in connection with wrongdoings such as those committed by Enron and KPMG, but that the sanctions against law firms in connection with their conduct have been relatively small).

disciplines such as "law," "business," and "international affairs" (a degree frequently held by risk managers). In recent years, some organizations have addressed this situation by hiring personnel with varied professional backgrounds, leading to the creation of entities that have a multidisciplinary practice.[91] In fact, in Europe, many of the largest employers of lawyers are accounting firms.[92]

Traditionally in the United States, most states do not permit lawyers to divide their profits with non-lawyers (although they are able to retain them as consultants or hire them on salary).[93] This situation is being creatively circumvented in some cases, leading both academics and practitioners to examine the benefits and detriments of permitting multidisciplinary practices in the United States.[94]

C. *Multijurisdictional Practice of Law*

Another issue that has gotten a great deal of attention in recent years is the multijurisdictional practice of law.[95] According to the

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91. *See* George C. Nnona, *Multidisciplinary Practice Under the World Trade Organization's Services Regime*, 16 IND. INT'L & COMP. L. REV. 73, 75 (2005) (defining "multidisciplinary practice" as "joint practice by lawyers and members of other professions, where their professional activities in pursuit of that joint practice involve the offer of legal services to the public").

92. ABA COMMITTEE ON RESEARCH ABOUT THE FUTURE OF THE LEGAL PROFESSION, WORKING NOTES: DELIBERATIONS OF THE COMMITTEE ON RESEARCH ABOUT THE FUTURE OF THE LEGAL PROFESSION ON THE CURRENT STATUS OF THE LEGAL PROFESSION (Aug. 31, 2001), *available at* http://www.abanet.org/lawfutures/report2001/finalreport.pdf (explaining that four of the five top accounting firms are among the world's top ten employers of lawyers and that many law firms in Europe "are owned by or affiliated with accounting firms").

93. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2006), *available at* http://www.abanet.org/cpr/mrpc/rule_5_4.html (last visited Apr. 2, 2007) (creating the prohibition not allowing lawyers to divide profits with non-lawyers); *see also* George C. Nnona, *Multidisciplinary Practice Under the World Trade Organization's Services Regime*, 16 IND. INT'L & COMP. L. REV. 73, 75 (2005) (explaining how Rule 5.4 of the ABA Model Rules of Professional Conduct "prohibits lawyers from sharing fees with non-lawyers, forming law partnerships with non-lawyers, and practicing law in a professional corporation owned or controlled by a non-lawyer").

94. *See* George C. Nnona, *Multidisciplinary Practice in the International Context: Realigning the Perspective on the European Union's Regulatory Regime*, 37 CORNELL INT'L L.J. 115, 137-76 (2004) (outlining the history of how the need for and the benefits of having entities with multidisciplinary practices evolved in Europe and the likelihood for the concept to be accepted in the United States).

95. *See* AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 5-6 (August 2002), *available at* http://www.abanet.org/cpr/mjp/introover.doc (providing recommendations for dealing with the increase of multijurisdictional

American Bar Association, multijurisdictional practice of law is "the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law."[96] The rules in this area are largely anachronistic, and in transactional settings they are frequently ignored.[97] Technology and ease of travel have made increased transactional practice across jurisdictions possible.

It is a bit absurd that a lawyer licensed to practice in Minnesota may be prohibited from negotiating on behalf of his clients in

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practice); American Bar Association Commission on Multijurisdictional Practice, http://www.abanet.org/cpr/mjp/home.html (last visited Apr. 2, 2007) (explaining that the American Bar Association adopted the recommendations in the committee's report on August 12, 2002) (on file with the *St. Mary's Law Journal*). *See generally* Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715 (1995) (commenting on the recent growth in the multijurisdictional practice of law and examining ABA Model Rule 8.5 to determine if it addresses the concerns raised by these practices); Quintin Johnstone, *Multijurisdictional Practice of Law: Its Prevalence and Its Risks*, 74 CONN. B.J. 343 (2000) (discussing the history of, legal restrictions on, and changes in rules and laws governing the multijurisdictional practice of law); Carol A. Needham, *Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual?: Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331 (commenting on how legal regulations should be eased to allow for attorneys to more easily practice law in multiple jurisdictions).

96. AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 5 (August 2002), *available at* http://www.abanet.org/cpr/mjp/intro-over.doc.

97. *See, e.g.*, *id.* at 2 (discussing how regulations in the area of multijurisdictional law practice have not kept up with the realities of a more connected world); Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 721 (1995) (commenting that "the scant attention paid to resolving inconsistent and conflicting professional standards" between different jurisdictions by firms participating in a multijurisdictional practice "is surprising"). In contrast, in the litigation setting, requiring lawyers to be members of the bar of the court before which they are practicing has some rationale. State court procedural rules are not uniform. U.S. District courts do not have identical local rules. Lawyers who know the judges before whom they are appearing have a distinct advantage over lawyers who are unfamiliar with the judges and local procedures and practices. In addition, in many instances, it is more convenient for litigants and their attorneys to be located near the court where their cases are being heard. Although courts increasingly are accepting electronic filings, hearings and other proceedings are almost always done in person. Many are postponed or cancelled at the last second, thus involving local lawyers is more efficient. In addition, all courts have procedures for admitting lawyers on a *pro hac vice* or co-counsel basis. *See, e.g.*, Crossing the Bar, http://www.crossingthebar.com/ (last visited Apr. 2, 2007) (providing a subscription-based service that tracks the *pro hac vice* statutes across the United States) (on file with the *St. Mary's Law Journal*). This allows lawyers with a pre-existing relationship with the client, more familiarity with the facts and persons involved in the case, or specialized expertise that local counsel may lack, to be able to participate in a court in which they have not previously been admitted.

Michigan. There are no language barriers, and the applicable federal laws and regulations apply in both states.[98] Additionally, the rules of the other jurisdictions are readily available through LexisNexis, Westlaw, and other databases. Should it not be up to the client to decide who should represent them? Some cynics might suggest that hesitation toward allowing the practice of law across jurisdictions stems from the monopoly the respective state bars wish to maintain on the legal business within the state.

Moreover, it may be argued that change is slow in coming because it is in the interest of larger law firms that probably have multiple offices in various states to sustain the competitive advantage they may enjoy over smaller law firms with which they are in competition for clients. Ironically, the European Union is much more flexible in this area.[99]

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98. *See* Wayne J. Carroll, *Liberalization of National Legal Admissions Requirements in the European Union: Lessons and Implications*, 22 PENN ST. INT'L L. REV. 563, 599-600 (2004) (drawing attention to the similarities that exist between the jurisdictions in the United States and commenting how one would expect jurisdictions with such similarities to have more lenient rules for practicing law across jurisdictional lines).

99. *See id.* at 571-77, 596 (discussing the requirements for European Union lawyers to qualify to practice law in another part of the EU and comparing those requirements to their counterparts in the United States). The policies and procedures for lawyers licensed to practice in one EU member country wishing to practice in another are relatively simple. *See generally* European Commission — Background Information on Community Law, http://ec.europa.eu/youreurope/nav/en/citizens/working/qualification-recognition/lawers/index_en.html# (last visited Apr. 2, 2007) (explaining the conditions that must be met in order for a lawyer to practice in other EU member jurisdictions) (on file with the *St. Mary's Law Journal*). In 1988, the Council of Bars and Law Societies in Europe (CCBE), an organization consisting of 28 member states, issued its first Code of Conduct for European Lawyers. *See* COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS 5-30 (1988), *available at* http://www.ccbe.org/doc/En/2006_code_en.pdf (outlining the rules and regulations one must abide by when practicing law in Europe) (on file with the *St. Mary's Law Journal*); *see also* Council of Bars and Law Societies of Europe, http://www.ccbe.org/en/accueil/home_en.htm (last visited Apr. 2, 2007) (providing general information about the organization's purpose and membership) (on file with the *St. Mary's Law Journal*). The Code, which has been amended several times since 1988, was adopted to define lawyers' relations with (1) their clients, (2) the courts, (3) other lawyers, and (4) the public. COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS 5 (1988), *available at* http://www.ccbe.org/doc/En/2006_code_en.pdf (outlining the duties of a lawyer that sometimes conflict with one another) (on file with the *St. Mary's Law Journal*). The CCBE was established in 1960 and is recognized as the official organization for the legal profession in the EU and the European Economic Area. *See* CCBE – What is the CCBE?, http://www.ccbe.org/en/accueil/accueil_en.htm (last visited Apr. 2, 2007) (describing the organization's history and providing additional information regarding the CCBE) (on file with the *St. Mary's Law Journal*). In 1956, and later amended in 1988, the International Bar Association, a private

American lawyers seeking to engage or who actually are engaged in transactions in other states usually do not face the particularly unique risks that might contribute to malpractice. This is not the case when American lawyers seek to practice the equivalent of United States' law abroad[100] or when non-American lawyers practice in jurisdictions where they are not formally qualified. Although generic "international" law exists and can be used in straightforward purchase-sale agreements, the same is usually not the case where a certain jurisdiction's laws and regulations will, or may be, relevant (i.e., transnational transactions).

The use of qualified local counsel reduces the likelihood of problems arising in the latter situation, but identifying and vetting local counsel is a complex matter. This may be one of the reasons

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membership organization, issued its International Code of Conduct to serve as a model when other nations develop their own national codes of conducts. *See generally* INTERNATIONAL BAR ASSOCIATION, INTERNATIONAL CODE OF ETHICS (1988), *available at* http://www.ibanet.org/images/downloads/International_Ethics.pdf (establishing a set of rules regulating the interactions of lawyers when working in another jurisdiction) (on file with the *St. Mary's Law Journal*). Because the IBA consists of members throughout the world and not just more developed countries, its Code of Conduct has significant influence as a model because it is not regarded as a product of a particular region or country. *See generally* International Bar Association: About the IBA, http://www.ibanet.org/aboutiba/overview.cfm (last visited Apr. 2, 2007) (explaining that the organization's membership spans over every continent and is comprised of more than 30,000 lawyers and 195 bar associations and legal organizations) (on file with the *St. Mary's Law Journal*). The IBA Code of Conduct does not directly serve as authority for disciplining lawyers or establishing malpractice. *See* INTERNATIONAL BAR ASSOCIATION, INTERNATIONAL CODE OF ETHICS (1988), *available at* http://www.ibanet.org/images/downloads/International_Ethics.pdf (establishing a set of model rules for adoption by local governments) (on file with the *St. Mary's Law Journal*). Those actions are the responsibility of the local governments, usually through ministries of justice, legislatures, courts, and local bar organizations.

100. For example, as previously discussed in this Essay, incorrect translations can create substantial issues. *See* Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 270 (2006) (addressing the problems created by false friends); *see also* Gerald Erichsen, *Obvious . . . But Wrong: False Friends Often Lead to Mistakes*, ABOUT, http://spanish.about.com/cs/vocabulary/a/obviouswrong.htm (last visited Apr. 2, 2007) (pinpointing the problems with false friends between English and Spanish) (on file with the *St. Mary's Law Journal*); *False Friends/Falsche Freunde: German-English False Cognates*, ABOUT, http://german.about.com/library/weekly/aa030199.htm (last visited Apr. 2, 2007) (discussing false friends between German and English) (on file with the *St. Mary's Law Journal*); French Language: French-English False Friends, http://www.orbilat.com/Languages/French/Vocabulary/French-English-False_friends.html (last visited Apr. 2, 2007) (reviewing common false friends between French and English) (on file with the *St. Mary's Law Journal*).

that some law firms have begun hiring foreign legal consultants.[101] In theory, such individuals should only provide advice on the law of the country where they are licensed to practice, but how this actually operates is a subject worthy of study.[102] Drawing lines between the law of one country involved in a transaction and that of a second (or third) country is not always easily accomplished. Consequently, it is only reasonable to assume this presents an enhanced risk of malpractice.

D. *Systems to Prevent Malpractice*

Companies handling legal transactions in-house and law firms are capable of developing systems to reduce the risk of malpractice. Such a system demands that these entities:

(1) Identify and acknowledge the risks of legal malpractice;
(2) Properly analyze the precise nature of the risk(s) likely to be faced and assess the most likely consequences (indeed some corporations may either be judgment proof or be willing to assume the risks as a business matter). Of course, contractual risk is easier to anticipate than risks posed by torts or unforeseen governmental actions;
(3) Develop procedures to reduce the risk to manageable levels (adopt codes of conduct, create specialized training programs, establish an effective operations monitoring system), and develop a corporate culture that supports the maintenance of a strong compliance program (including encouraging whistleblowing). It is critical that corporate management develop and observe a culture of compliance that is appreciated by the board of directors, management, employers, contractors (including accounting, consulting, and law firms retained), customers, and suppliers; and

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101. *See generally* Carole Silver, *Regulating International Lawyers: The Legal Consultant Rules*, 27 HOUS. J. INT'L L. 527 (2005) (discussing the permissible function of foreign legal consultants and how various states regulate them). *See also* Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 MINN. J. GLOBAL TRADE 159, 180 (1996) (noting that the liberalization in the trade of goods and services should in theory open up the practice of law to foreign lawyers; however, because the international concessions may not provide benefit to local lawyers, self-regulated bar associations have little incentive to encourage this opening of international practice).

102. *See generally* John A. Barrett, Jr., *International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U. J. INT'L L. & POL'Y 975, 994-95 (1997) (describing the "crisis" resulting from a very small percentage of lawyers trained in the United States ever receiving any education in international law).

(4) Repeatedly assess whether the procedures developed are fulfilling their objectives and modify them as appropriate.

It is not possible to develop a system or operate it effectively without the involvement of lawyers. If the system is either inadequate or improperly implemented, depending on the relevant substantive law, legal malpractice may have occurred.

Up to this point, the discussion has largely focused on substantive and practical issues related to the practice of law in a global business environment. The practice of law, however, involves more than merely the proper application of legal skills and knowledge of applicable law. It also requires that lawyers conduct themselves in an ethical manner.[103] In general, if lawyers violate the rules of professional conduct, it does not constitute legal malpractice *per se* but may serve as evidence of it.[104]

The above discussion shows that it is not sufficient to have the legal skills and knowledge to deal with the legal issue. A lawyer also needs the proper foundation in legal ethics to determine

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103. *See generally* ABA Model Rules of Professional Conduct — Center for Professional Responsibility, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Apr. 2, 2007) (providing a set of model rules regulating the ethical behavior of lawyers) (on file with the *St. Mary's Law Journal*).

104. *See* Timothy P. Chinaris, *More Than the Camel's Nose: The Sarbanes-Oxley Act as Bad News for Lawyers, Their Clients, and the Public*, 31 OHIO N.U. L. REV. 359, 375 & 375-76 nn.73-76 (2005) (observing that some courts have allowed plaintiffs to introduce violations of rules of professional responsibility in support of legal malpractice claims and emphasizing that lawyers cannot feel inoculated by language in the ABA Rules of Professional Responsibility, similar state rules, and rules adopted pursuant to Sarbanes-Oxley Act that ethical violations cannot play a prominent role in legal malpractice claims); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. f (2000) (providing examples of situations in which a rule of professional responsibility can be invoked by a client to help prove the lawyer's misconduct). Some courts allow the rules of professional responsibility to be introduced in order to establish the standard of care required of attorneys. Douglas R. Richmond, Senior Vice President in the Prof'l Servs. Group of Aon Risk Servs., Presentation at the St. Mary's University School of Law Sixth Annual Symposium on Legal Malpractice and Professional Responsibility: Why Legal Ethics Rules are Relevant to Lawyer Liability (Feb. 23, 2007). *See generally* Douglas R. Richmond, *Why Legal Ethics Rules are Relevant to Lawyer Liability*, 38 ST. MARY'S L.J. 929 (2007) (expanding on the presentation given at the Symposium on Legal Malpractice and Professional Responsibility and explaining the role that legal ethics rules play in malpractice litigation).

It appears that the areas of potential liability for securities lawyers have been expanded, potentially including international commercial activities. *See, e.g.*, Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 118 (2005) (noting that the Sarbanes-Oxley Act has granted the SEC the power to initiate legal malpractice claims).

whether it is appropriate for the particular lawyer to work on the matter.[105]

V. The Critical Role of Insurance Companies

A. *Formal Risk Management*

Insurance companies play a critical role in promoting good risk management by lawyers.[106] Perhaps of greatest importance is that they work to reduce the risk of malpractice by law firms in order to lessen their own potential financial exposure.[107] In fact, some insurance companies provide formal risk management services designed to help law firms avoid malpractice before it occurs.[108] This may lead to better law firm management techniques,[109] in particular, improvements in the operations of multi-office law firms and those with offices abroad. Insurance companies may be encouraging innovation to reduce client conflicts and making law firms more sensitive to the risks inherent in taking on new matters in areas

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105. *See* Association of American Law Schools Annual Meeting, Workshop on Integrating Transnational Legal Perspectives into the First Year Curriculum (Jan. 4, 2006), recording available at http://www.aals.org/am2006/program/transnational/index.html (discussing the need to update first year law school curriculum to address transnational legal issues) (on file with the *St. Mary's Law Journal*); *see also* Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 280 (2006) (emphasizing the importance of having adequate ethics courses that address concerns in the practice of international law). *See generally* Susan Saab Fortney, *Is it Educational Malpractice not to Teach Comparative Legal Ethics?*, 3 JURIDIKUM 144 (2001) (discussing the importance of adequately educating law students in the area of comparative legal ethics).

106. *See* George C. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 307 (1998) (concluding that "legal malpractice insurers are increasingly serving as regulators of lawyer behavior"); William H. Fortune & Dulaney O'Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617, 635, app. B (1994) (explaining that malpractice insurance providers can play a key role in helping their clients reduce risk and providing an example of a self-assessment risk survey based on one provided by an insurance company for its insureds).

107. *See* George C. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 326-27 (1998) (examining how some insurance companies provide loss prevention services to their insureds to help decrease the amount of risk to liability).

108. *See id.* (discussing the formal risk prevention services provided by legal malpractice insurance providers).

109. *See id.* (addressing the irony that legal malpractice insurance companies need to provide what is akin to legal advice in regards to avoiding legal malpractice to attorneys who should already be knowledgeable in the subject).

where they lack appropriate competence. Unfortunately, some law firms may not benefit from the formal risk management (malpractice avoidance) expertise provided by insurance firms or other consulting entities.

B. *The Cost of Increased Risk*

Those lawyers who practice in more risky areas, including those involved in an international (transnational) practice, generally pay more for professional liability insurance. Applications to obtain professional liability coverage require that applicants identify the share of the law firm's revenue that is attributable to difficult categories (e.g., contracts, commercial, customs, litigation, maritime, real estate, securities, taxes, trusts and estates, etc.). While "international" is usually listed as a category (it seems that "transnational" is less frequently given as an option), most law firms apparently attribute low percentages of their revenue to this area. This stands in direct contradiction to the impact globalization has on the services law firms render. Law firms need not have offices abroad to have an international (transnational) practice.

If one accepts the premise that law firms advise or serve corporations with operations in more than one country, one would expect that the number of legal risks that might arise is greater than if they were active in a single jurisdiction in the United States or had a purely domestic practice. While it might be possible to have a purely domestic practice in areas such as family law, personal injury, and real estate, this is less true in the commercial area (particularly where corporations seek foreign capital).

Because some insurance companies might deny coverage to law firms who are involved in activities with a foreign element, the law firms may be reluctant to make a claim. In fact, many professional liability policies require the firm to inform the insurance company if a member of the law firm believes there is a risk that malpractice was committed. If this does not occur, it is grounds to deny coverage.

If a law firm makes a malpractice claim and the insurance company agrees that the professional liability policy covers the relevant action, the law firm may be quoted higher insurance premiums or

even denied coverage in the future.[110] This has the negative effect that law firms may not bring possible legal malpractice claims to their insurance company's attention.

Although lawyers have an ethical duty to report wrongdoing including breaches of a fiduciary duty,[111] this does not always occur in practice. Reporting is even less likely in situations where there are multiple domestic offices and offices abroad.[112] The situation can become even more complex if the ethical rules of more than one jurisdiction are involved.

C. *Other Factors*

There are even more reasons why instances of legal malpractice in the international context are not reported. For example, some law firms have professional liability insurance with a relatively high self-insured retention (e.g., $750,000 to $2,000,000). Such law firms will not file a claim that falls within its self-insured range with their insurers as they will not be able to have their financial exposure covered. As a result, they pay compensation to their clients directly. Another factor that may lead to an underestimation of the international component of legal malpractice results from many insurance policies not providing for repayment of fees or forfeitures.

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110. *See* George C. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 327 (1998) (explaining how a history of malpractice claims can lead an insurance company to deny coverage during the underwriting process).

111. MODEL RULES OF PROF'L CONDUCT R. 8.3 (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_8_3.html (last visited Apr. 2, 2007) (requiring that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority").

112. Although all ethical wrongdoing by lawyers does not automatically constitute malpractice, it is indeed the case that they are sometimes interrelated. Timothy P. Chinaris, *More Than the Camel's Nose: The Sarbanes-Oxley Act as Bad News for Lawyers, Their Clients, and the Public*, 31 OHIO N.U. L. REV. 359, 375 & 375-76 nn.73-76 (2005) (observing that some courts allow plaintiffs to introduce violations of rules of professional responsibility in support of legal malpractice claims); *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 5 cmt. c (2000) (addressing the effect of general provisions in rules of professional responsibility); *id.* § 52 cmt. f (providing examples of situations in which a rule of professional responsibility can be invoked by a client to help prove the lawyer's misconduct); *see also* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY ch. 8.3 (Thomson West 2006) (analyzing the implications of section five of the Third Restatement of the Law Governing Lawyers).

Consequently, law firms with such policies will often have no need to notify the insurers of many acts constituting malpractice.

Of course, some law firms have inadequate risk management systems and do not effectively "police" themselves. Law firms (or particular individuals working at such firms) may believe it advisable to keep their insurance carriers in the dark. Instead, they approach their client and propose a reduction in the level of future fees or other arrangements. This may avoid the loss of current and potential future clients. Furthermore, given the uncertainties, complexities, disruption, and length of time to resolve international litigation, as well as fear of potential shareholder suits if they themselves have some degree of fault, some clients may opt to deal in a non-adversarial manner when malpractice may have occurred.

VI. If The Amount of International Legal Malpractice Has Increased, Why Does It Seem to Be Below the Radar Screen?

Despite the increase in law firm size, the practice of law remains a "people" business. Maintaining good relationships with various categories of organizations and individuals remains critical. Law firms need to ensure that law firm morale is strong, since poor morale hurts work product and personnel retention.

Law firms need to nurture the relationships with their clients. The market for legal services is highly competitive, and the loss of several large clients could threaten the very existence of the law firm. The individuals who make the decision to retain law firms must be convinced that their work receives high priority. This means that law firms must deliver timely, thorough, and useful work that is consistent with that available from other law firms.

Similarly, law firms must maintain the respect of governmental and judicial authorities. This requires that the lawyers who interact with government and judicial officials conduct themselves as skilled professionals who possess a high level of personal integrity. If they fail in this regard, they become less effective in representing their clients.

Law firms should have a good reputation not only within the legal community, but also with businessmen and the general public. They gain if they can work effectively with counterparts. Law firms also benefit from referrals, the source of which can be highly

unpredictable. Finally, law firms must be informed of developments that impact their effectiveness.

A reputation for ethical problems or bad publicity from the mishandling of matters, including being known for having lawyers who have committed malpractice, can undermine the efforts of law firms in the aforementioned areas. It is critical that law firms work to preserve their professionalism, which often means declining work where they lack expertise. Law firms must deal with the issue collectively so that the attorneys who benefit from a new client do not cause future problems for the firm.

A. *How Personal Relationships Lead Companies Not to Pursue Malpractice*

Human factors not only play a role in the hiring of in-house counsel, they also play a determinative role in the retention of outside counsel. If a corporation is looking to hire new outside counsel, situations may develop that are ethically and legally complex. Depending on how outside counsel is selected, personal relationships frequently play a role.

There are numerous ways in which personal relationships affect the operation of corporations and law firms. Although a corporation may be the law firm's client, the lawyers' principal contacts will be members of management or lawyers employed by the corporation. A corporation is an "artificial person." This "person" is owned by shareholders who are likely to have little or no relationship with the corporation's law firm, much less show any interest in the governance and performance of the corporation, other than purchasing or selling more stock in the corporation. Below are three examples of how personal relationships may play a role.

1. In-house Counsel May Hire the Law Firms or Lawyers They Know

In-house counsels frequently hire law firms where they have worked previously or firms where friends and acquaintances from professional associations are employed.[113] Although this might have the flavor of impropriety, it need not. Because in-house

113. Former law school roommates, neighbors, fellow members of a religious congregation, or another parent on a child's soccer team may provide the connection leading to retention by and representation of a corporation.

counsel is familiar with a firm, he may have confidence it can do the work. Furthermore, given pre-existing relationships, the in-house counsel may feel confident that the law firm will assign a high priority to his employer's work.

On the other hand, given the existence of these relationships, the possibility of favoritism may exist. This may result in the retention of less qualified counsel than is otherwise available. It also may lead to reluctance in challenging what may be unjustified higher legal costs. In any event, lawyers are probably reluctant to sue their former law firms and colleagues, particularly if they were instrumental in hiring them in the first place.

2. In-house Counsel May Hire the Law Firm Where They Wish to Work

If the in-house counsel does not intend to spend his entire career at his corporate employer, he may feel that his inside knowledge of the corporation may produce a situation where he could bring the corporation to his new law firm as a client. This may arise if the corporation has made a decision to decrease the size of its legal department.[114]

Although this firm may have a special expertise that would justify in-house counsel to join it, the lawyer may be reluctant to be overly critical of work received from the law firm, even if it entails ethical violations and legal malpractice.

3. In-house Counsel May Make the "Safe Choice"

Finally, the in-house counsel may decide to make the "safe choice." For example, the in-house counsel may hire a large law firm with a reputation for performing good work in many different countries. Such decisions are unlikely to be second-guessed and in

114. It is worth noting that many corporate legal departments are reducing the amount of work being sent to outside law firms. Although this may involve increasing the number of attorneys employed by corporations, it also is the result of better management techniques and the more effective use of technology to increase the department's efficiency. For example, whereas in 2006 the projected budgets for corporate legal departments increased by 5%, the increase for outside counsel was only 1%. *See, e.g.*, *InterAlia: Legal Spending: The Cost of Doing Business from the 2006 ACC/Serengeti Managing Outside Counsel Survey*, ACC DOCKET, May 2007, at 12 (analyzing the results from the survey); *InterAlia: Technology Insights from the 2006 ACC/Serengeti Managing Outside Counsel Survey*, ACC DOCKET, April 2007, at 14 (discussing the survey results).

fact the corporation's interests may be well-served. For a corporation to work with a single outside international counsel may have certain practical advantages. The law firm is more likely to understand its client and objectives. It also will have a greater opportunity to build personal relationships that will increase the effectiveness of the service to its clients.

That being said, there are few international law firms that are strong in all regions of the world. Over-reliance on one outside international counsel may lead to problems. The law firm's operations in each locale must be examined separately, since one office may be excellent, but another may not. Some law firms do not maintain a consistently high standard of quality. Although this might suggest that separate counsel be retained for different countries, this may not occur for numerous practical reasons. If this is the case and the safe choice commits malpractice, the corporate counsel is faced with a major dilemma that if he pursues a malpractice claim, substitute outside counsel will have to be found in all locations in which the corporation operates.

The choice-of-counsel problem discussed above could potentially be reduced if all attorneys in the office of general counsel collectively hired outside counsel subject to management approval. For example, the in-house attorney responsible for anti-trust matters, products liability, or international matters would be accountable to a larger group. Such a system would probably reduce the risk of this form of private sector corruption.

B. *How Uncertainty Discourages the Bringing of Malpractice Claims*

In all litigation there are uncertainties as to the outcome. This situation multiplies in the international context. There may be questions as to applicable law. In contractual situations, it is indeed possible that a single dispute may multiply into numerous separate actions, unless there is a well-drafted arbitration clause. The cost of pursuing the fractured action may be prohibitively expensive.

Although some cases are resolved on the merits of the dispute, in other instances procedural factors dominate. If all the outcomes of disputes could be predicted in advance, either all cases would settle, or there would be no split decisions and few appeals.

C. *How Poor Corporate Governance Discourages Malpractice Claims*

As organizations become larger, they become increasingly difficult to manage and control. This is particularly true with entities operating in numerous countries. Internal confusion and miscommunication may lead to disputes in which assigning fault is difficult.

D. *Some Other Factors at Work*

Most states within the United States are comparative negligence jurisdictions.[115] However, some states, such as Maryland, follow the old contributory negligence rule.[116] In such contributory negligence jurisdictions, if the plaintiff has any fault it cannot prevail in the case.[117] Some rules limit the harshness of the principle;[118] however, it is a factor that cannot be overlooked.

There are innumerable other factors that dissuade corporations from pursuing potential claims against law firms that may have committed legal malpractice. For example, if the corporation terminated some of its employees involved in the dispute, how they might testify is uncertain.

Sometimes the management and board of directors fear that if they file a claim against their law firm, it might trigger shareholder claims. The logic behind this is that the shareholders might believe that the loss in value to the corporation must be at least partially the result of the corporation's actions or inactions.

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115. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 471 & n.30 (West Group 5th ed. 1984 & Supp. 1988) (concluding that as of the 1988 pocket part, all but six states and the District of Columbia follow some form of comparative negligence); BLACK'S LAW DICTIONARY 1062 (8th ed. 2004) (defining "comparative negligence" as "[a] plaintiff's own negligence that proportionally reduces the damages recoverable from a defendant").

116. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 471 & n.30 (West Group 5th ed. 1984 & Supp. 1988) (explaining that as of the 1988 pocket part, the remaining contributory negligence jurisdictions were Alabama, the District of Columbia, Maryland, North Carolina, South Carolina, Tennessee, and Virginia); *see also id.* at 451-52 (explaining that, under the doctrine of contributory negligence, "although the defendant has violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because [of] his own conduct").

117. *Id.* at 451-52.

118. *See id.* at 462-68 (addressing some of these limitations on the contributory negligence doctrine).

Lastly, corporations recognize that litigation is disruptive and divisive. Management and boards of directors tend to be prospective. Litigation, even if the corporation were victimized by malpractice, could harm the corporation's reputation. Consequently, alternative dispute resolution attracts corporations because of the potential that the problems will not become public.[119] This may be in both the interest of the disputants as well as their employees and boards. Compromises can be reached. Law firms that become convinced of their own malpractice can cut their fees to a longstanding client. This can be a better alternative than bad publicity to both the institution and the individual lawyers.

VII. Final Thoughts

As the business world has become more globalized, the field of law has changed to meet the demands of clients. This Essay has attempted to address several of the issues in the legal profession caused by the international marketplace. The current methods lawyers utilize to address the needs of their clients across state and national boundaries have resulted and will inevitably continue to result in legal malpractice. Although research indicates that many of these instances have yet to result in a flood of international legal malpractice lawsuits, lawyers should not sit idly. Attorneys committing the types of international legal malpractice discussed in this Essay will eventually be held accountable for their actions if they do not take steps to correct their behavior. Not only will the dog eventually bark, it will also bite.

119. *See, e.g.*, Commercial Arbitration and Mediation Center for the Americas Mediation and Arbitration Rules, American Arbitration Association art. 36, http://www.adr.org/sp.asp?id=22092#priv (last visited Apr. 2, 2007) (requiring that "[u]nless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award") (on file with the *St. Mary's Law Journal*).