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# Challenges and Guidance for Lawyering in a Global Society

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## FOREWORD

### CHALLENGES AND GUIDANCE FOR LAWYERING IN A GLOBAL SOCIETY

SUSAN SAAB FORTNEY\*

Various aspects of law practice have radically changed over the last thirty years. Developments in technology, economics, organizational structures, and firm governance have transformed how lawyers practice and communicate. The number of practicing lawyers has increased, along with the size and number of mega firms.<sup>1</sup>

Even lawyers who function as solo proprietors use technology unavailable twenty years ago. Technology has changed “how we access information and conduct our legal research, to electronic court filings, ubiquitous emails, and the need to be on-call all hours

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1. See Robert A. Stein, Dean Emeritus and Everett Fraser Professor of Law, Univ. of Minn. Law Sch., Keynote Address at the University of Minnesota Law Review Banquet: The Future of the Legal Profession (Apr. 6, 2006), *in* 91 MINN. L. REV., at 1, 2 (2006) (noting that the number of lawyers in the United States increased from 286,000 in 1961 to over 1,100,000 in 2006). Mega firms are now run more “as a business, with professional managers, marketing departments, business consultants, and a large number of ancillary personnel.” *Id.* at 5.

of the day, all days of the week.”<sup>2</sup> Technology that tethers lawyers to their work causes many to feel as if they are practicing law on a 24/7 basis because they can be reached any time, on any day, and at any place, including on weekends.<sup>3</sup> Today, lawyers’ work need not be limited to representing clients in particular communities, states, or countries; rather, lawyers effectively handle legal work for clients with interests spanning the world.

Over the last ten years, globalization has directly affected the delivery of legal services. With globalization of capital and financial markets linking even the remotest parts of the world, cross-border practice is no longer restricted to lawyers who handle private and public international law matters.<sup>4</sup> Lawyers on Main Street in countries around the world, as well as lawyers on Wall Street in New York City and in other financial centers, should consider cross-border and ethics issues when representing clients.<sup>5</sup> For example, a domestic relations lawyer in Texas representing an immigrant in Texas may need to understand property and domestic relations law of the client’s homeland.<sup>6</sup>

On a daily basis, clients’ use of the Internet may connect them with people around the world, resulting in legal entanglements. This is illustrated by the custody dispute over the twins adopted by couples in Great Britain and the United States. Although the only connection the couples shared was an Internet “adoption broker,” the couple became embroiled in a cross-border custody dispute.<sup>7</sup>

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2. *Id.* at 5.

3. SUSAN SAAB FORTNEY, IN PURSUIT OF ATTORNEY WORK-LIFE BALANCE: BEST PRACTICES IN MANAGEMENT 21 (2005) (reporting on the results of an empirical study of over 6,000 attorneys in law firms, government offices, and corporate legal departments).

4. Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century from Now?*, 1 J. INST. FOR STUDY LEGAL ETHICS 297, 300 (1996) (noting that telecommunication and technological advances that have “intimately link[ed] the remotest parts of the world . . . are here and improving every day”).

5. For a discussion of how globalization has “trickled down” from “‘Wall Street’ to ‘Main Street,’” see *id.* at 310. For examples of how solo practitioners and small firm lawyers provide cross-border services, see generally Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small-Firm and Solo Practitioners*, PROF. LAW. 123 (1995).

6. “Immigrants, even those who eventually become citizens, are retaining financial, cultural, and personal ties to their countries of origin.” Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT’L L.J. 1239, 1250-51 (1998).

7. Sarah Lyall, *Battle by Couples to Adopt U.S. Twins Moves to Britain*, N.Y. TIMES, Jan. 18, 2001, at A3, available at 2001 WLNR 3409031 (explaining that the couples paid the

As a result, the lawyers for the couples, like the corporate lawyer handling international mergers, must understand the role and ethics of lawyers in other countries, as well as applicable substantive and procedural law. This suggests that enhancing lawyer competence to improve client service is the primary motivation for studying comparative ethics.<sup>8</sup>

Law schools and other legal education providers should recognize their own professional responsibility in integrating legal and comparative ethics in their programs. Increasingly, schools and continuing education providers are including international and comparative perspectives into their program.<sup>9</sup> Symposia such as this one provide excellent opportunities for experts to examine how the new legal environment impacts lawyer conduct and malpractice exposure.

Ethan S. Burger's Symposium Essay, *International Legal Malpractice: Not Only Will the Dog Eventfully Bark, It Will Also Bite*,<sup>10</sup> discusses various challenges for lawyers who practice on a transnational basis.<sup>11</sup> After tracing the emergence of transnational corporations, he considers how representation of such corporations presents particular issues for lawyers, including obtaining qualification to provide services to clients in particular jurisdictions and developing the requisite knowledge and skills to represent such

same adoption broker, resulting in an "extraordinary international tug of war" revealing the vast differences between the two countries' adoption laws).

8. As stated by Dean Mary C. Daly: "[L]awyers who engage in cross-border practice cannot competently represent their clients if they are unaware that the foreign lawyers who are also providing legal services . . . are subject to different or even conflicting ethical norms." Mary C. Daly, *Transnational Legal Practice*, chapter 5, at 1 (Apr. 26, 2000) (unpublished manuscript, on file with the *St. Mary's Law Journal*).

9. As a result of the expanding reach of legal and judicial globalization, the literature, the curricula of law schools, and mandatory continuing legal education programs have become more comprehensive, including international human rights, intellectual property, cyberspace and e-commerce, biodiversity, trans-national organized crimes and law enforcement, international arbitration, immigration and citizenship, extradition, and others." Florida Ruth P. Romero, *Legal Challenges of Globalization*, 15 *IND. INT'L & COMP. L. REV.* 501, 507 (2005). A Workshop on Integrating Transnational Legal Perspectives into the First Year Curriculum was conducted during the 2006 Annual Meeting of the American Association of Law Schools. See <http://www.aals.org/am2006/program/transnational/index.html> (last visited Mar. 31, 2007) (providing a program for the event) (on file with the *St. Mary's Law Journal*).

10. 38 *ST. MARY'S L.J.* 1025 (2007).

11. Ethan S. Burger, *International Legal Malpractice: Not Only Will the Dog Eventually Bark, It Will Also Bite*, 38 *ST. MARY'S L.J.* 1025 (2007).

clients.<sup>12</sup> The Essay describes pitfalls that lawyers encounter and the analysis that transnational lawyers go through in tackling engagements.<sup>13</sup>

Despite the fact that transnational lawyers may be navigating in treacherous and sometimes uncharted waters, Mr. Burger explains that there has not been an explosion of legal malpractice claims related to the "internationalization" of law practice.<sup>14</sup> Although there are various explanations for why the likelihood of malpractice claims has not increased, Mr. Burger asserts that legal malpractice consequences of globalization remain "below the public's radar."<sup>15</sup> In support of this thesis, he discusses various factors that explain why corporations may not pursue litigation against their outside law firms.<sup>16</sup> Mr. Burger recognizes the important role that insurers play in educating lawyers on the risks of practicing on a global basis.<sup>17</sup>

Regardless of practice setting or size, the question is whether lawyer regulation has kept pace with the dramatic changes in law practice. The organized bar has made valiant efforts to revise disciplinary rules to fit modern-day practice. Despite these efforts, lawyers are left wondering about the propriety of conduct and structures in the new world of lawyering on a daily basis.

In numerous situations, rules and opinions provide limited guidance for practitioners who aspire to practice ethically. In some cases, court decisions and ethics opinions contradict each other, leaving practitioners in a quandary. In his Article, *Enforceability of General Advance Waivers of Conflicts of Interest*,<sup>18</sup> Professor Nathan M. Crystal discusses uncertainty surrounding lawyers' use of advance waivers.<sup>19</sup>

To elucidate the difficulty for practitioners, Professor Crystal first addresses the current standards for advanced waivers under

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12. *Id.* at 1034-43.

13. To illustrate traps for the unwary, Mr. Burger uses the example of an attorney crafting enforceable dispute resolution clauses for international arbitration. *Id.* at 1040-43.

14. *Id.* at 1056-59.

15. *Id.* at 1059.

16. Ethan S. Burger, *International Legal Malpractice: Not Only Will the Dog Eventually Bark, It Will Also Bite*, 38 ST. MARY'S L.J. 1025, 1060-64 (2007).

17. *Id.* at 1056.

18. 38 ST. MARY'S L.J. 859 (2007).

19. Nathan M. Crystal, *Enforceability of General Advance Waivers of Conflicts of Interest*, 38 ST. MARY'S L.J. 859 (2007).

the American Bar Association's (ABA) Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers (Restatement).<sup>20</sup> He carefully dissects each provision, identifying the similarities and differences between the approaches used in the Model Rules and the Restatement.<sup>21</sup> Although the Restatement provides more guidance than the Model Rules, Professor Crystal notes that both suffer from vagueness in not clarifying the disclosure requirements necessary for informed consent.<sup>22</sup> Professor Crystal also explains how the Model Rules and the Restatement fail to address the validity of advanced waivers that apply to substantially related matters.<sup>23</sup>

After discussing policy concerns and the impact on different categories of clients, Professor Crystal persuasively argues that general advance waivers that apply to substantially related matters should be invalid, unless the waiver involves a conflict resulting from representation of co-clients in a single matter, such as co-defendants in the same litigation.<sup>24</sup> Professor Crystal maintains that informed consent requires disclosure.<sup>25</sup> While numerous commentaries and law review articles refer to consent requirements, few provide detailed guidance. In departure from this norm, Professor Crystal discusses five categories of disclosures.<sup>26</sup>

Professor Crystal's critique of court decisions provides insight on the likelihood of advance waivers being upheld by courts. Although some general lessons might be drawn from the decisions, the review of these decisions reveals no clear framework for analyzing general advance waivers. To address this uncertainty, Professor Crystal provides a multi-dimensional proposal for creation of a presumption of enforceability. By outlining three requirements for the presumption to apply, Professor Crystal fashions a workable approach that addresses uncertainty and balances interests of clients and lawyers.<sup>27</sup>

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20. *Id.* at 866-70.

21. *Id.* at 871-73.

22. *Id.* at 873.

23. *Id.* at 877.

24. Nathan M. Crystal, *Enforceability of General Advance Waivers of Conflicts of Interest*, 38 ST. MARY'S L.J. 859, 878-89, 895 (2007).

25. *Id.* at 901-02.

26. *Id.* at 904-09.

27. *Id.* at 921-22.

Once lawyers commence representing clients, other ambiguities in the rules create questions for lawyers who want to aggressively investigate and prepare. James L. Burt and Jeremy J. Cook discuss holes in disciplinary rules relating to contacts with represented and unrepresented persons. Their Article, *Ethical Considerations Concerning Contacts by Counsel or Investigators with Present and Former Employees of an Opposing Party*,<sup>28</sup> first considers how those rules apply to contacts between investigators retained by lawyers and employees of represented persons.<sup>29</sup> Although the language of ABA Model Rules 4.2 and 4.3 appears to be clear, the authors urge caution. They identify problems that exist in determining the reach of the rule, including the application to undercover investigations and difficulties with determining who is represented when dealing with entities.<sup>30</sup> Given the different approaches used around the country, the authors underscore the importance of practitioners understanding "boundaries" imposed in jurisdictions where lawyers practice.<sup>31</sup> The authors provide practical suggestions on avoiding traps when dealing with present and former employees of an opposing party.<sup>32</sup> The recommendations they provide may help lawyers discern between thorough and creative preparation on the one hand and unethical and destructive overreaching on the other hand.

In his Article, *Why Legal Ethics Rules Are Relevant to Lawyer Liability*,<sup>33</sup> Douglas R. Richmond turns from analyzing specific ambiguities in disciplinary rules to the proper use of ethics rules in civil litigation.<sup>34</sup> This Article provides readers an opportunity to consider the interplay of two external controls on lawyer conduct: the disciplinary system that enforces violations of the applicable rules of professional conduct and the civil liability system that provides parties redress when they are injured by lawyer conduct. Mr. Richmond addresses what role, if any, violations of disciplinary

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28. 38 ST. MARY'S L.J. 963 (2007).

29. James L. Burt & Jeremy J. Cook, *Ethical Considerations Concerning Contacts by Counsel or Investigators with Present and Former Employees of an Opposing Party*, 38 ST. MARY'S L.J. 963, 967 (2007).

30. *Id.* at 968.

31. *Id.* at 968-86.

32. *See generally id.*

33. 38 ST. MARY'S L.J. 929 (2007).

34. Douglas R. Richmond, *Why Legal Ethics Rules Are Relevant to Lawyer Liability*, 38 ST. MARY'S L.J. 929 (2007).

rules should play in civil litigation against lawyers. After thoughtfully discussing the different angles and consequences of using different approaches, Mr. Richmond convincingly presents the case for allowing rules to be used as evidence of the standard of care.<sup>35</sup>

Professor Colin P. Marks addresses a different type of uncertainty in his Essay, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*.<sup>36</sup> He discusses the precarious situation for corporate counsel and corporate constituents involved in internal investigations of possible wrongdoing. After discussing the scope and purpose of internal investigations and conduct by counsel, Professor Marks examines the privileges afforded to information obtained in such investigations.<sup>37</sup> In the past, corporate counsel attempted to conduct investigations in a way to afford protection for information obtained from corporate constituents. Starting with a 1990 memorandum issued by Deputy Attorney General Eric Holder (the Holder Memo), U.S. Department of Justice (DOJ) positions have altered the principles that apply to internal investigations. By setting forth factors that the U.S. Justice Department would consider in charging corporations with crimes, the Holder Memo began to impact counsel perspectives and practices. Professor Marks underscores the concern over Factor Four, which provides that cooperation with the government could include "if necessary, the waiver of the corporate attorney-client and work-product privileges."<sup>38</sup> The threat of prosecutors pressuring corporations to disclose privileged information captured national attention in 2002 when Deputy Attorney General, Larry Thompson (author of the Thompson Memo), reiterated the Holder Memo factors and added an additional factor and language that emphasized that a corporation lending its full cooperation would be gauged on the completeness of the corporation's "disclosure including, if necessary, a waiver of attorney-client and work product protections."<sup>39</sup>

Professor Marks joins the ranks of numerous experts nationwide who have questioned the effect of the Thompson Memo on the

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35. *Id.* at 960-61.

36. 38 ST. MARY'S L.J. 1065 (2007).

37. Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*, 38 ST. MARY'S L.J. 1065, 1071-74 (2007).

38. *Id.* at 1076.

39. *Id.* at 1077.



perspectives and practices of corporate counsel. Referring to the "culture of waiver," he thoughtfully explains how the Thompson Memo has effectively "deputized" counsel.<sup>40</sup> As stated by Professor Marks, the "culture of waiver transforms the internal investigation from one driven purely by the corporation's interests, into one driven by the DOJ's interests."<sup>41</sup>

Although some of these concerns may be addressed in a December 12, 2006 Memorandum issued by Deputy Attorney General Paul J. McNulty, Professor Marks warns that the "culture of waiver" may remain.<sup>42</sup> Therefore, Professor Marks concludes his Essay with an insightful discussion of the ethical implications of "deputizing" counsel.<sup>43</sup> This discussion should be read by prosecutors, lawyers representing corporations, and other attorneys concerned about the erosion of the attorney-client privilege and lawyer independence.

The Article *Recent Development in Texas Legal Malpractice Law*<sup>44</sup> by Kelli M. Hinson and Elizabeth A. Snyder also describes the changing legal environment.<sup>45</sup> After noting that legal malpractice law continues to evolve, the authors chronicle noteworthy developments relating to (1) who can bring a legal malpractice claim, (2) when claims can be brought, (3) what claims can be asserted, and (4) how a claimant can establish causation.<sup>46</sup> Their survey helps readers understand that legal malpractice continues to be a developing body of law and that certain steps, such as defining the scope of representation and the identity of clients, can help lawyers avoid being good targets in legal malpractice suits.

The Comment, *Brother's Keeper: The Legal Ethics of Representing Family Members*,<sup>47</sup> by Jason W. Whitney illuminates professional responsibility traps associated with lawyers representing their family members. From the day they are accepted in to law

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40. *Id.* at 1077-82.

41. *Id.* at 1079.

42. Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*, 38 ST. MARY'S L.J. 1065, 1082-85 (2007).

43. *Id.* at 1085-99.

44. 38 ST. MARY'S L.J. 1003 (2007).

45. Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003 (2007).

46. *See generally id.*

47. 38 ST. MARY'S L.J. 1101 (2007).

school until the day they go to rest in their graves, lawyers are often “on call” to handle their family members’ legal issues. Despite the frequency of lawyers providing legal service to family members, lawyers often launch into representation not fully appreciating the array of legal ethics concerns. To provide lawyers guidance, the Comment examines common ethical problems for lawyers representing family members.<sup>48</sup> After distinguishing family members from other clients, Mr. Whitney surveys applicable disciplinary rules, advisory ethics opinions, and case law.<sup>49</sup> Drawing from this background, Mr. Whitney identifies practical guidelines for lawyers representing family members and suggests amendments to the Texas Disciplinary Rules of Professional Conduct for improving lawyers’ ability to deal with ethical problems.<sup>50</sup>

This Sixth Annual St. Mary’s Law Journal Symposium on Legal Malpractice and Professional Responsibility provides an important forum for experts to expose and explore changes and implications for lawyers who seek to practice ethically. On behalf of the practicing bar and academy, I thank the members of the St. Mary’s Law Journal and their faculty for sponsoring such a worthwhile program.

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48. See generally Jason W. Whitney, Comment, *Brother’s Keeper: The Legal Ethics of Representing Family Members*, 38 ST. MARY’S L.J. 1101 (2007).

49. *Id.* at 1114-25.

50. *Id.* at 1130-35.

