

Ethical Obligations for a Global Firm

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MEMORANDUM

To: Bigger, Means and Better, P.A. Management Committee
From: General Counsel
Date: March 4, 2016
Re: The Ethical Obligations We Incur from Foreign Acquisitions

INTRODUCTION

As discussed in a previous management meeting, Bigger, Means and Better, P.A. (BMB) is preparing to expand its operations by acquiring existing practices abroad. Management predicts the expansion will increase BMB's value to U.S. corporations that are current clients and attract foreign corporations as new clients. BMB is particularly interested in acquisitions in the United Kingdom (U.K.), Germany, China, South Korea, and an unspecified developing country.

This Memorandum explains how BMB's acquisitions may incur ethical obligations. Part I identifies potential sources of BMB's ethical obligations under foreign legal traditions and regimes, as well as intergovernmental organizations. Parts II, III, and IV discuss how to manage risks involving conflicts of interest, different doctrines of attorney-client privilege, and unauthorized practice of law. Part V further discusses strategies to meet BMB's duties of competence, communication, and compliance with local rules in foreign countries. All of these ethical issues lead to the conclusion that BMB's expansion will impact operations at every level, from who BMB hires to who owns BMB. However, successfully navigating the issues will provide BMB with international experience that is becoming ever more important as corporations continue globalizing.

I. SOURCES OF ETHICAL OBLIGATIONS

In addition to the Model Rules, BMB should be aware of potential obligations from foreign legal traditions, civil law regimes, and intergovernmental organizations.

A. Legal Traditions

In the State of Progress, the Model Rules are public laws that have been published in written form. See generally Model Rules of Prof'l Conduct (2013) [hereinafter Model Rules]. In that sense,

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Progress is different from many foreign jurisdictions. Outside of the U.S., legal ethics may be set forth in a country's oral traditions, and may not carry the force of law. 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, 1091 (1997). In the U.K., barristers "thought it quaint that American lawyers felt in need of legal rules for their governance." Id. Although there is a written code of English legal ethics, many ethical standards remain unarticulated and are not formally expressed. Id.

B. Civil Law Regimes

China, South Korea, and Germany have civil law regimes. Lusina Ho & Rebecca Lee, Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis 11 (Cambridge Univ. Press 2013). In civil law countries, a lawyer's ethical obligations are directed to society as a whole, and are less focused on individual clients than the Model Rules. See Lauren R. Frank, Ethical Responsibilities and the International Lawyer: Mind the Gaps, 2000 U. Ill. L. Rev. 957, 966–68 (2000).

C. The Council of Bars and Law Societies of Europe (CCBE)

The CCBE acts as liaison between the European Union (EU) and the bars and law societies in Europe, including those in the U.K. and Germany. Council of Bars & Law Soc'ys of Eur., About Us, <http://www.ccbe.eu/index.php?id=375&L=0>; Frank, supra, at 963 n.38. The CCBE's primary task was to draft a legal ethics code for European lawyers. Frank, supra, at 962. The CCBE does not have binding legislative authority, but EU member states defer to its recommendations. Id.

II. CONFLICTS OF INTEREST

BMB should caution its solicitors in the U.K. that some of the Model Rules define conflicts of interest more broadly than the U.K.'s Code of Conduct. For example, the U.K. rules do not recognize a conflict in representations directly adverse to a current client in unrelated matters, but Model Rule 1.7(a)(1) does, so BMB's solicitors could not undertake such representations without obtaining informed consent and meeting other criteria in Model Rule 1.7(b). See Janine Griffiths-Baker & Nancy J. Moore, Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?,

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80 Fordham L. Rev. 2541, 2558 (2012). Furthermore, the U.K. rules do not impute conflicts, but Model Rule 1.10 does, so BMB's solicitors face the risk of disqualification through the screening process in Model Rule 1.10(a)(2)(i). See id. at 2553.

In civil law countries, BMB should be aware that its ability to enforce rules on conflicts of interest may be limited to moral authority. For example, the CCBE does not require lawyers to obtain waivers for conflicts of interest, but instead relies on them to voluntarily decline a representation when they have a conflict. 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, 1289 (1998). Generally, "[i]n most civil law countries, conflicts are a matter of personal ethics, not law." Daly, General Counsel, supra, at 1093 (quotation marks omitted). Thus, enforcement is the responsibility of bar association presidents acting on moral authority, not judges acting on legal authority. Id. at 1094.

Because conflicts of interest pose many risks for a global law firm, BMB should invest in strengthening its conflict-checking system to keep pace with the firm's expansion. A sophisticated system reduces the risks that BMB's foreign lawyers fail to perceive a conflict or perceive it late enough that the client would have difficulty procuring new counsel. See id. at 1095. BMB should also invest in providing ethics education to its foreign lawyers, because neither the U.K. nor civil law countries have the equivalent of the U.S. ethics accrediting requirement, course of study, and examination. See id. at 1090.

An additional way to reduce risk is for Progress to narrow the definition of an imputed conflict. BMB could propose amending Model Rule 1.10 such that neither current or former client conflicts would be imputed when the representations involve lawyers in separate countries, so long as the law firm implements effective screening devices. See Griffiths-Baker & Moore, supra, at 2561. There are many arguments to support such a proposal. First, the current rule does not reflect the likelihood that information would be passed between lawyers in a firm, especially one with international

offices. Id. at 2552. Second, the current rule burdens firms with obtaining client consent for imputed conflicts even when the matters are unrelated or confidential information is not at stake. Id. Finally, there is anecdotal evidence that the current rule can lead to strategic behavior by clients, such as when a large corporation spreads insignificant business around to prevent firms from acting against it in another matter. Id. at 2553 n.68.

III. ATTORNEY-CLIENT PRIVILEGE

Availability of the attorney-client privilege in the EU depends on where the attorney is licensed and employed. In the EU, it is well-settled that the privilege protects a client corporation's communications with outside counsel who is admitted to practice in an EU member state. Daly, General Counsel, supra, at 1108. It does not protect communications with in-house counsel and attorneys whose professional status is not recognized by the EU, such as attorneys admitted to practice law only in the U.S. Daly, Teaching, supra, at 1278–79. To preserve privilege in the EU, BMB's EU lawyers should communicate directly with clients, and BMB's offices outside the EU should communicate with clients through BMB's EU lawyers. If BMB's EU lawyers must relay advice to a client through in-house counsel, the BMB lawyers should caution the client that their advice is discoverable through the communications between the client and in-house counsel. See Daly, General Counsel, supra, at 1105.

Availability of the attorney-client privilege in the U.S. for communications with foreign counsel is decided by first applying a choice-of-law test. A U.S. district court would likely use a version of the “touch base” test that incorporates inquiries from the comity plus function test and the most direct and compelling interest test. Jennifer H. Roscetti & Anthony C. Tridico, Atty Privilege When U.S. Patent Case Involves Foreign Attys, Law360 (Oct. 31, 2013), <http://www.law360.com/articles/484151/atty-privilege-when-us-patent-case-involves-foreign-attys>. Accordingly, the court may look at where the professional relationship commenced and was centered at the time the communication

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occurred, and whether the application of foreign privilege law would be inconsistent with important policies in U.S. law. Id.

If the court finds that the communication touches base with the U.S., the court would then analyze it for the elements of the U.S. doctrine of privilege: the attorney, the client, a communication, the confidentiality that was anticipated and preserved, and the legal advice or assistance that was the primary purpose of the communication. Id. If the communication does not touch base with the U.S., courts generally analyze whether the law of the foreign jurisdiction “provides a privilege comparable to the attorney-client privilege.” Id. (quoting Softview Computer Prods. Corp. v. Haworth Inc., No. 97 CIV. 8815 KMWHBP, 2000 WL 351411, at *11 (S.D.N.Y. Mar. 31, 2000)). For example, a court would likely find that German law is comparable, because courts consistently view the German privilege as robust. Id. (citing Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 524 (S.D.N.Y. 1992)). In contrast, Korean law does not confer privilege on communications from attorneys to clients, although an unprotected communication may still be exempt from disclosure for procedural reasons. Id. (citing Astra Aktiebolag v. Andrex Pharms. Inc., 208 F.R.D. 92, 100–02 (S.D.N.Y. 2002)).

If BMB is aware that a client would want to preserve its claim of privilege in a U.S. court for communications from lawyers in BMB’s Korean office, they could try to maximize the likelihood that the court would find the communication to touch base with the U.S. This may involve commencing the professional relationship through a U.S. BMB office, and providing the Korean lawyers’ advice as a supplement to U.S. lawyers’ advice. Furthermore, the lawyers would need to ensure that the communication satisfies the elements of the U.S. doctrine of privilege if it touches base with the U.S. To successfully argue for comparable privilege if the communication does not touch base, it may be necessary for BMB to provide the U.S. court with expert testimony on the foreign jurisdiction’s privilege doctrine. See id. Not all U.S. courts consider case law citations alone to be sufficient evidence of a comparable privilege. Id.

IV. UNAUTHORIZED PRACTICE OF LAW

Generally, if BMB's foreign lawyers advise on a matter pending before a U.S. tribunal, give advice in the U.S., or give advice that predominantly affects the U.S., the Model Rules apply to them. See Model Rule 8.5(b). The Model Rules prohibit unauthorized practice of law. Model Rule 5.5. If BMB's foreign lawyers practice in a context where the Model Rules apply, they must therefore obtain authorization by license, court order, or any other legal basis available to them. See Model Rule 5.5 cmt. 1. The same conclusion applies to any non-lawyers who seek to render legal advice.

The Model Rules also prohibit assisting unauthorized practice of law. Model Rule 5.5. To avoid assisting unauthorized practice, BMB must verify the qualifications of its foreign personnel. See Robert E. Lutz, Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners, 16 Fordham Int'l L.J. 53, 80 (1992-1993). BMB should retain the results of the verification process, because local, state, and national bar associations have policed the unauthorized practice of law. See Thomas R. Andrews, Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?, 40 Hastings L.J. 577, 583 (1989).

Non-lawyers must refrain from not only unauthorized practice of law, but also ownership of BMB. Essentially every U.S. jurisdiction has held that corporations owned or controlled in part by non-lawyers may not offer the services of lawyers to the public. Id. at 581. This position is vigorously defended by the ABA and other bar associations. Id. at 584. In deference to these authorities, BMB must restrict its ownership to lawyers. BMB could be disadvantaged if its non-lawyers who no longer have an ownership stake join a competing foreign firm, so BMB should consider negotiating a non-competition agreement with them, or helping them fulfill the requirements to become licensed so they can retain partial ownership of the practice. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 423 (2001) (allowing partnerships between U.S. lawyers and members of recognized legal professions in foreign countries).

V. OTHER ETHICAL ISSUES

Before making foreign acquisitions, BMB should consider how to meet its duties of competence, communication, and compliance with local rules in foreign countries. The duty of competence requires lawyers to provide “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rule 1.1. Among other requirements, the duty of communication requires lawyers to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Model Rule 1.4(b).

A. Duty of Competence

For financial and legal reasons, BMB’s foreign practices are likely to be small, which restricts their range of competencies. See Carole Silver, Globalization and the U.S. Market in Legal Services —Shifting Identities, 31 Law & Pol’y Int’l Bus. 1093, 1130–31 (2000). Firms tend to staff foreign offices leanly because of difficulty predicting clients’ needs for foreign services. See id. at 1131. Laws in some countries, such as France and Spain, restrict the number of attorneys permitted to join one firm. Frank, supra, at 968. Therefore, BMB should anticipate times when none of the lawyers in its foreign office have the expertise that a client needs in that country. To reduce the risk that BMB’s foreign lawyers will need to turn down work because they lack competence in the requisite foreign legal specialties, BMB should determine which specialties will be most useful and selectively acquire practices with those specialties. BMB could also mitigate potential financial losses by encouraging its foreign lawyers to market the firm’s broad range of U.S. legal specialties to foreign clients. Globalized U.S. firms have found that foreign clients are interested to know how transactions are conducted in countries other than their own, especially if their own laws are ambiguous or non-existent. Silver, supra, at 1134.

Rather than solely relying on one U.S. or foreign BMB office, however, some clients may want BMB’s U.S. and foreign lawyers to advise on a matter together. BMB’s U.S. lawyers need to inform their client if their advice incorporates a foreign lawyer’s opinion, lest a U.S. court hold the U.S.

lawyers responsible for the foreign lawyer's opinion and find that they violated their duty of competence to the client. See Lutz, supra, at 82. U.S. lawyers may use the following disclaimer clause in their advice: "In rendering the opinions expressed in paragraphs —, we have relied [solely] on the opinion of — insofar as such opinions relate to — law, and we have made no independent examination of the laws of such jurisdiction." Id. at 83.

B. Duty of Communication

BMB must enable its clients to make informed decisions about representation in foreign jurisdictions. See Model Rule 1.4(b). When deciding whether to accept the services of a BMB office, clients need to be aware of differences between legal services in their country and the country where the BMB office is located. BMB's corporate clients likely have sufficient sophistication to know some differences already, so BMB should assess each client's level of knowledge and provide explanations as needed.

C. Duty of Compliance with Local Rules

When BMB acquires a foreign practice, that office should have already developed best practices for complying with the local rules that govern its lawyers. BMB needs to ensure that these practices remain in place after the acquisition, even if some of them seem counterintuitive to management in the U.S. For example, contingent fee agreements are generally prohibited in civil law countries. Frank, supra, at 969. If the foreign practice is located in a jurisdiction that has not established laws to govern the practice of law, a possible strategy for BMB is to conduct background checks on the foreign lawyers. BMB should not only ascertain that they are free of ethical controversy, but also evaluate their knowledge of their country's social and political systems. In countries where the legal system is largely undeveloped, lawyers derive their standards of conduct from cultural understandings. See Silver, supra, at 1104.

CONCLUSION

No matter where BMB ultimately acquires new practices, it will face ethical challenges that arise from becoming a larger firm. The more BMB expands, the more these challenges will intensify. Expansion pulls BMB into competition with other large firms over a select group of clients who can afford international services, and over the lawyers who attract such clients. See id. at 1093–94. To ensure that BMB acts ethically in the face of competition, management should treat compliance as an important measure of BMB’s success as an expanded firm. With each new practice that BMB acquires, more lawyers are exposed to risk from any potential lapse of compliance. To reap the benefits of expansion without falling victim to the risks, everyone at BMB should continue taking their compliance responsibilities seriously.

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