A Closer Look at Confidentiality and Privilege When Doing Business Abroad

By Mollie Roy, Kenneth C. Moore and Steve Delchin

30-SECOND SUMMARY

The scope of information to be held confidential is remarkably similar for all lawyers, no matter the country you practice in. The real differences are manifested in the exceptions to the duty of confidentiality and the applicability of the duty to in-house lawyers. The exceptions to confidentiality are generally (though not universally) broader in the United States. Do not always assume that US ethics law is the most protective. When it comes to confidential information relating to business crimes or fraud, for example, it often may not be. It is imperative to fully understand and properly analyze confidentiality and choice of law issues where foreign ethics law is involved.

If your company operates in multiple countries, the laws on the duty of confidentiality and the attorney-client privilege can pose challenging ethical and practical questions. What jurisdiction's ethics laws govern your treatment of confidential matters when you are traveling abroad? Do lawyers with whom you are dealing have the same ethical duties as you? How do you preserve the attorney-client privilege when you are in a jurisdiction that may not recognize such a privilege? These are not merely academic questions; they are issues that arise whenever you are confronted with the necessity of sharing confidential information with lawyers in other nations. You need to be in a position to advise your management team and others in the company on whether foreign lawyers have a duty under their governing rules of professional conduct to preserve the confidentiality of your company's information. This article will guide you onto the right path by highlighting the key issues that you need to consider. And it will do so in the context of a real-world scenario.

Comparing US confidentiality rules with the rest of the world

It should come as no surprise that the duty of confidentiality is a universally acknowledged feature of ethics codes around the world. Lawyer confidentiality rules generally have two parts:

- a broad scope of information that must be held confidential, and
- narrow exceptions to the duty of confidentiality.

There is a perception among some American lawyers that foreign ethics codes generally afford less protection to confidential client information than US ethics law. But, in fact, the scope of information to be held confidential is remarkably similar for all lawyers. The real differences are manifested in the exceptions to the duty of confidentiality and in the differences in the applicability of the duty to in-house lawyers. Although internal communications between in-house counsel and their company's employees are afforded little or no protection in a number of foreign jurisdictions, what surprises many American lawyers is that the exceptions to confidentiality are generally (though not universally) broader in the United States. In other words, do not always assume that US ethics law is always the most protective. When it comes to confidential information relating to business crimes or fraud, for example, it often may not be.

To put these principles into sharper focus, it's useful to consider US and foreign ethics law in the context of a real-life scenario involving the general counsel of an international company that has subsidiaries located around the world. The general counsel's name is Geraldine Counsel. She is the general counsel of USA Manufacturing, Inc., a Delaware company headquartered in Virginia. USA Manufacturing wholly owns several subsidiaries around the world, including in England, the Czech Republic and Western Australia. The company's chief financial officer advises Geraldine Counsel that illegal price fixing may have occurred, and still might be occurring, at several of the company's subsidiaries. Accordingly, Geraldine Counsel needs to select legal counsel to conduct an investigation immediately, but she does not want the results of counsel's investigation to become public.

Who should conduct the investigation into alleged price fixing at the company's subs? Should it be lawyers from DC, Ohio or Virginia, or the Czech Republic, UK or Western Australia? Or a combination of lawyers from these jurisdictions?

Scope of the duty of confidentiality among foreign jurisdictions

Geraldine Counsel's initial concern is whether foreign lawyers have the same duty of confidentiality as US lawyers. A comparison of US and foreign ethics law makes clear that the scope of protection for confidential information is similar.

Take, for example, the ABA Model Rules of Professional Conduct (that have been adopted, in some form, in nearly every US jurisdiction) and compare them with the Code of Conduct for European Lawyers (that applies to the cross-border practice of all lawyers from the European Economic Area, regardless of what Bar or Law Society they belong to).[1] Both of these codes have highly similar and astonishingly broad definitions of the scope of information protected by the ethical duty of confidentiality. Rule 1.6 of the ABA Model Rules, which addresses the duty of confidentiality, covers "information relating to the representation of a client." In a similar fashion, Rule 2.3.2 of the European Code of Conduct covers "all information that becomes known to the lawyer in the course of his or her professional activity." Note that the scope of the ethical duty of confidentiality under the ABA Model Rules is broader than the scope of the attorney-client privilege. The latter privilege only protects information given by a client to an attorney in the course of seeking legal advice, plus the advice given by the attorney in response.[2] The ethical duty of confidentiality, by contrast, includes information outside the scope of that attorney-client privilege (as well as within it).[3]

See Table 1 for another example of similarity between jurisdictions: the confidentiality rules in DC and the Czech Republic. Note how both rules from vastly differing legal traditions have the same four prohibitions for client confidential information.

Geraldine Counsel is convinced; the scope of the duty of confidentiality for foreign lawyers is generally just as broad as it is for American lawyers.

Mollie Roy serves as vice president, legal affairs and corporate secretary for ICF International, where she has overseen the legal matters for ICF's global business and companies since 2010. *mollie.roy@icfi.com*

Kenneth C. Moore is chair of the Squire Sanders Ethics Committee and has spent more than 15 years in the field of professional ethics, counseling the firm's global lawyers. He also advises a number of clients on legal ethics and governance issues. *kenneth.moore@squiresanders.com*

Steve Delchin has expertise in general litigation matters, appellate advocacy, legal ethics and product liability. He has counseled Squire Sanders lawyers on professional ethics in 39 offices worldwide. *steven.delchin@squiresanders.com*

Register now for the **ABA Business Law Section Spring Meeting** which takes place April 10 -12, 2014, in Los Angeles. Attendees will delve into current business law topics with over 1,800 practitioners, thought leaders, and policy influencers at nearly 60 CLE programs, over 350 substantive meetings and topical sessions, and dozens of popular social events. Registration rates start at $475.

The Spring Meeting will take place at the JW Marriott Los Angeles at L.A. Live and the Los Angeles Convention Center. Discounted accommodations are available at the JW Marriott Los Angeles at L.A. Live and The Ritz-Carlton Los Angeles.

REGISTER AT AMBAR.ORG/BLSACC1

BUSINESS LAW SECTION SPRING MEETING

APRIL 10 - 12, 2014 | LOS ANGELES, CA

AMERICAN BAR ASSOCIATION
Business Law Section

ABA BUSINESS LAW SECTION

KNOWLEDGE | COMMUNITY | EXPERIENCE

EARLY-BIRD REGISTRATION CLOSES ON FEBRUARY 7, 2014.

REGISTER NOW & SAVE: AMBAR.ORG/BLSACC1

The majority of European Union countries, however, do not recognize a privilege for in-house counsel. Such countries include, among others, Austria, Greece, Hungary, Italy, France and the Czech Republic.

Exceptions to the duty of confidentiality.

The question remains, however, whether the exceptions to a lawyer's duty of confidentiality in the relevant jurisdictions are similar or different. Geraldine Counsel needs to examine these before deciding which lawyers should conduct the investigations into alleged price fixing at the company's subsidiaries. On the one hand, Geraldine Counsel is concerned that one or more of the foreign lawyers may disclose information that the company does not want disclosed. On the other hand, she questions (perhaps correctly) the premise that US ethics law will always be most protective of client confidences.

In analyzing this issue, consider that both the ABA Model Rules in the United States and the ethics rules of foreign jurisdictions have both mandatory and discretionary disclosure rules. Virginia, for example, is a mandatory disclosure jurisdiction. Rule 1.6(c)(1) of the Virginia Rules of Professional Conduct provides that a lawyer "shall" promptly reveal the client's stated intent to commit a crime and the information necessary to prevent it if counseling of the client is ineffective.[6] By contrast, in the People's Republic of China, a lawyer generally has neither the discretion nor the mandatory duty to disclose his corporate client's price-fixing activity, but instead is ethically required to remain silent.[7] So here, we have an example where the foreign ethics rules (i.e., China) are more protective of client information than the rules in an American jurisdiction (i.e., Virginia).[8]

The US and foreign ethics rules also differ when it comes to permissive disclosures (e.g., financial crimes). In Western Australia, disclosure "may" be made "for the purpose of avoiding the probable commission of a serious offence," pursuant to Rule 9(3)(d) of the Western Australia Legal Profession Conduct Rules 2010. Similarly, in Ohio, under Rule 1.6(b)(2) of the Ohio Rules of Professional Conduct, disclosure "may" be made "to the extent the lawyer reasonably believes necessary … to prevent the commission of a crime by the client or other person."

But the story is much different in California, where almost no disclosure may be made for any crime, including financial crime.[9] Similarly, in the Slovak Republic, lawyers have a broad duty to keep the affairs of their clients confidential.[10]

See Table 2 for the variation among US and foreign jurisdictions when it comes to exceptions to the duty of confidentiality.

TABLE 1

DISTRICT OF COLUMBIA[4]	CZECH REPUBLIC[5]
An attorney "shall not knowingly reveal" confidential client information.	An attorney "shall keep confidential" all facts learned in the representation.
Prohibits "use" of confidential information to the "disadvantage of the client."	Prohibits "use" of confidential information to the "detriment of the client."
Prohibits the "use" of confidential information for "the advantage of the lawyer."	Prohibits the "use" of confidential information to "the attorney's own benefit."
Prohibits the "use" of confidential information for "the advantage of" a "third person."	Prohibits the "use" of confidential information for the "benefit of third persons."

In-house counsel and the attorney-client privilege

Armed with the information above, Geraldine Counsel is beginning to get a better handle on which lawyers in her company should conduct investigations into alleged price-fixing. She is leaning toward using her in-house counsel at the subsidiaries in question because these lawyers are licensed in jurisdictions without mandatory disclosure duties that likely would be applicable to price-fixing. That's when her assistant raises the concern about potential limits to the attorney-client privilege when in-house counsel are involved. The concern may be well founded.

On the one hand, there are a number of foreign jurisdictions that recognize a privilege for inside counsel. In Australia, for example, the privilege applies to in-house counsel generally like outside lawyers. Similarly, in Hong Kong, in-house counsel have the same duties as outside counsel to maintain confidentiality and invoke privilege. Likewise, in the United Kingdom, communications with in-house counsel can be privileged if the attorney is a Solicitor with a practicing certificate from the Solicitors Regulation Authority (SRA), and if the communication meets all requirements for privilege applicable to outside counsel.[13]

The majority of European Union countries, however, do not recognize a privilege for in-house counsel. Such countries include, among others, Austria, Greece, Hungary, Italy, France and the Czech Republic. In addition, the European Union has its own privilege standard for cases involving the European Commission. In its landmark decision in *Akzo Nobel*

Pulling Your Hair Out Managing Contracts?

CONQUER CORPORATE CONTRACTS

Finally, one software solution for:

- Contract Management
- Contract Drafting
- Auto Extract
- Clause Management
- Workflows
- Document Management
- Price/Cost Tracking
- Calendaring Alerts
- Online Negotiations
- Electronic Signatures
- Compare Versions
- Compliance Tracking
- Configurable Solution
- Task & E-mail Alerts
- Case/Incident Management
- Electronic Approvals
- Rules Based Monitoring
- SaaS, Deployed, & Mobile Ready

CobbleStone Systems

Leaders with Contract Management Software!

LEARN WHY THOUSANDS USE COBBLESTONE SOFTWARE:

Contact us today: 866-330-0056 | sales@CobbleStoneSystems.com

Register for a free 30 day trial at CobbleStoneSystems.com

TABLE 2

EXCEPTIONS FOR WHEN AN ATTORNEY MUST NOT, MAY, AND MUST BREACH DUTY OF CONFIDENTIALITY			
JURISDICTION	FOR ANY CRIME?[11]	FOR CRIMINAL FRAUD?	FOR NON-CRIMINAL FRAUD?
District of Columbia	Must Not 1.6(a)	May 1.6(b)(2), (b)(3)	May 1.6(b)(2), (b)(3)
California	Must Not § 6068(e) Business and Professions Code; California Rule 3-100(B)	Must Not § 6068(e) Business and Professions Code; California Rule 3-100(B)	Must Not § 6068(e) Business and Professions Code; California Rule 3-100(B)
England and Wales	Must Not Solicitors Regulation Authority Code of Conduct O(4.1)	Must Not Solicitors Regulation Authority Code of Conduct O(4.1)	Must Not Solicitors Regulation Authority Code of Conduct O(4.1)
China	Must Not Law on Lawyers of the People's Republic of China Article 38	May (if endangers security or safety) Article 38	Must Not Law on Lawyers of the People's Republic of China Article 38
Czech Republic	Must Not Czech Act on Advocacy, Section 21(1)	Must if damage exceeds $250,000 Czech Act on Advocacy, Section 21(6)	N/A
New York	May 1.6(b)(2)	May 1.6(b)(2)	Must Not 1.6(a)
Ohio	May 1.6(b)(2)	May 1.6(b)(2)	Must Not 1.6(a)
Western Australia	May (serious offense) Legal Profession Conduct Rule 9(2)	May Legal Profession Conduct Rule 9(3)(d)	Must Not Legal Profession Conduct Rule 9(2)
Virginia	Must 1.6(c)(1)	Must (prospective) -1.6(c)(1) May (past) - 1.6(b)(3)	Must Not 1.6(a)

Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission (Case C-550/07 P), the European Court of Justice held that internal communications between a company's employees and in-house counsel (whether admitted to a member state Bar or not) are not privileged in European competition law cases on the reasoning that in-house counsel are not fully independent of their client. That means that in a jurisdiction such as the United Kingdom, which recognizes a privilege for SRA-certified in-house counsel, communications with in-house counsel may not be privileged if the EU Commission[14] or other government authority is involved from a jurisdiction that does not recognize the attorney-client privilege for in-house counsel.

When considering corporate investigations in foreign jurisdictions, you (like Geraldine Counsel) need to be fully aware that the scope and application of the attorney-client privilege to in-house counsel vary significantly among foreign jurisdictions. In evaluating legal strategy, you need to consider not only what jurisdiction may be involved, but also the investigating authority involved.

Choice of law rules: What ethics law applies?

After considering all of the information about confidentiality and privilege, Geraldine Counsel's next step is to consider what ethics law applies to lawyers conducting price-fixing investigations in foreign jurisdictions. Do the lawyers from "mandatory silence" jurisdictions have an independent ethical duty not to reveal information to:

- co-counsel in jurisdictions with mandatory disclosure duties, and
- co-counsel with the discretionary right to disclose?[15]

An important unresolved question that is fundamental to any choice of law analysis involving foreign ethics law is whether a foreign nation's limitation of its ethical rules to lawyers who are members of the Bar in that country affects whether law-

yers licensed in the United States are governed by such ethical rules. Thus, it is prudent to review the ethics law of a particular jurisdiction to determine whether it is applicable to lawyers who are not licensed to practice law in that particular jurisdiction. Some codes answer the question expressly; others are silent. For example, the Code of Conduct for European Lawyers explicitly applies to European lawyers in the many European nations that have adopted the European Code when they engage in cross-border practice. There is a modest trigger to be "cross-border," and even a simple telephone call from a lawyer in one European nation to a lawyer in another European nation will suffice. (Note that lawyers from the United States are not covered by the European Code unless the choice of law of the American State governing the American lawyer is interpreted in the future to choose foreign ethics law that the foreign jurisdiction itself would not apply to an American lawyer.)[16]

In the United States, determining which ethics law will apply to an American lawyer requires a choice of law analysis under ABA Model Rule 8.5. The problem is that there is a lack of uniformity among states regarding which version of Model Rule 8.5 each has adopted, coupled with a lack of authorities to analyze choice of law issues generally.

There are three versions of Model Rule 8.5. Under the oldest version of Model Rule 8.5 from 1983, the law of the lawyer's license would apply everywhere (including out of state and out of country), unless a conflict arose with the law of another jurisdiction in which the lawyer was deemed to be practicing, or in which the lawyer was also licensed. In that case, generally applicable rules for choice of law may govern.[17] This rule is still followed in Alabama and Kansas.

In 1993, the ABA amended Model Rule 8.5 to add a detailed choice of law provision. Under the 1993 version, the law of the forum or tribunal applies in litigation. For transactions and everything else, the ethics law of the licensing jurisdiction applies. If the lawyer is licensed in multiple states, the state where the lawyer principally practices generally will control, provided, however, that "if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct."[18] The 1993 version is followed in DC and New York.

The current version of ABA Model Rule 8.5 was revised in 2002, and some form of it is the law in a substantial majority of states. Under the 2002 version, the ethics law of the forum or tribunal applies in litigation. For transactions and everything else, the ethics law of the jurisdiction in which the lawyer's conduct occurred controls unless the "predominant effect" of the lawyer's conduct occurred in a different jurisdiction. In that case, the rules of that jurisdiction apply to the conduct.[19]

It is not always clear how Rule 8.5 should be applied under a particular set of facts. For this reason, when the current version of Model Rule 8.5 was amended in 2002, a safe harbor provision was added, providing that a lawyer "shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Unfortunately, this safe harbor has not been adopted in many states. Further complicating matters is the fact that the meaning of "predominant effect" under the rule is largely undefined. Neither the earlier ABA 1993 choice of ethics law rule nor the current 2002 rule provide significant guidance for determining where the "predominant effect" of a lawyer's conduct occurs. Authorities are not setting forth meaningful interpretations of the term "predominant effect" under the ethics rules.

It is prudent to review the ethics law of a particular jurisdiction to determine whether it is applicable to lawyers who are not licensed to practice law in that particular jurisdiction.

What is clear, though, is that foreign ethics law can apply when a US in-house or outside lawyer travels abroad or lives abroad. For example, foreign ethics law can apply to a business transaction, or an international arbitration or court litigation under the current 2002 version of Model Rule 8.5.

Consider how the choice of law analysis might play out in our factual scenario regarding possible price fixing at USA Manufacturing's subsidiaries. Even minor changes in the facts (including how they are reasonably perceived) can affect a lawyer's ethical duties in profound ways.

Alternative No. 1: Alleged price-fixing at company's Western Australian subsidiary

Geraldine Counsel decides to send her assistant general counsel, Dis Klohsz, a Virginia-licensed attorney, to Western Australia to investigate alleged price fixing at the company's subsidiary in Perth, the capital city of the state of Western Australia. Dis Klohsz jointly investigates the Australian sub with Gude Mate, the sub's in-house lawyer. The two lawyers discover blatant price-fixing and subsequently meet in Perth with Australian government authorities at Geraldine Counsel's request. During the meeting, the government authorities demand that both lawyers disclose everything they know about the alleged price-fixing at the sub. As in-house lawyers in this situation, what

are Dis Klohsz's and Gude Mate's ethical obligations?

Under the facts presented, Gude Mate could refuse to answer the government's questions because Western Australia is a discretionary disclosure jurisdiction, and the Western Australian ethics rules would apply to him. But what about Dis Klohsz, who is licensed in the mandatory disclosure jurisdiction of Virginia? His investigatory conduct occurred in Western Australia, where the illegally higher prices from price-fixing are occurring and where the government enforcement would occur. Accordingly, Virginia's version of Rule 8.5 on choice of ethics law likely would select the ethics law of Western Australia.[20] So, like Gude Mate, Dis Klohsz could remain silent in response to the questions by the Western Australian government authorities even though he is licensed in Virginia, which is a mandatory disclosure jurisdiction.

Alternative No. 2: Alleged price-fixing at Ohio sub – meeting in Virginia

Assume that USA Manufacturing has a distribution subsidiary located in Cleveland, Ohio. Cy Lent, the assistant general counsel of the Ohio sub and an Ohio-licensed lawyer, discovers ongoing price-fixing in his investigation of the sub. Geraldine Counsel asks Cy Lent to come to USA Manufacturing's headquarters in Virginia for a meeting with the Department of Justice (DOJ). During the meeting, the DOJ asks Cy Lent to disclose all that he knows about the alleged price-fixing at the Ohio sub. Is Cy Lent, an Ohio lawyer, required to disclose what he knows? Does it matter if enforcement is sought in the Ohio federal court?

As we learned above, Ohio is a discretionary disclosure jurisdiction, and thus, Cy Lent would not be required to disclose all he knows if the meeting with the DOJ was in Ohio. But does Ohio Rule 8.5 (which is substantively identical to ABA Model Rule 8.5) pick up Virginia ethics law, under which Cy Lent would have a mandatory duty of disclosure? Arguably, the predominant effect of his conduct was in Ohio, where he conducted the investigation and where the price-fixing occurred. Thus, to the extent this premise is accepted by a court or by Bar disciplinary authorities (and note that Ohio adopts the ABA's "safe harbor" provision in Rule 8.5), Cy Lent would not be required to disclose any information. Of course, if the predominant effect were in Virginia, Cy Lent would be subject to Virginia's mandatory disclosure rule through Ohio's choice of ethics law. But, if the DOJ filed suit against the company in Ohio federal court, then Ohio ethics law would apply because the law of the place of the tribunal would control, if not the rules of the tribunal itself.

Alternative No. 3: Alleged price-fixing at USA Manufacturing and its subs – meeting in DC

Finally, consider a third alternative scenario (and this is where the outcome determinative effect of differences in choice of ethics rules among jurisdictions really gets interesting). Assume that the meeting with the DOJ that was planned for USA Manufacturing's headquarters in Virginia had to be rescheduled to the DOJ's office on Pennsylvania Avenue in DC. Geraldine wants both Dis Klohsz and Cy Lent to handle the meeting. During the meeting, the DOJ asks the two assistant general counsel to disclose all they know about the price-fixing. Under Virginia's choice of ethics law provision, is Dis Klohsz, a lawyer from Virginia (a mandatory disclosure jurisdiction), required to disclose what he knows at the meeting in DC (a mandatory silence jurisdiction)? Under Ohio's choice of ethics law, is Cy Lent, a lawyer from Ohio (a discretionary disclosure jurisdiction), required to disclose what he knows on the basis that the predominant effect of the conduct at issue is at the company's headquarters in Virginia (a mandatory disclosure jurisdiction)?

Let's start with Dis Klohsz. Like many other jurisdictions, Virginia makes the jurisdiction in which the lawyer's conduct occurred the controlling choice of law rule. But unlike other states, as noted above, Virginia does not have an exception when the

ACC EXTRAS ON… Privilege

ACC Docket
In-house Licensing and the Case of the Missing Attorney-client Privilege (Oct. 2010). *www.acc.com/docket/missing-acp_oct10*

Form & Policy
Sample Confidentiality Agreement International (Jan. 2011). *www.acc.com/form/conf-agree_jan11*

QuickCounsel
Privilege in a Global Landscape Part II: International In-house Counsel (May 2013). *www.acc.com/quickcoun/global-scape2_may13*

Article
The Brussels Court Of Appeal Recognizes In-house Counsel Legal Privilege (Mar. 2013). *www.acc.com/brussels-coa_mar13*

Practice Resource
ACC Alliance Partner WeComply's "Attorney-Client Privilege for Employees" online training course was developed upon feedback from ACC members and explains the attorney-client privilege and attorney work product doctrine in simple, understandable terms. It includes news bulletins, pop quizzes and a final quiz highlighting real-world scenarios that illustrate the scope of the attorney-client privilege and how to avoid disclosure or waiver. *http://bit.ly/17Q9x42*

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT *WWW.ACC.COM*, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

"JUST PUT IT ON THE COMPANY CARD...NOBODY WILL NOTICE."

"YOU'RE REALLY SHOWING OFF YOUR BEST ASSETS TODAY."

"THEY'RE WORRIED ABOUT OVERTIME. I'M JUST WORKING OFF THE CLOCK."

"I NEVER WEAR THE SAFETY GOGGLES. THEY LEAVE A MARK."

What you don't hear can still hurt you.

The things employees say when you're not around can cause legal troubles for you. Fisher & Phillips provides practical solutions to workplace legal problems. This includes helping you find and fix these kinds of employee issues before they make their way from the water cooler to the courthouse.

FISHER & PHILLIPS LLP

ATTORNEYS AT LAW

Solutions at Work®

866.424.2168 • **www.laborlawyers.com** • info@laborlawyers.com

ATLANTA
BALTIMORE
BOSTON
CHARLOTTE
CHICAGO
CLEVELAND
COLUMBIA
COLUMBUS
DALLAS
DENVER
FORT LAUDERDALE
GULFPORT
HOUSTON
IRVINE
KANSAS CITY
LAS VEGAS
LOS ANGELES
LOUISVILLE
MEMPHIS
NEW ENGLAND
NEW JERSEY
NEW ORLEANS
ORLANDO
PHILADELPHIA
PHOENIX
PORTLAND
SAN ANTONIO
SAN DIEGO
SAN FRANCISCO
TAMPA
WASHINGTON, D.C.

"predominant effect" is in a different jurisdiction. Thus, given that the conduct at issue is not "in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears," under Virginia Rule 8.5(b)(1), the controlling rules will be "the rules of the jurisdiction in which the lawyer's conduct occurred," pursuant to Virginia Rule 8.5(b)(2). So even though Dis Klohsz is a lawyer from a mandatory disclosure jurisdiction, his conduct could be controlled (under Virginia's own choice of ethics law rule) by the confidentiality rules of the jurisdiction where the meeting occurs — namely, in DC (a mandatory silence jurisdiction). In short, Dis Klohsz might have no duty to disclose. It's not clear whether this is the most likely outcome (since arguably Klohsz's conduct occurred in the jurisdiction where he conducted his investigation, not where disclosure is demanded), but it is a possible interpretation under the choice of law rules.

By contrast, Cy Lent, who is from a discretionary disclosure jurisdiction (Ohio) and who is meeting with DOJ officials in a mandatory silence jurisdiction (DC), ironically could be subject to a mandatory duty of disclosure if he reasonably believes that Virginia, where the company's headquarters are located, is the jurisdiction of predominant effect. Unlike Virginia, Ohio Rule 8.5 is substantively identical to the latest version of ABA Model Rule 8.5, including its "predominant effect" clause and its "safe harbor" provision. Thus, to the extent that Cy Lent reasonably believes that the predominant effect of his conduct is in Virginia, then Ohio's choice of ethics law would make Virginia ethics law apply, and Cy Lent would be required to respond to the DOJ's questioning, assuming that all the other prerequisites of Virginia Rule 1.6 (including counseling of the client before disclosure) have been met. By contrast, if Cy Lent reasonably believes that either Ohio or DC is the place of predominant effect, then Cy Lent could remain silent in response to the DOJ's questioning.

Takeaway checklist

As our factual scenarios demonstrate, it is imperative to fully understand and properly analyze confidentiality and choice of law issues where foreign ethics law is involved. The failure to do so will have real-world consequences for your ability to advise and counsel your management team. Without a doubt, the similarities and differences between US and foreign ethics and privilege law can be critically important to in-house lawyers of global companies.

Below is a useful "takeaway checklist" of points to keep in mind when dealing with legal protections for confidential information of your company, and in considering how choice of law issues may affect the analysis:

- Learn which of the foreign nations that your corporation operates in recognize privilege for attorney-client communications of in-house counsel and outside counsel (as in the United States).
- Note whether the information in the company's files as client are protected as fully as the lawyer's files.
- Determine whether in-house counsel in foreign nations have a professional duty as lawyers to maintain confidentiality. (If no such duty exists, consider putting specific confidentiality provisions in employment contracts.)
- Be aware of choice of law issues that will determine whether foreign or US ethics and privilege law will be selected.
- Become sensitive to which American states and foreign nations have mandatory disclosure requirements.
- Become sensitive to whether the governing ethics law provides for discretionary disclosure or mandatory silence.
- Recall that many foreign nations and some jurisdictions in the United States mandate silence regarding illegal activity of the client.
- Be familiar with ethics law and choice of law, both in the United States and in foreign nations.
- When resources allow, assign an attorney in the general counsel's office with primary responsibility to become the "ethics guru" and serve as the "go-to" person for complex ethics questions.
- When in doubt, pick up the phone and call ethics counsel. **ACC**

Note: The authors would like to thank the following lawyers spanning the Squire Sanders global network who contributed their time and expertise to the development of this article: Dan Roules (China), John Paulsen (Western Australia), Andrew Pike (United Kingdom), Rostislav Pekar (Czech Republic), Richard Mattiaccio (New York), Kevin Connor (Riyadh), Tatiana Prokopova (Bratislava), Horst Daniel (Frankfurt), Mark Dosker (California), Abby Brown, Mark Botti, Brady Dugan, Kenny Alce, and Germaine Dunn (Washington, D.C.), William Killian (Florida), and Alana Jochum, Max Czernin and James Alex (Ohio).

NOTES

1 Rule 1.3.1 of the Code of Conduct for European Lawyers.

2 Professor Wigmore defined the privilege as follows: 1) Where legal advice of any kind is sought 2) from a professional legal adviser in his capacity as such, 3) the communications relating to that purpose, 4) made in confidence 5) by the client, 6) are at his instance permanently protected 7) from disclosure by himself or by the legal adviser, 8) except the protection be waived. 8 J. Wigmore, Evidence § 2292, at 554 (rev. ed. J. McNaughton 1961 & Supp. 1991) (footnote omitted) (emphasis deleted).

3 See Comment [3] to ABA Model Rule 1.6 ("The confidentiality rule … applies not only to matters communicated in confidence by the client but also

You can't know where you're going unless you know where you've been.

THE REWARD FOR WORK WELL-DONE IS THE OPPORTUNITY TO DO MORE.

The best way to predict the future is to invent it.

ART © T.H. BENTON AND R.P. BENTON TESTAMENTARY TRUSTS/UMB BANK TRUSTEE/LICENSED BY VAGA, NEW YORK, NY

Lathrop & Gage was founded in 1873 on the heartland principles of honor, service, trust and value. We work tirelessly to serve our clients in the same unwavering manner today. To find out more about Lathrop & Gage, contact us at (800) 476-4224.

LATHROP & GAGE LLP

NATIONAL FIRM. MIDWEST VALUE.℠

CALIFORNIA | COLORADO | ILLINOIS | KANSAS | MASSACHUSETTS | MISSOURI | NEW YORK

(800) 476-4224 | LATHROPGAGE.COM

to all information relating to the representation, whatever its source."); Edward J. Imwinkelried, "The New Wigmore: Evidentiary Privileges" § 1.3.1 ("[A]lthough the attorney-client privilege applies only to confidences obtained from the client, the lawyer's ethical duty extends to secret information acquired from third parties during the course of representation.").

4 See Rule 1.6(a) of the D.C. Rules of Professional Conduct.

5 See Section 21 of the Czech Act of Advocacy; Rules of Professional Conduct and the Rules of Competition of Lawyers of the Czech Republic (Code of Conduct), Section Two (Duties of an Attorney Vis-à-vis the Client), Article 6 (Basic Rules).

6 The Virginia rule *requires* disclosure of a client's intent, "as stated by the client," to commit a crime and the information necessary to prevent it. But prior to such disclosure, the lawyer must, where feasible, "advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel." Rule 1.6(c)(1) of the Virginia Rules of Professional Conduct.

7 See Article 38 of the Law on Lawyers of the People's Republic of China.

8 In discussing the ethics law of different nations and states, this article addresses whether a lawyer can voluntarily initiate disclosure of past, present or future criminal activity, such as ongoing price-fixing in nations that make it illegal. This is different from the question of whether a lawyer can lawfully refuse to answer or produce documents at the demand of the state, which is a question not of ethics law but rather of privilege law. As noted above, a lawyer's duty of confidentiality in the United States is much broader than the scope of the attorney-client privilege. Thus, US governmental authorities lawfully can demand that a lawyer turn over client confidential information that is not privileged. The distinction is particularly acute in China where the law does not recognize any right to refuse to answer questions of the state. Of course, this is not unique to China. For example, under the European Court of Justice's landmark decision in *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission* (Case C-550/07 P), agents in a pre-dawn raid of a company who are from the European Competition Authority have the right to demand answers and documents with legal advice from in-house counsel right on the spot. Moreover, any state county prosecutor in the United States can demand information that is protected by the ethics law duty of confidentiality if it is not privileged.

9 The only exception is disclosure when the lawyer reasonably believes the crime is likely to result in death or serious bodily injury, as set forth under California Business and Professions Code § 6068(e)(2) and Rule 3-100(B) of the California Rules of Professional Conduct, and even then, the lawyer has discretion whether to disclose. Moreover, before revealing confidential information to prevent a criminal act, the California rules specify various steps that the lawyer first must take: 1) Try to persuade the client not to do the criminal act or to pursue a course of conduct that will prevent death or substantial bodily harm; and 2) tell the client ("at an appropriate time") of the lawyer's ability or decision to reveal the confidential information. See Rule 3-100(C) of the California Rules of Professional Conduct. And after all that, in revealing confidential information, the disclosure must be no more than is necessary to prevent the criminal act. See Rule 3-100(D) of the California Rules of Professional Conduct.

10 See Section 9(1) of the Slovak Rules of Professional Conduct for Lawyers. ("The lawyer is obliged to treat any information learnt in connection with the practice of law as strictly confidential (Sec. 23 of [Act No. 586/2003 Coll. on the Legal Profession and on amending Act No. 455/1991 Coll. on Business and Self-Employment Services, as amended]). He is obliged not to reveal any personal data which are protected under a separate law.")

11 The "any crime" exception to a lawyer's duty of confidentiality is the most appropriate provision for analysis of the antitrust violation in our article. It must be read in the context of a state or nation's law, which may have other provisions for particular crimes, such as criminal fraud, or crimes that used the lawyer's services, or crimes where disclosure is reasonably necessary to prevent reasonably certain death or substantial bodily harm.

12 The privilege, however, may be denied if an SRA certified in-house lawyer combines pure legal advice with business or management advice in the same communication; in that case, the entire communication may be denied the privilege.

13 The decision by the European Court of Justice in *Akzo Nobel* could adversely affect your company's ability to advise on competition law in confidence. It may be more prudent to have corporate investigations conducted by outside counsel in order to ensure that the advice of counsel during an investigation is protected by privilege. You also need to consider the fact that inconsistent privilege rules may apply if the European Commission and the Department of Justice are conducting parallel investigations.

14 It bears noting, of course, that additional factors must be considered in the selection of counsel in addition to the differences among nations and states regarding the duty of confidentiality and privilege law. These factors, among others, include: 1) expertise and experience in the legal subject matter; 2) skill in interviewing company witnesses while observing applicable ethical limitations such as "civil *Miranda* warnings" (which are designed generally to clarify to an employee that in-house counsel represents the corporation and not the individual employee, and to explain to the employee that while communications between counsel and the employee are covered by the attorney-client privilege, the privilege belongs to the corporation and not the individual employee); and 3) the capability of framing advice based on good judgment as well as on the facts and the law.

15 Rule 1.3.1 of the Code of Conduct for European Lawyers.

16 Rule 8.5 of the Model Rules of Professional Conduct (1983).

17 Rule 8.5(b)(2) of the Model Rules of Professional Conduct (1993).

18 Rule 8.5(b)(2) of the Model Rules of Professional Conduct (2002).

19 Virginia's choice of law rule provides in relevant part as follows:
(b) Choice of Law. In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:
(1) for conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise;
(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred. …
Rule 8.5(b) of the Virginia Rules of Professional Conduct.

Total Control.

Long straightaways or tight corners, with Primerus you're in the driver's seat. Very refreshing.

With Primerus, you get the power and control you need to succeed in today's global marketplace. Our team of lawyers from nearly 200 law firms in 45 countries gives you the power of worldwide, personal connections. And with reasonable fees and a client-centered approach to everything we do, you're in complete control of the bottom line.

Learn more today at www.primerus.com/acc.

For personal assistance finding the right lawyer for you, contact Nick Kacher, Senior Vice President & General Counsel.

Email: nkacher@primerus.com, Phone: 800.968.2211

Primerus

The World's Finest Law Firms

International Society of Primerus Law Firms

171 Monroe Avenue NW | Suite 750 | Grand Rapids, Michigan 49503

1.800.968.2211 | 1.616.454.9939 | primerus.com