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ARTICLES

PROFESSIONAL RESPONSIBILITY AND PRIVILEGE IN THE CROSS-BORDER PRACTICE OF LAW

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ABSTRACT

This Article captures my presentation and the discussion at the May 2024 Dubrovnik Program on Cross-Border Dispute Resolution co-sponsored by the Center for International Legal Education (CILE) at the University of Pittsburgh School of Law and the Law Faculties at the University of Verona and the University of Zagreb. I review U.S. law on professional responsibility and cross-border practice, with a focus on disciplinary decisions and cases dealing with the unauthorized practice of law. I follow that discussion with consideration of the attorney-client privilege and work product doctrines in order to highlight how challenges to the admissibility of evidence in dispute resolution proceedings both demonstrate the differences in legal system approaches to the lawyer-client relationship and indicate the need for careful communication at all stages of that relationship when it crosses borders. I conclude that the current system of lawyer regulation does not meet the needs of the contemporary world. The result is a need for vigilance on the part of any lawyer engaged in the cross-border practice of law.

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I. INTRODUCTION

As commercial and personal interactions consistently become more global in nature, the legal profession necessarily must deal with cross-border relationships. That requires that lawyers understand not only the law in their own jurisdiction but the law in other jurisdictions as well. Dealing with cross-border relationships requires a comparative method in the study of law.¹ When more than one law can govern a relationship, it becomes necessary to understand the law that applies to determine which one governs the legal questions that are raised. In other words, all legal analysis begins with rules of private international law (conflict of laws). Lawyers in the twenty-first century must understand comparative law, private international law, and the implications of those disciplines for addressing legal relationships.

As lawyers deal with these issues, they participate in cross-border conduct. They travel to other countries and communicate in many ways with clients, other lawyers, dispute resolution tribunals, and governments in other countries. Many lawyers do this on a daily basis. All of this raises questions about the regulation of lawyers and the regulation of the practice of law. That, in turn, raises questions in the realm of rules of professional responsibility—rules of legal ethics. A lawyer must always be ethical in their conduct, and their ethical compass should always fit within the legal framework so that the conduct is not only ethical, but legal.

In this Article, I address the way in which legal practice in the United States is governed and how that process does and does not adequately address the cross-border practice of law. We cannot deny that cross-border practice exists, but we must ask whether the existing legal framework for the practice of law adequately allows and properly regulates that practice. I begin with the challenge of cross-border practice and its regulation in the United States. I follow that discussion by considering an area that affects cross-border practice in significant ways but is not directly a question of compliance with ethical standards—the impact of rules on the admissibility of evidence on the lawyer-client relationship and how it is affected when the relationship crosses

¹ “Unlike most of the other subjects in the law school curriculum, Comparative Law is not a body of rules and principles. It is a method, a way of looking at legal problems. Strictly speaking, the term Comparative Law is a misnomer. It would be more logical to speak of the Comparative Method.” See Ronald A. Brand, *Comparative Method and International Litigation*, 2020 J. DISP. RESOL. 273 (2020) (citing RUDOLPH B. SCHLESINGER, *COMPARATIVE LAW* 1 (3d ed. 1970)).

borders in some way. I then conclude with thoughts on how the United States approach to these issues fits within an increasingly globalized practice of law.

II. GLOBAL PRACTICE AND LOCAL REGULATION: THE CHALLENGE OF THE CROSS-BORDER PRACTICE OF LAW

In the United States, lawyers are regulated at the U.S. state level. This places the regulation of lawyer conduct in the realm of state law (not federal law). In that realm, improper conduct by a lawyer can result in sanctions in at least six different ways:

- (1) In an individual case before a court, a lawyer may be disqualified from representation of a client or held in contempt of court for engaging in conflicts of interest or other improper conduct.
- (2) In criminal cases, under the Sixth Amendment of the U.S. Constitution, a lawyer's improper representation of a defendant client may result in reconsideration of a conviction of that client in later proceedings.
- (3) A lawyer may face criminal charges for conduct that violates criminal law, such as fraud, theft of funds, or similar conduct.
- (4) A lawyer may be sued for malpractice, resulting in a judgment requiring the payment of damages to the client.
- (5) Charges may be brought against a lawyer before the state bar disciplinary authorities that can result in sanctions, including the suspension or loss of the license to practice law.
- (6) A non-lawyer or out-of-state lawyer may be found to be in violation of rules prohibiting the unauthorized practice of law, usually in an action brought by the lawyer against a client to order payment of fees, but also possibly as a matter of criminal law when the statute makes the unauthorized practice of law a criminal violation.

It is the fifth and sixth of these sanctions that have most often raised the question of the improper cross-border practice of law and thus been the subject of cases and disciplinary decisions involving whether a lawyer can receive payment for services rendered in a cross-border practice. While the proceedings often involve internal border crossings among the states of the

United States, the concepts apply as well to international cross-border practice.²

III. RULES OF PROFESSIONAL CONDUCT IN THE CROSS-BORDER PRACTICE OF LAW

The rules of conduct for U.S. lawyers are found in the ABA Model Rules of Professional Conduct.³ These rules are not statutory. They are normally applied by bar authorities but also are relied upon for guidance by courts. The fundamental duty on which all others are based in the Model Rules is the duty of competence, found in Rule 1.1:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁴

A lawyer may demonstrate competence in a variety of ways. Thus, “A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.”⁵ A foreign lawyer is not licensed locally and is therefore not a lawyer for purposes of applying the unauthorized practice rules of Model Rule 5.5, which defines the unauthorized practice of law.⁶

Lawyers engaged in cross-border practice are often asked to advise clients on foreign law. Whether a local lawyer can give advice on the law of another state or country is not a clear matter in U.S. case law. In *In re Roel*,⁷ the New York Court of Appeals stated that “[w]hen counsel who are admitted

² See RONALD A. BRAND, INTERNATIONAL BUSINESS TRANSACTIONS FUNDAMENTALS 227–88 (2d ed. 2019); Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational and Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135 (2001) (providing more detailed discussions of professional responsibility obligations in the cross-border practice of law).

³ MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [hereinafter MODEL RULES].

⁴ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2024).

⁵ *Id.* r. 1.1 cmt. 2.

⁶ See *infra* notes 24–25 and accompanying text.

⁷ *In re Roel*, 144 N.E.2d 24 (N.Y. 1957), *appeal dismissed*, 355 U.S. 604 (1958).

to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State.”⁸ It is generally recognized that giving legal advice regarding foreign law does constitute the practice of law.⁹ If a lawyer’s conduct causes loss to a client as a result of a lack of knowledge of foreign law, that lack of knowledge will not relieve the lawyer from liability for the harm caused.¹⁰ However, cases generally do not provide clear guidance when only questions of knowledge of foreign law are involved.

A Pennsylvania Bar Association ethics opinion suggests that a lawyer providing an opinion on foreign law may use a disclaimer when advising on foreign law:

[A]n opinion clearly denoting a lack of expertise may state the following:

We are qualified to practice law in the State of New York and we do not purport to be experts on, or to express any opinion herein concerning, any law other than the law of the State of New York and the federal law of the United States.¹¹

Lawyers may also be held responsible for the conduct of foreign lawyers. This can occur when a lawyer refers a client to foreign counsel, when a lawyer obtains advice from foreign counsel that is to be passed on to the client, and when direct employment of a foreign lawyer is arranged to assist the local lawyer in a matter.¹²

In *Bluestein v. State Bar of California*,¹³ the California Supreme Court held that a California lawyer who referred a client to an unlicensed “of counsel” to advise on Spanish law, aided and abetted in the unlicensed practice of law. The Court determined that the practice of law “includes legal

⁸ *In re Roel*, 144 N.E.2d at 28.

⁹ See *Bluestein v. State Bar of Cal.*, 529 P.2d 599, 606 (Cal. 1974).

¹⁰ See, e.g., *In re Roel*, 144 N.E.2d 24 (N.Y. 1957), *appeal dismissed*, 355 U.S. 604 (1958); *Degen v. Steinbrink*, 195 N.Y.S. 810 (N.Y. App. Div. 1922), *aff’d per curiam*, 142 N.E. 328 (N.Y. 1923); *Rekeweg v. Fed. Mut. Ins. Co.*, 27 F.R.D. 431 (N.D. Ind. 1961), *aff’d*, 324 F.2d 150 (7th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964).

¹¹ Pa. Bar Ass’n Comm. on Legal Ethics & Pro. Resp., Formal Op. 90-02 (1990) (quoting Special Comm. on Legal Ops. in Com. Transactions, New York Cnty. Law’s Ass’n, *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891, 1903 (1979)).

¹² See, e.g., MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS’N 2024).

¹³ *Bluestein*, 529 P.2d at 604–07 (Cal. 1974).

advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court,” and “[g]iving legal advice regarding the law of a foreign country thus constitutes the practice of law”¹⁴ *Bluestein* involved advice on foreign law by someone who was not licensed to practice anywhere. Liability would appear to be reduced if the advice comes from one licensed in another state.¹⁵

Regardless of the relationship between the local lawyer and the foreign lawyer brought into a transaction, the local lawyer is subject to the duty to report any professional misconduct by the foreign lawyer under Model Rule 8.3.¹⁶ This raises the question of whether, for purposes of Rule 8.3, a lawyer admitted in a foreign jurisdiction but not locally is to be considered a “lawyer.” A careful approach would assume that the discussion above of the unauthorized practice of law means that the foreign lawyer will not be a “lawyer” for purposes of Rule 8.3.

IV. PROVIDING OUT-OF-STATE LEGAL SERVICES

A. The Model Rules of Professional Conduct

Like any other legal issue in cross-border relationships, the discussion of lawyer conduct in that relationship begins with the question of what law applies. As already noted, lawyer conduct in the United States is most often

¹⁴ *Id.* at 606.

¹⁵ *See, e.g.,* Tormo v. Yormark, 398 F. Supp. 1159 (D.N.J. 1975) (use of New Jersey lawyer for advice on New Jersey law, given to the requesting New York lawyer, shielded New York lawyer from liability for New Jersey lawyer’s unethical conduct so long as referring lawyer knew New Jersey lawyer was admitted to practice in New Jersey).

¹⁶ MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS’N 2023). Rule 8.3, Reporting Professional Misconduct, states:

- (a) 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.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

guided by the Model Rules of Professional Conduct—which may not be statutory law but are used by disciplinary bodies as a principal source and by courts as the normal source of the test of lawyer conduct.

The basic conflicts rule of the Model Rules of Professional Conduct is found in Model Rule 8.5. Prior to its amendment in 1993, that Rule provided only a jurisdictional rule and no choice of law rules.¹⁷ In 1993, this rule was amended and made to be substantially more complex. Not many states adopted the 1993 amended version of the rule, and it was again amended in 2002. That amended rule was more widely adopted. It now provides both a jurisdictional rule and a choice of law rule.¹⁸

Rule 8.5(a) provides that the jurisdiction in which a lawyer is admitted to practice has authority for disciplinary actions.¹⁹ If a lawyer is admitted in multiple jurisdictions, then they may be subject to disciplinary authority in all such jurisdictions under this rule. Rule 8.5(b) then provides the choice of law rules for determining which substantive rules govern a lawyer's conduct. The rules of a jurisdiction in which a court sits apply when the conduct occurs in court proceedings.²⁰ For non-court conduct, where the lawyer is licensed

¹⁷ MODEL RULES OF PRO. CONDUCT r. 8.5 (AM. BAR ASS'N 1983). The 1983 version of Rule 8.5, Jurisdiction, states:

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

¹⁸ MODEL RULES OF PRO. CONDUCT r. 8.5 (AM. BAR ASS'N 2024). Rule 8.5, Disciplinary Authority; Choice of Law, states:

- (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
- (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
 - (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
 - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. 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.

¹⁹ MODEL RULES OF PRO. CONDUCT r. 8.5(a) (AM. BAR ASS'N 2024).

²⁰ *Id.* r. 8.5(b)(1).

in multiple jurisdictions, the Rule looks to the law of the jurisdiction in which the lawyer “principally practices,” or the jurisdiction in which the “particular conduct clearly has its predominant effect.”²¹ As a choice of law rule, Rule 8.5(b) has broad applications and expressly includes practice outside of the United States. Comment 7 states that “[t]he choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.”²²

Unlike Rule 8.5, the separate Model Rule that provides some guidance regarding the unauthorized practice of law, Rule 5.5, deals only with the crossing of internal state borders within the United States.²³ It does, however, provide guidance on the question of temporary practice in a state in which the lawyer is not admitted:

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a

²¹ *Id.* r. 8.5(b)(2). An interesting comparison is found in Rule 1-100(D)(1) of the Rules of Professional Conduct of the State Bar of California, CAL. CODE vol. 23, pt. 2, Rule 1-100(D)(1), which provides that lawyers practicing outside California are exempted from California ethics rules if “specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from [the California] rules.”

²² MODEL RULES OF PRO. CONDUCT r. 8.5(b) cmt. 7 (AM. BAR ASS’N 2024).

²³ *Id.* r. 5.5.

person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

- (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or
 - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
- (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or
 - (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.²⁴

While Rule 5.5 applies only to internal cross-border matters, it provides some guidance for external cross-border practice. It does not, however, provide a clear definition of the unauthorized practice of law—leaving that to each jurisdiction through statutes and case law.²⁵

B. The Case Law

1. Understanding the Need for Cross-Border Practice

While the general rule in the United States is that only a lawyer admitted to practice in a state may render legal services in that state, the New Jersey

²⁴ MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2024).

²⁵ MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N 2024). Comment 2 provides: The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3.

Supreme Court acknowledged in 1964 in *Appell v. Reiner* that there must be exceptions to that rule.²⁶ Discussing services provided across the New Jersey-New York border, the court stated:

[L]egal services to be furnished to New Jersey residents relating to New Jersey matters may be furnished only by New Jersey counsel. We nevertheless recognize that these are unusual situations in which a strict adherence to such a thesis is not in the public interest. In this connection recognition must be given to the numerous multistate transactions arising in modern times. . . . [I]t follows that there may be instances justifying such exceptional treatment warranting the ignoring of state lines. This is such a situation. Under the peculiar facts here present, having in mind the nature of the services to be rendered, the inseparability of the New York and New Jersey transactions, and the substantial nature of the New York claim, we conclude that plaintiff's agreement to furnish services in New Jersey was not illegal and contrary to public policy.²⁷

For the most part, courts are concerned with limitations on conduct in litigation practice while treating transactional practice a bit more liberally:

It must be remembered that we are not here concerned with any participation by plaintiff in a court proceeding. . . . Under the peculiar circumstances here present, independent negotiations by members of different bars, even though cooperating to the greatest extent, would be grossly impractical and inefficient.²⁸

A year later, in *Spivak v. Sachs*,²⁹ the New York Court of Appeals referred approvingly to the language of *Appell* despite refusing to allow the collection of fees by an out-of-state lawyer:

We agree with the Supreme Court of New Jersey . . . that, recognizing the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York.³⁰

In *Spivak*, the New York court noted the “danger” that prohibitions on unauthorized practice could be “stretched to outlaw customary and innocuous practices.”³¹ Similarly, in the truly international case of *El*

²⁶ *Appell v. Reiner*, 204 A.2d 146, 148 (N.J. 1964).

²⁷ *Appell v. Reiner*, 204 A.2d at 148.

²⁸ *Id.*

²⁹ *Spivak v. Sachs*, 211 N.E.2d 329 (N.Y. 1965).

³⁰ *Id.* at 331 (citing *Appell v. Reiner*, 204 A.2d 146 (N.J. 1964)).

³¹ *Id.*

Gemayel v. Seaman,³² the New York court acknowledged that a Lebanese lawyer could give assistance to New York residents on Lebanese law when all of his contacts were by telephone and mail except for a visit to New York after the completion of his legal services. In *Freeling v. Tucker*, an Oklahoma lawyer's representation of an heir in an Idaho probate proceeding was "incident to the disposition of a particular matter isolated from his usual practice in the state of his residence," and did not amount to unauthorized practice.³³ Then, in *Goldstein v. Muskat*, an Illinois lawyer who attended a first meeting with an estate's Wisconsin lawyer, and engaged in further consultations by phone and mail on probate and tax matters, was held not to be engaged in the unauthorized practice of law in Wisconsin.³⁴

2. Relevant Connections to Determine Unauthorized Practice

a. The Location of the Lawyer's Conduct

More recently, cases have started to focus on issues other than the intensity of the incursion into the state in which the question of unauthorized practice arises. A series of California cases has taken on particular relevance. In *Birbrower v. Superior Court*,³⁵ the court considered whether a lawyer licensed in New York could collect for work performed in California in preparation for arbitration proceedings in California. The court stated that "the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice."³⁶ Nonetheless, the court focused entirely on the location of the lawyer's conduct in stating that "[t]he primary inquiry is whether the

³² 533 N.E.2d 245, 249 (N.Y. 1988).

³³ *Freeling v. Tucker*, 289 P. 85, 86 (Idaho 1930).

³⁴ *Goldstein v. Muskat*, 338 N.W.2d 528 (Wis. Ct. App. 1983). See also *Cowen v. Calabrese*, 41 Cal. Rptr. 441, 442-43 (Cal. Ct. App. 1964) (Illinois lawyer who came to California to advise California client, after first contact at Illinois office, could recover fees for work on federal bankruptcy matter in California, where only practice in California was in federal court); *Brooks v. Volunteer Harbor* No. 4, 123 N.E. 511, 512 (Mass. 1919) (Maine lawyer could recover fees for work for Massachusetts client performed in Massachusetts, where he had informed client he was not locally admitted and would have to retain local counsel).

³⁵ *Birbrower v. Superior Court*, 949 P.2d 1 (Cal. 1998).

³⁶ *Id.* at 6.

unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.”³⁷ The court held that the lawyer could collect for fees for work done in New York, where he was licensed, but not for work done while physically present in California.³⁸

b. The Location of the Client

The same year as the *Birbrower* case, a California court, in *Estate of Condon*,³⁹ focused not on the location of the lawyer’s conduct, but rather on the location of the client, when a Colorado lawyer represented a Colorado client in probate proceedings in California. The court noted that “[a] tension is . . . created between the right of a party to have counsel of his or her choice and the right of each geopolitical entity to control the activities of those who practice law within its borders.”⁴⁰ The court stated that “[w]hether an attorney is duly admitted in another state and is, in fact, competent to practice in California is irrelevant in the face of [the] language and purpose” of California’s statutory prohibition on the unauthorized practice of law,⁴¹ which provides that “[n]o person shall practice law in California unless the person is an active licensee of the State Bar.”⁴² It then went on to state that “[i]t is therefore obvious that . . . the client’s residence or its principal place of business is determinative of the question of whether the practice is proscribed by Section 6125. Clearly, the state of California has no interest in disciplining an out-of-state attorney practicing law on behalf of a client residing in the lawyer’s home state.”⁴³

³⁷ *Birbrower*, 949 P.2d at 5.

³⁸ *Id.* at 13.

³⁹ *Estate of Condon*, 65 Cal. App. 4th 1138 (1998).

⁴⁰ *Id.* at 1146.

⁴¹ *Id.*

⁴² Cal. Bus. & Prof. § 6125.

⁴³ 65 Cal. App. 4th at 1146. (More recently, a California court has upheld a trial court’s decision not to award attorney fees to an out-of-state attorney, who was effectively acting as lead counsel in a class action where California residents were putative class members. *Golba v. Dick’s Sporting Goods, Inc.* 238 Cal. App. 4th 1251 (2015).)

c. The Location of the Lawyer-Client Relationship

In 2023, in *Rostack Investments Inc. v. Sabella*, a California appellate court allowed an award of attorney fees for Hong Kong counsel who assisted in discovery and other matters in Hong Kong in support of California litigation.⁴⁴ The *Rostack* court stated that “[t]he primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.”⁴⁵ The court went on to state that “[p]hysical presence” in California “is one factor . . . but it is by no means exclusive,” and “[i]t is therefore obvious that . . . the client’s residence or its principal place of business is determinative of the question of whether the practice is proscribed by Section 6125.”⁴⁶ The court went on to provide language that can be instructive in future cases:

Here, Rostack was not a California client. Rostack is a Liberian corporation based in Hong Kong with Hong Kong-based officers and directors. Nor is there any indication Wilkinson was practicing law in California. Indeed, Rostack only sought fees for Wilkinson’s “taking instructions at the outset of the case, interviews with witnesses and preparation of their statements, review and product of documents for Rostack’s production of documents throughout the case”; and “taking instructions from, and discussing the case with, Rostack.” This was not practicing law in California and was perfectly reasonable given the global nature of this case. As this case again proves, “[s]ocial interaction and the conduct of business transcends state and national boundaries; it is truly global.” (See *Estate of Condon*, 65 Cal. App. 4th 1138, 1145-46 (Cal. Ct. App. 1998).

. . . Wilkinson often acted as an intermediary between Mayer Brown and Rostack, which was reasonable given “[v]irtually all percipient witnesses in the case reside in or about, and/or were deposed in, Hong Kong” and Wilkinson was familiar “with certain procedures in Hong Kong relating to litigation and to conduct effectively certain Hong Kong proceedings involving judicial officers known as examiners.” These examples do not show Wilkinson was practicing law in California within the meaning of Business and Professions Code Section 6125 under the circumstances.⁴⁷

⁴⁴ No. B311811, 314779, 2023 WL 7483934, at *1 (Cal. Ct. App. Nov. 13, 2023).

⁴⁵ *Id.* at *15 (citing *Birbrower v. Superior Ct.*, 949 P.2d 1, 5 (Cal. 1998); *Estate of Condon*, 76 Cal. Rptr. 2d 922, 926 (Cal. Ct. App. 1998)).

⁴⁶ *Rostack Investments, Inc.*, 2023 WL 7483934, at *15.

⁴⁷ *Id.* at *16.

The combination of California cases provides us with examples relying entirely on the location of the lawyer's conduct, the location of the client, and the lawyer's relationship with a California client. It does not provide full clarity on which of these tests will most likely apply to a given case in the future.

d. The Duty of Competence Over Geographic Connections

A 1998 Hawaii case takes a less formalistic and more pragmatic approach by acknowledging the principal focus on competence in Rule 1.1 of the Model Rules of Professional Conduct. In *Fought & Co. v. Steel Eng'g & Erection, Inc.*,⁴⁸ Oregon counsel, who had represented a party to Hawaii litigation in matters other than directly in the litigation, sought fees under a Hawaii statute authorizing attorney fees. The court noted that:

A blanket rule prohibiting the taxing of fees for the services of extrajurisdictional legal counsel who assist local counsel in the conduct of litigation among parties, who are themselves domiciled in different jurisdictions, would be an imprudent rule at best . . . [S]uch a rule might also create an incentive for ethical violations, inasmuch as . . . Rule 1.1 mandates that "[a] lawyer shall provide competent representation to a client."⁴⁹

Focusing simply on the question of competence in the particular matter given the services provided, the court allowed the collection of fees.

3. Specific Issues

a. Email and Cross-Border Practice

The daily use of technology in the practice of law means that physical location has become a difficult concept to apply in determining unauthorized practice of law. The ubiquity of email communication makes it particularly difficult to apply rules that require placement in a particular geographic location.

A decision by the Minnesota Supreme Court wrestled with the implications of that difficulty in *In re Charges of Unprofessional Conduct in*

⁴⁸ *Fought & Co. v. Steel Eng'g & Erection, Inc.*, 951 P.2d 487 (Haw. 1998).

⁴⁹ *Id.* at 497.

Panel File No. 39302.⁵⁰ A lawyer living in Colorado was admitted in Colorado, New York, Florida, and Alaska. His wife's parents in Minnesota had a dispute with their condominium association, which held a \$2,500 judgment against them.⁵¹ When the association's lawyer tried to collect the judgment, the son-in-law called the association's Minnesota lawyer and asked that he deal with the in-laws through him.⁵² After four months of continued email communication, the association's lawyer filed a complaint with the Minnesota Office of Lawyers' Professional Responsibility.⁵³ The Court upheld a determination of unauthorized practice by the ethics panel, stating that "engaging in e-mail communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5(a), even if the lawyer is not physically present in Minnesota."⁵⁴

The challenged lawyer in the Minnesota case argued that email communication alone was not enough to submit to prohibitions on unauthorized practice simply because that communication is directed to a jurisdiction in which the lawyer is not admitted to practice.⁵⁵ The Court responded to this argument stating that "Rule 5.5(a) of the Minnesota Rules of Professional Conduct does not explicitly define what it means to practice law *in* a jurisdiction. Certainly, physical presence is one way to practice law *in* a jurisdiction. But, . . . it is not the only way."⁵⁶ The Court then referenced the California decision in *Birbrower*, finding it to be persuasive and concluding that the lawyer's conduct violated Minnesota's Rule 5.5(a).⁵⁷ A strong three-judge dissent in the case expressed concern with the holding, stating:

as a policy matter, the implications of the court's decision are troubling and counterproductive. The ABA Model Rule 5.5(c), as adopted by our state, was intended as a broad catch-all that "represent[s] a bold step towards new latitude in [a] multijurisdictional practice of law," which accommodates the increasingly

⁵⁰ *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661, 663–64 (Minn. 2016).

⁵¹ *Id.* at 664.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 663.

⁵⁵ *Id.* at 665.

⁵⁶ *Id.*

⁵⁷ *Id.* at 666.

mobile and electronic nature of modern, national legal practice. . . . Today's decision represents a step backwards. . . . Simply put, the court's decision is contrary to the principles and policy goals intended by Rule 5.5(c).⁵⁸

b. Representation Prior to Suit

A 2024 decision by the U.S. Federal District Court for the Southern District of New York took on the question of whether out-of-state representation prior to suit within the state falls within the prohibition of unauthorized practice of law. In *Davis v. Espinal-Vasquez*, an out-of-state lawyer (Palermo) began representation of an auto accident victim (Davis), including sending a demand letter for settlement to the insurance company.⁵⁹ Davis hired a new lawyer in New York (Schatz), who filed suit and later settled the case. Palermo then asserted an attorney's lien on the settlement funds. The court considered the facts in light of New York Judiciary Law § 478, which provides:

It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself or herself in a court of record in this state, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself or herself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney.⁶⁰

The court acknowledged the difficulty of application of the statute to out-of-state attorneys:

The text of § 478 contains no geographic limitation and would appear to impose a universal bar on all attorneys who “render legal services” without a New York law license. But it is a “settled rule of statutory interpretation,” that legislation is presumed not to “operate outside the territorial jurisdiction of the state enacting it” unless stated otherwise.⁶¹

The court then acknowledged the prior case law in New York, including *Spivak* and *El Gemayel*, stating that pre-suit representation does not necessarily “run afoul” of the decisions in those cases:

⁵⁸ *Id.* at 672–73 (Anderson, J., dissenting).

⁵⁹ 2024 WL 1194715, at *1 (S.D.N.Y. Mar. 20, 2024).

⁶⁰ N.Y. JUD. LAW § 478 (McKinney 2013).

⁶¹ *Davis*, 2024 WL 1194715 at *6.

Per *Spivack*, § 478 does not reach every negotiation “relating to [] New York,” . . . , and it does not bar a foreign attorney from resolving claims on behalf of a New York client, provided their contact with New York is limited, Here, a Pennsylvania attorney negotiated on behalf of his Pennsylvania client to resolve a common-law negligence claim against non-New York defendants. While the claim may have arisen under New York common law, the negotiation’s connection to the jurisdiction is attenuated at best.⁶²

The court held that the statutory prohibition on unauthorized practice had not been violated.⁶³

V. ATTORNEY-CLIENT RELATIONSHIPS AND THE ADMISSION OF EVIDENCE IN INTERNATIONAL DISPUTES

A. *The Attorney-Client Privilege*

Attorney-client relationships affect more than just ethical questions about lawyer conduct and the unauthorized practice of law. And, just as ethical conduct is regulated differently in different states, the results of the lawyer-client relationship can differ as well. This is particularly true in cross-border dispute resolution when questions of privilege are raised. Two concepts in particular provide differences in cross-border practice that can affect both the lawyer and the client. These are the attorney-client privilege and the work product doctrine. These arise most commonly in questions of the admissibility of evidence in cross-border litigation and arbitration.

“Few issues arise with greater frequency in the discovery disputes that characterize civil litigation than whether a document is privileged from compelled disclosure by virtue of the attorney-client privilege.”⁶⁴ In 1972, the Chief Justice of the United States proposed to Congress a Federal Rule of Evidence that would have clearly defined the privilege as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer’s representative, or (2) between his

⁶² *Id.* at *9.

⁶³ *Id.*

⁶⁴ 1 EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 1 (6th ed. 2017).

lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.⁶⁵

This definition has been noted by the courts to provide "a comprehensive guide to the federal common law of attorney-client privilege."⁶⁶

The origins of the attorney-client privilege date to the reign of Elizabeth I in England, and originally saw that privilege as preventing an attorney from being required to "take an oath and testify against the client," which meant that it was the attorney, rather than the client, who held and could assert the privilege.⁶⁷ The current rationale for the privilege is that "in an increasingly complex society, unless confidentiality is assured, clients will be reluctant to consult lawyers as to how they must act to conform their behavior to the requirements of the law."⁶⁸ Thus, it is the client, not the lawyer, that holds the privilege. "[T]here can be neither compelled nor voluntary disclosure by the attorney of matters conveyed to the attorney in confidence by a client for the purpose of seeking legal advice."⁶⁹ This is considered to promote full confidential disclosure by the client to the attorney for purposes of proper representation. Without the privilege, "[i]f a client is concerned that what is told to the attorney will return to haunt the client, necessary information will be withheld and legal advice will be predicated on half-truths."⁷⁰

The contours of the attorney-client privilege are not the same in all countries, and a lawyer must be careful when engaged in transnational matters to be sure just when it applies. For example, in the United States, the

⁶⁵ *United States v. (UNDER SEAL)*, 748 F.2d 871 n.5 (4th Cir. 1984). The proposed Federal Rule of Evidence 503(b) (also known as Supreme Court Standard Rule 503(b)) was never enacted but has nonetheless received attention and support in the case law. *See, e.g., In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 928 (8th Cir. 1997) ("Rule 503 is an accurate definition of the federal common law of attorney-client privilege.") (internal quotations omitted).

⁶⁶ *(UNDER SEAL)*, 748 at n.5, *citing* Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 and n.6 (8th Cir. 1981).

⁶⁷ EPSTEIN, *supra* note 64, at 4–5.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 6.

⁷⁰ *Id.* "A second policy rationale for the privilege is that by promoting a client's freedom of consultation with an attorney, the privilege fosters voluntary compliance with regulatory laws and thereby facilitates the effective administration of the laws." *Id.* at 11.

attorney-client privilege applies not only to communication with outside counsel, but also to in-house counsel as “professional legal advisors for purposes of the privilege, whether locally admitted or not.”⁷¹ Moreover, the U.S. privilege extends to foreign, as well as United States lawyers.⁷² Each of these extensions of the privilege is not always available in other legal systems. The Court of Justice of the European Union has clearly recognized an attorney-client privilege common to all of its Member States.⁷³ That privilege, however, is limited to lawyers admitted to practice in the Member States of the European Union, and will not apply to communication between a European client and a non-European lawyer.⁷⁴ Additionally, it is not available to communications between in-house counsel and any other employee of the same corporation, and thus applies only to those communications between a client and “an independent lawyer, that is to say one who is not bound to his client by a relationship of employment.”⁷⁵

B. The Work Product Doctrine

The work-product doctrine differs from the attorney-client privilege, but similarly protects information and documents from disclosure. It “arises from

⁷¹ RESTATEMENT OF THE LAW GOVERNING LAWYERS § 122, Reporter’s Note at 5-96 (Preliminary Draft No. 11, 1995). *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney-client privilege applies to employee disclosures to corporation’s General Counsel, who was also Vice President and Secretary); *Bruce v. Christian*, 113 F.R.D. 554, 560 (S.D.N.Y. 1987); *Research Inst. for Medicine & Chemistry, Inc. v. Wisconsin Alumni Research Found.*, 114 F.R.D. 672, 676 (W.D. Wis. 1987); *Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 367 (D. Del. 1975).

⁷² *See, e.g.*, *Mitts & Merrill, Inc. v. Shred Pax Corp.*, 112 F.R.D. 349 (N.D. Ill. 1986) (extending the privilege to communications with a German patent agent); *Mendenhall v. Barber-Greene Co.*, F. Supp. 951 (N.D. Ill. 1982) (extending the privilege to communications with British and Canadian patent agents); *Renfield Corp. v. E. Rémy Martin & Co.*, 98 F.R.D. 442 (D. Del. 1982) (recognizing a privilege for communications between the U.S. subsidiary of French company and the French in-house counsel of the parent).

⁷³ *See, e.g.*, *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission of the European Communities*, Case C-550/07P [2010] ECRI-8301 (“legal interconnection between the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular as regards certain communications between lawyer and client. That confidentiality serves the requirement, the importance of which is recognised in all of the Member States, that every person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.”)

⁷⁴ *AM & S Europa Ltd. v. Commission*, Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264, 323.

⁷⁵ *Id.* at 324.

the assumption that an attorney cannot provide adequate representation unless certain matters are kept beyond the knowledge of adversaries.”⁷⁶ It further prevents an adversary from freeloading on the work of the lawyer for the other side.⁷⁷ The doctrine protects materials prepared in anticipation of litigation from disclosure.⁷⁸ While the attorney-client privilege focuses on encouraging communication by the client to the attorney, the work product doctrine is thought to “encourag[e] careful and thorough preparation of the case by the attorney so that the adversarial process can elicit the truth.”⁷⁹ This results in differences in scope, making the work product doctrine broader as it is not limited only to communication between the attorney and client. It also applies to agents of attorneys such as investigators.⁸⁰ On the other hand, the work product doctrine is limited to matters that occur in preparation for litigation.⁸¹

As with the attorney-client privilege, the work product doctrine can differ in its scope and effect from one country to another. British courts, for example, have held that documents prepared by lawyers and forensic accountants instructed by lawyers during an internal investigation into bribery and corruption issues were not covered by what they describe as a litigation privilege that prevents disclosure.⁸²

C. *Waiving Protection from Disclosure*

While the attorney-client privilege creates an important right for the client, it is important to note that the right is subject to waiver if not guarded carefully. In *McDermott Will & Emery LLP v. Superior Court*, the client received an email from his lawyer and inadvertently forwarded it by iPhone email to another, who shared it with other family members in a dispute over family corporations and trusts.⁸³ An inadvertent recipient then shared the

⁷⁶ EPSTEIN, *supra* note 64, at 1039.

⁷⁷ *Id.*

⁷⁸ *Hickman v. Taylor*, 329 U.S. 495, 508–14 (1947); Fed. R. Civ. P. 26(b)(3).

⁷⁹ EPSTEIN, *supra* note 64, at 1040.

⁸⁰ *United States v. Nobles*, 422 U.S. 225, 238–39 (1975).

⁸¹ *Id.*

⁸² *Dir. of the Serious Fraud Office v Eurasian Nat. Res. Corp. Ltd* [2017] EWHC (QB) 1017 [190] (Eng.).

⁸³ 217 Cal. Rptr. 3d 47, 57–59 (Cal. Ct. App. 2017).

email with other family members, who passed it on to their lawyer.⁸⁴ The court noted that, as a legislative creation in California, the courts had no power to expand or limit the attorney-client privilege by implying exceptions.⁸⁵ Moreover, “[o]nce the proponent makes a prima facie showing of a confidential attorney-client communication, it is presumed that the communication is privileged and the burden shifts to the opponent to establish waiver, an exception, or that the privilege does not for some other reason apply.”⁸⁶ The privilege can be waived by the holder of the privilege, and a waiver results “when the holder, without coercion, (1) has disclosed a significant part of the communication, or (2) has consented to the disclosure made by anyone else.”⁸⁷ The court found that the client (Dick) had not waived the privilege through the inadvertent disclosure:

Although Dick’s testimony about his intent is not dispositive, it is an important consideration in deciding whether he waived the attorney-client privilege because waiver requires an intention to voluntarily waive a known right. . . . Moreover, substantial evidence besides Dick’s testimony supports the trial court’s finding Dick did not intentionally waive his attorney-client privilege: (1) the absence of any text in Dick’s e-mail to Ninetta explaining why he forwarded the Blaskey e-mail to her; (2) the forwarded e-mail came from Dick’s iPhone; (3) Dick’s elderly age (nearly 80 years old); (4) his reduced dexterity caused by multiple sclerosis; (5) the lack of any connection between Ninetta and the MHI dispute discussed in the e-mail; (6) Dick’s testimony he rarely spoke with Ninetta and never about MHI; and (7) Gavin’s testimony that transmission of the e-mail was a mistake, Dick had no reason to forward the e-mail to Ninetta, and he never spoke with Dick about the e-mail.⁸⁸

The court noted that the attorney who receives the inadvertent disclosure has important obligations as a result of the way the information was received.⁸⁹ Thus,

When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should

⁸⁴ *Id.* at 58–59.

⁸⁵ *Id.* at 63.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 66.

⁸⁹ *Id.* at 68 (citing *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1990)).

refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged.⁹⁰

Moreover, the court noted that the same obligations for the receiving lawyer also apply to the work product doctrine.⁹¹ The result of the improper use in both contexts in the particular case was the disqualification of the lawyer's firm from further representation in the matter.⁹²

The proponent of the attorney-client privilege has the burden of proving that the attorney-client relationship exists, that the communication being considered is privileged, and that the privilege has not been waived.⁹³ The disclosure in *McDermott Will & Emery* was found to be inadvertent.⁹⁴ It is important to note that involuntary and inadvertent disclosures differ. Involuntary disclosure often occurs through criminal activity or bad faith under conditions where there is no consent to disclosure by the proponent of the privilege.⁹⁵ Inadvertent disclosure can involve knowing but mistaken production of the document by the proponent of the privilege, or unknowing production by failing to implement sufficient confidentiality precautions.⁹⁶ It is inadvertent disclosure that can lead to a finding of waiver.⁹⁷

A Federal District Court in the Western District of Virginia addressed the question of inadvertent disclosure and waiver when it considered conduct that resulted in lodging documents in a cloud-based system (Box). In *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, an insurance company posted material to a publicly accessible, non-password-protected cloud

⁹⁰ *Id.* (internal citations omitted).

⁹¹ *Id.*

⁹² "Although disqualification necessarily impinges on a litigant's right to counsel of his or her choice, the decision on a disqualification motion 'involves more than just the interests of the parties.' [Citation.] When ruling on a disqualification motion, '[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.'" *Id.* at 79.

⁹³ See *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

⁹⁴ 217 Cal. Rptr. 3d at 66.

⁹⁵ See, e.g., *Walton v. Mid-Atl. Spine Specialists*, 694 S.E.2d 545, 551 (Va. 2010).

⁹⁶ *Id.* at 551–52.

⁹⁷ Note also that the waiver may be expressly waived by the client's conduct or statement. *Id.* at 549.

account.⁹⁸ The insurance company investigator uploaded the company's Claims file to the Box file, and in doing so, unknowingly made the Claims File available to the National Insurance Crime Bureau (NICB) and the NICB unknowingly made the Claims File available to Insureds' counsel."⁹⁹

The *Harleysville Ins.* case demonstrates the difficulty of determining waiver. The Magistrate Judgment originally appointed to review the privilege claim found it to have been inadvertent but waived.¹⁰⁰ The court, after taking further evidence, found no waiver and focused instead on the conduct of the insureds' counsel who received the inadvertently disclosed material, stating that "counsel did not conduct themselves appropriately, and there is evidence to support . . . that they 'attempted in bad faith to conceal [their] access of the [Box Folder].'"¹⁰¹ This occurred after considering a reasonableness test for inadvertent disclosures:

To determine whether the privilege has been waived, courts must consider five factors:

- (1) [T]he reasonableness of the precautions to prevent inadvertent disclosures,
- (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege . . . had used its unavailability for misleading or otherwise improper overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.¹⁰²

The court found that although "any person with access to the Internet could have reviewed" the contents of the uploaded Box Folder if they had the URL, it "was not searchable through Google or any other search engine." The court further found that the URL itself functioned as a password, and that the person who uploaded the file "understood the Box Folder to be secure."¹⁰³ The court found that "a balancing of the relevant factors compels the conclusion that the attorney-client privilege was not waived."¹⁰⁴

⁹⁸ *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15CV00057, 2017 WL 4388617, at *1 (W.D. Va. Oct 2, 2017).

⁹⁹ *Id.* at *6.

¹⁰⁰ *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15cv00057, 2017 WL 1041600, at *5 (W.D. Va. Feb. 9, 2017) (finding the inadvertent disclosure to be "the cyber world equivalent of leaving its claims file on a bench in the public square and telling its counsel where they could find it.").

¹⁰¹ 2017 WL 4388617, at *6.

¹⁰² *Id.* (internal citation omitted).

¹⁰³ *Id.* at *7.

¹⁰⁴ *Id.* at *8. The court further found no waiver of the work product doctrine. *Id.* at *8–10.

D. Whose Law Applies to Questions Regarding the Exclusion of Evidence?

Both the attorney-client privilege and the work product doctrine arise when one party seeks to introduce evidence, and the other party objects to its introduction. The two doctrines allow a party to argue that evidence of lawyer communication should be excluded from consideration in the process of dispute resolution. When the contours of either doctrine differ from one jurisdiction to another, a court or arbitral tribunal must determine whose law on the attorney-client privilege or work product doctrine will apply.

The starting point in U.S. courts for determining whether to look to foreign law on either doctrine is a demonstration that the foreign law would create a conflict with the domestic law on the same issue. If there is no conflict, then courts may find that there is no need to find, understand, and apply foreign law. This question of whether a conflict existed was addressed by the Federal District Court for the Middle District of Louisiana in *Firefighters' Retirement System v. Citco Group*.¹⁰⁵ When the plaintiffs sought to compel discovery of communication between the defendants' lawyers and employees of an investment bank hired by the defendants to assist in the transaction involved, the defendants argued that those communications were protected under U.K. privilege law because the bank's employees were all in the United Kingdom.¹⁰⁶ The court held that the defendants had not met their burden of proving that English law in fact conflicted with Louisiana state law on privilege.¹⁰⁷ Because no conflict of law actually existed, the court concluded that Louisiana law applied.¹⁰⁸

When a party demonstrates the existence of a conflict between the law of the relevant U.S. jurisdiction and that of a foreign jurisdiction, choice of law rules apply to determine which jurisdiction's doctrine to apply. Given that choice of law rules vary by U.S. state, that may not always be a consistent process. The Federal District Court for the Southern District of New York is

¹⁰⁵ No. 13-373-SDD, 2018 WL 2323424, at *1 (M.D. La. May 22, 2018).

¹⁰⁶ *Id.* at *2.

¹⁰⁷ *Id.* at *3.

¹⁰⁸ *Id.* The court ultimately found the documents to be privileged under Louisiana law, so the defendant prevailed on the issue. *Id.* at *8. For a similar result on the question of conflict, see *Nuss v. Sabad*, 976 F. Supp. 2d 231, 241 (N.D.N.Y. 2013) (applying New York law to questions of privilege because plaintiff had not proved that the Mexican law on privilege claimed by plaintiffs to apply in fact conflicted with New York's law on the attorney-client privilege).

a leader in international litigation (and generally is a magnet for such cases). That court, and the Second Circuit Court of Appeals under which it sits, have applied a “touch base” approach to determining the applicable law in attorney-client privilege cases. In *Golden Triangle S.r.L. v. Lee Apparel Co.*, the defendant requested production of communications between a non-party Italian corporation and its patent agents in Norway, Germany, and Israel.¹⁰⁹ The Magistrate Judge found that the communications “related to matters solely involving” foreign countries, and therefore were governed by the laws of Norway, Germany, and Israel, and thus did not “touch base” with the United States.¹¹⁰

In *Astra Aktiebolag v. Andrx Pharm., Inc.*, the Southern District again applied the touch base analysis, stating that:

Where, as here, alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings, this court defers to the law of the country that has the “predominant” or “the most direct and compelling interest” in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum.¹¹¹

In 2010, a Magistrate Judge in the Southern District, in *Gucci America v. Guess?*, addressed whether to grant a protective order requested by Gucci that would prevent disclosure of communications between Gucci America’s former in-house counsel and a related but non-party corporation’s in-house intellectual property counsel (who was not a licensed attorney in any jurisdiction).¹¹² The parties seemed to agree that the question was one of

¹⁰⁹ 143 F.R.D. 514, 517 (S.D.N.Y. 1992).

¹¹⁰ 143 F.R.D. at 520–22.

¹¹¹ 208 F.R.D. 92, 98 (S.D.N.Y. 2002); see also, e.g., *In re Philip Services Corp. Sec. Litig.*, No. 98 Civ. 0835, 2005 WL 2482494, at *2 (S.D.N.Y. Oct. 7, 2005) (applying American law to American and Canadian attorney opinion letters dealing with a securities offering in United States); *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618(KMW) (HBP), 2005 WL 1925656, at *3 (S.D.N.Y. Aug. 11, 2005) (applying British law to documents relating to prospective litigation in England); *Johnson Matthey, Inc. v. Research Corp.*, No. 01 Civ. 8115, 2002 WL 1728566, at *9 (S.D.N.Y. July 24, 2002) (applying British law to communications regarding British proceedings between a British patent agent and an American client, and New York law communications concerning U.S. contract obligations); *Tulip Computers Int’l B.V. v. Dell Computer Corp.*, Civ. A. 00-981(MPT), 2002 WL 31556497, at *3 (D. Del. Nov. 18, 2002) (applying Dutch law to documents involving legal advice regarding Dutch law and Dutch patents); *VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8, 17–19 (D. Mass. 2000) (applying British law to communications regarding European patent application between a British patent agent and a U.S. attorney).

¹¹² *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 61, 63 (S.D.N.Y. 2010).

attorney-client privilege, but differed on whether U.S. or Italian law should apply.¹¹³ The Magistrate Judge elaborated on the touch base analysis, stating:

Contrary to Guess's contention, the "touch base" analysis must not necessarily be focused on where particular documents are located, or even where a particular person is situated at the time the communication is sent or received. . . . While these factors may be relevant, they are not dispositive. Rather, the analysis is fact-specific and focuses on whether documents have a "more than incidental" connection with the United States.¹¹⁴

The Magistrate Judge found that "none of the documents reflect that advice was requested or rendered regarding Italian law," and that, "[a]t best, Italy's interest in the . . . communications may be considered equal to that of the United States,"¹¹⁵ concluding that U.S. law applied to the asserted privilege.¹¹⁶

In 2020, in *Mangouras v. Squire Patton Boggs*, the Second Circuit applied a "touch base" analysis leading to "the law of the country that has the 'predominant' or 'the most direct and compelling interest' in whether . . . communications should remain confidential."¹¹⁷ The court elaborated on the touch base analysis and its use within the Second Circuit, stating:

[D]istrict courts within this Circuit have applied the "touch base" test, a "traditional choice-of-law 'contacts' analysis to determine the law that applies to claims of privilege involving foreign documents." . . . This common law approach derives from Federal Rule of Evidence 501, which provides that claims of privilege in a federal question case are "govern[ed]" by the principles of "common law . . . as interpreted by United States courts in the light of reason and experience."¹¹⁸

On this basis, the court held that the touch base analysis applied when documents were requested to support litigation in a foreign court under 28 U.S.C. § 1782.¹¹⁹

¹¹³ *Gucci*, 271 F.R.D. at 64.

¹¹⁴ *Gucci*, 271 F.R.D. at 67 (quoting *VLT Corp.*, 194 F.R.D. at 16).

¹¹⁵ *Gucci*, 271 F.R.D. at 67.

¹¹⁶ *Gucci*, 271 F.R.D. at 70.

¹¹⁷ *Mangouras v. Squire Patton Boggs*, 980 F.3d 88, 99 (2d Cir. 2020) (quoting *Astra*, 208 F.R.D. at 98).

¹¹⁸ *Mangouras*, 980 F.3d at 98–99.

¹¹⁹ *Id.* at 99 (citing 28 U.S.C. § 1782(a)) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted

While courts thus apply a conflict of laws analysis to determine the law applicable to the attorney-client privilege, they do not do so to claims of work-product doctrine protection. This is largely because of the procedural nature of the work product doctrine, which justifies application of the law of the forum state.

The work product doctrine is codified in Rule 26(b)(3) and exempts from discovery “documents and tangible things that are prepared in anticipation of litigation.” Fed. R. Civ. P. 26(b)(3)(A). Because the doctrine is procedural in nature, the rules of the forum court apply and it is therefore not subject to a choice of law analysis.¹²⁰

In sum, lawyers engaged in cross-border representation need to be aware of the differing scope and contours of both the attorney-client privilege and the work product doctrine, the limitations placed on each in differing jurisdictions, and the possibility for waiver of each doctrine through negligent or inadvertent conduct.

VI. CONCLUSION

In a world of physical, electronic, and other cross-border relationships, it is useless to think that the work of lawyers will somehow be confined to physical geographic boundaries. Cross-border commercial relationships require cross-border legal representation. The framework for regulating the practice of law in the United States has failed to keep up with the realities of that requirement. Lawyers must be able to travel by car, train, airplane, and electronic communication to where clients need their services. We cannot require clients to engage separate legal counsel in every jurisdiction in which a transaction might have a connection. Doing so would result in disjointed

before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.”).

¹²⁰ *Gucci*, 271 F.R.D. at 73.

representation, wasteful repetition of preparation, and errors of communication that are completely inconsistent with any concept of good lawyering.

Unfortunately, we do not have a system of lawyer regulation that meets the needs of the contemporary world. That means that lawyers dealing in cross-border transactions and relationships must be aware of the limitations of the existing system of lawyer regulation, as well as of how decisions regarding details of the representation process and its documentation are carried out. This requires a clear understanding of comparative legal methodology, knowledge of the laws of multiple legal systems, a focused understanding of rules of applicable law, and a careful and cautious approach to the everyday practice of law.