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Feature Article

***69** PROFESSIONAL LIABILITY AND INTERNATIONAL LAWYERING: AN OVERVIEW

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INTERNATIONAL LAW is rapidly developing as an independent field in practically every country as the isolated legal markets of generations past give way to a global market. In such a climate, issues raised by international law are intertwined with every-day domestic practice, both in the United States and abroad. Most practitioners, no matter how specialized their practice area and market, encounter international legal issues, whether by questions raised by clients with international interests or by required compliance with practice-relevant international agreements or standards.

United States law schools now often require students to take at least one international course, and most have study abroad programs, certificate programs or international law journals. [FN1] As a result, new attorneys have greater exposure to international legal issues before entering practice. Despite these trends, questions concerning the professional liability exposure of U.S. lawyers engaged in international practice continue to be ignored both in the classroom and in the pages of law reviews. [FN2]

***70** Determining when a U.S. lawyer handling international issues has taken action that may give rise to professional liability exposure requires a thorough determination of the laws of relevant jurisdictions. Further complicating matters, "international lawyers" may be divided into three categories (which sometimes overlap), each facing different challenges: (i) attorneys who work abroad; (ii) those who work domestically servicing international clients; and (iii) domestic attorneys who outsource legal work to foreign legal service providers. This article considers the professional liability challenges faced by United States lawyers in each of these categories, addressing the possible bases for professional liability, the impact of foreign law differences and certain limited ways to reduce the cost of potential liability. [FN3]

I. Working in the International Arena

United States attorneys working abroad and domestic attorneys working with international clients encounter similar legal issues, and many laws apply to both without regard for their actual geographical locations. However, for purposes of establishing professional liability, differences exist between these two classes of lawyers, and these differences may act to limit or increase the likelihood of being faced with civil action.

The United States attorney abroad is often an in-house attorney working for a multinational that either conducts business in the United States or is headquartered in the United States. For foreign companies, an expatriate attorney may be responsible for compliance with applicable United States law, expediting the employer's entrance into the United States market, financial or real estate issues or international trade. These attorneys are generally physically

located outside the United States but are responsible to their client for matters of United States law. Expatriate attorneys working at a foreign law firm or a foreign office of a United States firm will have a greater variety of clients, but their practice areas and potential causes of liability are similar to ***71** those of expatriate in-house counsel. Accordingly both will be treated similarly.

Jurisdiction is an overlooked cause of concern of professional liability for the U.S. lawyer working abroad. The international lawyer (living and/or working abroad) needs to consider which countries may assert jurisdiction over his legal work, and accordingly, which laws and professional liability rules to which he is subject. While lawyers abroad may not anticipate that the United States would assert jurisdiction over their actions, on the basis of nationality alone most United States lawyers working abroad will be subject to United States law. Lawyers practicing abroad may also be subject to the laws and/or professional liability standards of other jurisdictions.

Under public international law, three different theories allow a country to assert jurisdiction and apply their laws over persons. These are nationality, territoriality and universality. [FN4] Territoriality, the most familiar of these, is geographically oriented, providing that "[a] nation has the right of sovereignty within its borders." [FN5] A person is subject to the laws and jurisdiction of the country in which they are physically present regardless of their nationality, meaning that the lawyer abroad is subject to the laws of the country in which he practices. The nationality theory, the most important theory for United States lawyers abroad, provides "that citizens are subject to the laws of their country, no matter where [in the world] the ***72** citizens are." [FN6] The United States can assert jurisdiction and hold its citizens responsible for violations of United States law whether or not they are within the country's borders and regardless of whether such actions were legal in the country where they took place.

While sovereign state governments alone traditionally have the right to assert jurisdiction under the nationality theory in exercising laws, especially criminal statutes, United States courts have developed ways to assert personal jurisdiction over U.S. citizens abroad. Federal courts utilize the "minimum contacts" standard applicable for interstate cases for this instance and similar rules have been adopted by various states. [FN7] It is important to note, however, that federal courts have also found that they cannot assert diversity jurisdiction over a U.S. citizen domiciled abroad. [FN8] Under the minimum contacts test, the lawyer's contacts must be shown ***73** to be continuous, systematic and substantial. [FN9]

Under these theories, the United States attorney abroad with requisite minimum contacts to a state or the United States may be subject to the laws and jurisdiction of multiple countries at any one time. The attorney abroad must concern himself both with compliance to the laws of the country he is in as well as with the laws of the United States.

II. Bases for Professional Liability

Because an attorney abroad must comply with the rules of professional conduct of multiple jurisdictions, an attorney should consider all bases of professional liability that may arise. In addition to the rules of professional liability associated with the jurisdictions in which he or she is licensed to practice, the attorney engaged in international work may be subject to additional rules. For example, ordinary activities may implicate ethical considerations related to issues of confidentiality, conflicts, consent and outsourcing as such rules are formulated under the Model Rules of Professional Conduct. Tort liability for malpractice, negligent referral, and negligent supervision may arise from such common practices as translations and advising joint ventures. International lawyers must also consider their contractual and fiduciary duties (whether based on an employment contract for the in-house counsel or an engagement letter for the firm-based attorney).

A. Professional Liability and the Model Rules of Professional Conduct

Most attorneys engaged in the practice of international law are licensed in one of a handful of states, including New York, the District of Columbia, California, Texas and Florida. These states, like most U.S. jurisdictions, have

adopted professional conduct rules based upon the Model Rules of Professional Conduct (Model Rules). [FN10] While attorneys necessarily must review and consider the rules of professional conduct relating to the jurisdiction(s) in which they are licensed, this analysis applies the Model Rules to address common challenges that arise in the practice of an international lawyer.

***74** The practice of legal outsourcing provides an increasingly common basis for ethical considerations arising under the Model Rules. For the purposes of this article, legal outsourcing is the practice of engaging foreign attorneys and non-lawyer assistants based overseas (foreign legal service providers) to conduct United States and/or foreign legal work. Ethics rules generally apply when an attorney hires a foreign attorney, whether for preparation of work to be completed in the United States or to act as local counsel on a matter in a foreign jurisdiction. These rules apply with equal force to the actions of the foreign attorney, whether he works on his own, in a firm, or with other local attorneys.

Attorneys with an international practice often work collaboratively with foreign attorneys, and in the legal outsourcing context, United States attorneys will be responsible for the actions of foreign attorneys. Model Rule 5.1 addresses the responsibilities arising from management of other attorneys and provides scenarios in which one attorney may be responsible for the actions of another attorney. Under Model Rule 5.1(a) a law firm's responsibility to enact measures to ensure the firm's conformance to the Model Rules will apply equally to an attorney or firm which has engaged another firm to outsource services. [FN11] Model Rules 5.1(b) and (c) offer additional guidance on ways that failure to properly monitor international work lead to ethical violations.

Model Rule 5.1(b) states that any "lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the" Model Rules. [FN12] As a result, an United States attorney must take reasonable steps to ensure that any foreign lawyer or non-lawyer assistant for which he has any supervisory responsibility conforms to the Model Rules. In the outsourcing context, the Ethics Committee of the San Diego County Bar Association, citing Model Rule 5.1(b), has opined "[r]etaining [an outside firm/company] ... does not relieve the attorney from the duty to act competently. The attorney retains the duty to supervise work performed ... [when] that work is outsourced." [FN13] Failure to monitor outsourced legal services (or local counsel, if the relationship is clearly supervisory in nature) will give rise to ***75** professional liability if the actions of foreign counsel fail to meet the standards of professional conduct of the supervisor's jurisdiction.

Model Rule 5.1(c) extends liability beyond the supervisory capacity in certain cases where an attorney ratifies legal services provided by a foreign attorney. "A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved." [FN14] The use of "ratifies" suggests that attorneys who are working together, and at the same level, could be held liable for their colleague's actions if they agree with or allow their colleague to proceed in an inappropriate manner without taking measures to correct the conduct, regardless of a lack of supervisory power or responsibilities. [FN15]

Model Rules Rule 5.3, as codified in state codes of professional responsibility, mandates certain responsibilities regarding non-lawyer assistants. The New York Code of Professional Responsibility defines "non-lawyer" as any lawyer (whether from the U.S. or abroad) not licensed to practice in the state of New York, as well as non-lawyer assistants such as secretaries and paralegals. [FN16] Modeled on Rule 5.1, Rule 5.3(a) generally requires that the lawyer or law firm take measures to reasonably assure that a non-lawyer's actions are in compliance with the Model Rules. [FN17] Lawyers who employ non-lawyers are responsible for the actions of the non-lawyers and must take reasonable steps to ensure that their actions comply with applicable rules.

In 2006, the New York City Bar Association Committee on Professional and Judicial Ethics considered the obligations of a New York attorney outsourcing legal work to foreign "non-***76** lawyers" (which, in New York, includes foreign licensed lawyers) under New York Rules of Professional Conduct. They determined that a New York lawyer is ethically obligated to "(a) supervise the non-lawyer and ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserve the client's confidences and secrets when outsourcing; (c) avoid

conflicts of interest when outsourcing; (d) bill for outsourcing appropriately; and (e) obtain advance consent for outsourcing." [FN18] In addition, the New York City Bar Association imposed an affirmative obligation to avoid aiding a non-lawyer in the unauthorized practice of law, explaining that the prohibition "aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." [FN19]

The Bar Associations of San Diego County and Los Angeles County have found similar duties for lawyers practicing in their jurisdictions. The Los Angeles Bar has added a "duty to exercise independent judgment," [FN20] as well as an ethical duty to the court, explaining that "[a]n attorney is responsible for all of the attorney's submissions to court. Any inaccuracies could [FN21] be a violation of several California ethical laws. The New York Bar stated it best, saying that a U.S. lawyer who outsources work 'must at every step shoulder complete responsibility for the non-lawyer's [including foreign licensed lawyers] work.'" [FN22] None of these bar associations found outsourcing to be a per se violation of ethics rules, perhaps in part owing to the difficulty of differentiating under the rules of professional conduct between outsourcing and the retention of local counsel. Each opinion "maintain[ed] that foreign legal outsourcing should be subject to the same ethical requirements as domestic use" of non-lawyer assistants and other lawyers. [FN23]

In the context of outsourcing, these opinions provide further guidance to United States lawyers who contemplate, or have been asked to contemplate, such an engagement. Prior to confirming an engagement a practitioner should "(a) obtain background ***77** information ... and obtain the professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance ... to ascertain the particular non-lawyer's suitability for the particular assignment." [FN24] During the engagement, a supervising attorney should "communicate with the non-lawyer ... to ensure that [they] understand the assignment and ... [are] discharging the assignment according to the lawyer's expectations." [FN25] A United States attorney should consider "in advance the work that will be done and reviewing after the fact what in fact occurred, assuring its soundness." [FN26] Upon conclusion of an engagement, the United States attorney should "review the brief or other work provided by [the foreign lawyer] and independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to ... the court." [FN27] In addition, in some jurisdictions, "[i]n order to satisfy the duty of competence, an attorney should have an understanding of the legal training and business practices in the jurisdiction where the work will be performed." [FN28] Gaining understanding of the "legal training and business practices" in an outsourcing jurisdiction may require an attorney to perform a good deal of background research, especially if the attorney has limited experience with the jurisdiction. Ultimately, each of these ethics opinions makes a similar point--an attorney may not simply engage a foreign licensed attorney and then rely without independent review solely on the foreign attorney: "under no circumstances may the non-California attorney 'tail' wag the California attorney 'dog'." [FN29]

B. Civil Liability Theories

Any violation of the applicable rules of professional conduct also may lead to civil liability. Given the financial and reputational impact of such suits, practitioners take equal care to avoid civil suits as they do ethics violations. Given the international travel and other related costs that may be incurred to defend these suits, domestic civil liability presents an even thornier problem for attorneys with an international practice. Under United States law, bases ***78** for a lawsuit by a former client or other aggrieved party against an international lawyer may sound in tort, contract and breach of fiduciary duty.

1. Tort and Contractual Liability

In the event of a violation of the rules of professional conduct, attorneys may be liable under theories of negligent supervision and negligent referral, and courts have also imposed liability for the acts of foreign attorneys under vicarious liability and joint venture theories.

An international attorney may be liable for professional malpractice based on "an allegation by a client that the" attorney "failed to perform his or her services in accordance with the applicable professional standard of care." [FN30] Though the standard of care for liability varies by jurisdiction, generally the "reasonably prudent person" standard will apply to international practice, much as it does in domestic practice. [FN31] In the international context, failure to properly obtain consent before retaining outsourced or local counsel [FN32] and negligent selection of foreign counsel are particularly likely to give rise to claims of negligence.

A domestic attorney does not become negligent merely by referring to local counsel or by outsourcing legal work, as long as he or she appropriately obtains client approval and consent. In fact, where an attorney lacks the expertise or specialized skill and knowledge to proceed in a certain area of the law, some courts have held that the attorney may have a duty to refer his client to an attorney with the requisite skill and knowledge. [FN33] The duty to refer is analyzed on a "case by case" basis. For example, in the medical malpractice context, the California Court of Appeals has held "the fact that the specialty exists does not mean that every ... case must be referred to a specialist. Many ... matters are so generally known that they can well be handled by general practitioners." [FN34]

As part of the duty to refer, some courts have recognized the existence of tortious negligent referral. The Pennsylvania Court of Appeals, for example, has concluded that "when the referring physician knows or has reason to know the specialist is incompetent" he may be liable ***79** "under general negligence principles." [FN35] Nevertheless, the domestic attorney does not become "ipso facto liable for any negligence of the foreign attorney" as long as he was not negligent in the selection and supervision of the foreign attorney. [FN36]

Attorneys may also become liable for the actions of another attorney under the theory of vicarious liability. Vicarious liability, the "[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate ... based on the relationship between the two parties," [FN37] would arise from the supervisory responsibility of the domestic attorney required under applicable rules of professional conduct. Vicarious liability also exists as a result of an imputed "joint venture", defined as "an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties." [FN38] "Joint ventures and partnerships are governed generally by the same basic legal principles." [FN39] The parties of the joint venture are "jointly and severally liable for all obligations pertaining to the venture, and the actions of the joint venture bind the individual co-venturers." [FN40] The Supreme Court of Mississippi has held that client consent does not destroy a joint venture where the "division of responsibility is not clearly spelled out." [FN41]

International lawyers may also become subject to contract liability under various theories, arising from circumstances in which they "failed to perform a specific service" stated in a contract, either express or implied, "failed to perform [the terms of the contract] in a timely fashion ... [,] failed to perform in a satisfactory manner or failed to meet the stated goal of the contract." [FN42] In addition, as mentioned above, the attorney may be held liable under contract ***80** for failure "to comply with professional standards." [FN43]

2. Breach of Fiduciary Duty

When outsourcing or utilizing foreign local counsel, a United States attorney also may become subject to breach of fiduciary duty claims. The attorney working abroad should take special consideration of fiduciary duty claims, because many factors make this type of claim more difficult to defend than tort or contract claims.

Unlike accountants and other professionals, the attorney-client relationship is a fiduciary relationship as a matter of law. [FN44] A fiduciary relationship is hard to define; as one court stated, "[t]he precise contours of a fiduciary relationship are incapable of expression." [FN45] However, a fiduciary relationship exists "where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard for the interests of the one reposing the confidence." [FN46] A fiduciary duty entails a "duty of utmost good

faith, trust, confidence, and candor owed by a ... lawyer or corporate officer ... to the ... client or shareholder; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person." [FN47]

The duty of care requires that an attorney "exercise the degree of skill and knowledge commonly possessed by" attorneys, [FN48] a higher than ordinary standard, when making recommendations to his clients. If the international attorney claims specialized knowledge or skill superior to others within the legal profession, he may be held to an even higher standard requiring that he "exercise in a reasonable manner the superior skills [or] knowledge claimed" by the attorney. [FN49] The attorney must also disclose all relevant facts relating to matters that are within the scope of the fiduciary relationship. [FN50] Here the basic requirement is that the attorney conducts himself "at a level higher than that trodden by the crowd." [FN51]

***81** The attorney's duty of loyalty, while not necessarily more stringent, has more requirements and more potential for breach. The duty of loyalty includes "[a] person's duty not to engage in self-dealing or otherwise use his or her position to further personal interests rather than those of the beneficiary (client)." [FN52] Stated differently, this duty "requires the fiduciary to act solely for the benefit of the person to whom the duty is owed with respect to all matters within the scope of the fiduciary relationship." [FN53] Loyalty is considered "the essence of the fiduciary relationship" requiring the attorney "to subordinate [his] own interests to those of the [client]." [FN54] Simply put, "[t]he distinguishing or overriding duty of a fiduciary is the obligation of undivided loyalty." [FN55]

Potential claimants find numerous advantages in claiming a breach of fiduciary duty over a claim in tort or contract. One "major advantage" of a breach of fiduciary duty claim over a negligence claim is that "many claims for breach of fiduciary duty do not require expert testimony." [FN56] Compared with a breach of contract claim, fiduciary duties may "extend beyond the obligations expressly assumed by the [professional] as part of the contract with the client." [FN57]

In many cases involving fiduciary duties, the burden of proof may shift from the plaintiff to the defendant-lawyer. [FN58] In addition, "In many breach of fiduciary duty cases, the plaintiff is not limited to compensatory damages." [FN59] Unlike contract and negligence claims, the plaintiff may be able to recover lost profits as well as obtain punitive damages. [FN60] In several states, the statute of limitations for breach of fiduciary duty claims is longer than for contract and negligence. [FN61] Finally, "failure to disclose [any relevant fact that relates to a matter within the ***82** scope of the relationship] may toll the statute of limitations." [FN62] In one notable instance, an accountant's failure to disclose relevant facts even tolled the statute of limitations until the relationship ended. [FN63]

III. International Legal Issues

A. Translations and the Meaning of Words

Many foreign-based attorneys and domestic attorneys working with foreign clients are conversant in the foreign language in which they most often work. However, the terms of contracts and other legal documents can become sufficiently complicated, arcane or complex as to require special skill in preparing a translation. In such situations, an attorney may prudently choose to hire a translator. The simple task of hiring a licensed translator qualified to work with the legal profession, or a local attorney to perform the translation, contains hidden pitfalls.

Idiomatic expressions, local usage, unfamiliar legal principles and colloquialisms all may lead to the mistranslation of sensitive legal documents, in which "the misuse of a single word can change an entire provision of a contract or alter its meaning under the law." [FN64] While a prospective translator or local attorney may speak both languages fluently, be a native speaker of one, and have excellent academic qualifications, the attorney should (and may be required to) consider his or her exposure to the language beyond university or colloquial speech. An attorney should determine if the translator ever lived in a country that speaks the language in question and, if not, if he or she had a

significant amount of contact with native speakers of the language. Having a nativelike understanding of the subtle nuances of a language may be essential in correctly translating legal documents. Other important factors to consider are the translator's familiarity with the legal structure and economy of the country. An attorney who is at least conversant in the local language and has prior experience with similar translations may be ***83** able to catch some mistakes. [FN65] The competence of the translator is particularly important in the context of the attorney who completely lacks any capacity for the local language. [FN66]

Failure to use a translator or local counsel in providing legal services for foreign language materials may give rise to liability claims under ordinary negligence theories, especially given the prevalence of legal translation services. Failure to exercise reasonable care in the evaluation and supervision of translations by translators or local counsel poses additional dilemmas for the United States attorney ethically bound to supervise their work. While an attorney who has exercised reasonable diligence in the selection of a qualified translator may not be liable for mistakes of translation, the degree of supervision required by United States counsel for foreign language legal services provided by local counsel has not been exhaustively addressed. Attorneys without language proficiency who hire local counsel to provide legal services and translation in a foreign language may, in some circumstances, find themselves unable to provide the level of supervision for these services that state ethics rules based on Model Rules Rule 5.1(b) require.

Another language-related source of liability may arise from the meaning of words. The meaning of particular words may vary greatly even in countries that speak the same language. The meaning of a word may change depending on the specific context in which it is being used. [FN67] Without realizing their misunderstanding, negotiators on both sides "may believe they have crafted a workable solution to a particular issue when in fact neither side has the same understanding of the agreement." [FN68] This important issue arises most commonly for attorneys handling sensitive matters when there are language barriers present between clients and counsel or between opposing parties. Accordingly, attorneys should take extra steps to ensure the quality and integrity of translations, including using only legal-translation certified professionals, having translations double-checked by equally qualified translators, or having outside attorneys fluent in both languages review the documents ***84** and relay their understanding of the terms of the documents.

Problems with translations and the meaning of words have arisen in at least four U.S. Supreme Court cases between 1829 [FN69] and 2008. The first two cases (from 1829 and 1832) dealt with land grants by the King of Spain in territory ceded to the United States in the Louisiana Purchase territory and Florida, respectively, while these areas were still under Spanish control. An 1819 treaty conveying the area to the United States addressed these land grants. The treaty was prepared and executed in both Spanish and English and parties in interest claimed, unsuccessfully, that both versions of the treaty were the "original language, and neither [was] a translation" of the other. [FN70] However, the Spanish version stipulated that all land grants "shall remain confirmed," [FN71] while the English version stated that the land grants "shall be ratified" making it "necessary that there should be a [domestic] law ratifying them." [FN72]

In 1906, the Court addressed the form of payment agreed to in a Puerto Rican real estate deed. The deed provided for payment at "the rate of 100 centavos ... for each peso." [FN73] The Court notes that at the time of the case one Puerto Rican peso was equivalent to sixty U.S. cents. [FN74] However, when translating the deed, the translator translated centavos into the English "cents." [FN75] This resulted in the translation reading, that payment was required at the rate of 100 U.S. cents for each Puerto Rican peso. In part, the ultimate outcome of the case hinged on the Court's assessment of the (ultimately) incorrect translation.

Most recently, in Medellin v. Texas, three dissenting Justices noted the issue of conflicting meaning of phrases under a multinational agreement on consular rights and the U.N. Charter. Justice Breyer noted that the majority's interpretation of the phrase "undertakes to comply" suggested that some further action by Congress was intended in order to make the treaty obligations binding under U.S. law. In contrast, Justice Breyer's dissent evaluated to the Spanish version of the U.N. charter, which used the phrase "compromete a cumplir" (promise to complete) indicating "a present obligation to execute, without any tentativeness of the sort the majority finds in the ***85** English word

'undertakes.'" [FN76] The dissent also cited instances when the Court turned to foreign language versions of a treaty "to clear up ambiguity in [the] English version." [FN77] Here the translation of the Charter's language, if accepted, would have rendered the Charter self-executing instead of requiring ratification.

B. Differing Legal Principles

The international attorney may find himself in circumstances where he is subject to the laws and professional standards of multiple jurisdictions. Any United States lawyer working abroad should take special note of these differences. The relevancy of different legal principles might arise equally where a domestic lawyer is working on his own, where he has outsourced legal services or where he has retained local counsel.

In addition to the duties imposed by the rules of professional conduct of the United States licensing jurisdiction, other countries impose ethical obligations not commonly imposed in the United States. The ethical rules of the European Union specifically require that lawyers from one jurisdiction working in another "comply not only with the rules of professional conduct applicable in his home Member State but also those of the host Member State" and state that if the lawyer fails to do so he will "incur disciplinary sanctions and exposure to professional liability." [FN78] In this instance, the European Court of Justice (ECJ) has universally applied the international law theory of jurisdiction based on nationality.

The ECJ also explicitly imposes a duty to refer or to seek assistance where the attorney "know[s] or ought to know they are not competent to handle" the matter. [FN79] In contrast to the United States, when a European attorney is retained to handle a real estate matter, and the attorney has no real estate experience, he is ethically bound to refer his clients to another attorney or retain another lawyer. [FN80]

Due to the multi-lingual makeup of the European Union, the ECJ places heavy significance on linguistic matters. Lack of knowledge of the local language is a type of incompetence requiring the lawyer to refer or seek assistance. The general ***86** principles of the attorney-client relationship require "a European lawyer to have sufficient linguistic knowledge or recourse to assistance where that knowledge is insufficient." [FN81] Proving sufficient knowledge may even require the attorney to take a language proficiency exam. [FN82] The ECJ, however, recognizes that the language requirement is flexible because in "international cases [where the law of another Member State, and not the host state apply] ... may not require" the same level "of knowledge of the languages of the" host state "as that required to deal with matters in which the law" of the host state applies. [FN83] In other words, a British solicitor working in France may not be required to be fluent in French, when he is handling British law matters.

Differences exist even in the laws of jurisdictions sharing a common legal background. In the United States it is widely known that "expert testimony is generally required to establish the standard of care in a legal malpractice action." [FN84] In legal malpractice actions expert testimony is required "to establish compliance with the standard of skill and care ordinarily exercised by an attorney." [FN85] However, a general exception states, "Expert testimony is not necessary in cases where the conduct complained of can be evaluated adequately by a jury." [FN86] In Hong Kong, in contrast, the "general guiding legal principles" state that "[e]xpert evidence is generally relevant and admissible to assist the court in deciding whether the acts or omissions of a professional defendant constituted negligence." [FN87] "Solicitors' [attorney's] negligence cases are generally an exception" to the rule. [FN88] Hong Kong courts "rarely [admit]" expert testimony "on the question of whether a solicitor has discharged his duty of skill and care, holding that courts generally possess the necessary professional expertise to decide the question." [FN89] In addition, "[t]he extent of legal duty in any ***87** given situation must ... be a question of law for the court." [FN90] Expert evidence is admissible only where the malpractice claim involves a "debate on established professional practices, or allegations of" malpractice relating to a "specialized or complex branch of the law." [FN91]

Conflicting legal principles may occasionally give rise to "Catch-22" situations relating to the fiduciary duties of confidentiality and loyalty. The principle of confidentiality in the attorney-client relationship is recognized and un-

iversally respected, [FN92] and Model Rule of Professional Conduct 1.6 prohibits lawyers from revealing "information relating to the representation of a client unless the client consents after consultation." [FN93] However, confidentiality standards vary between jurisdictions. In China in 1996, the Chinese government "sent orders to foreign law offices in China requiring quarterly reports on information usually considered confidential by American lawyers such as 'client lists, locations of projects under consideration, affiliations with Chinese law firms, business reference lists, and the value of deals in negotiations." [FN94] Compliance with this government imposed standard would have violated United States ethics rules and the fiduciary duty of confidentiality.

The converse of these issues arises when representing with clients subject to shari'a. Islamic principles of confidentiality are largely on par with U.S. standards, [FN95] but some principles of shari'a may "demand that a lawyer abide by a higher standard of duty in maintaining a client's confidentiality." [FN96] For instance, a "Muslim client or party would naturally expect confidentiality to ***88** apply 'not merely to matters communicated in confidence by the client but also to all information relating to representation, whatever its source.'" [FN97] This could, possibly, extend to discussing the abstract facts of their case in a hypothetical matter with a fellow attorney who is not involved in the representation or an associate in the same firm. "In complex representation involving Islamic issues, lawyers operating under the Model Rules [of Professional Conduct] are charged with recognizing these higher standards." [FN98] An attorney representing clients who are subject to shari'a should consult with their clients about the attorney's perceived duty of confidentiality. Failure to appropriately address this higher standard of confidentiality could result in a violation of the fiduciary relationship.

Ethics committees have maintained a duty on lawyers to maintain client confidentiality when outsourcing legal service. However, sufficient monitoring of local counsel's behavior may be especially difficult when dealing with counterparts thousands of miles away. Differing standards like those mentioned above, if not considered in advance, may occur apply in an outsourcing relationship leading to ethical and fiduciary violations. Attorneys contemplating outsourcing should also research the provider's home jurisdiction's confidentiality laws and should explain and verify compliance of the United States duty owed to clients in any outsourcing arrangement.

IV. Limiting Liability

Generally, because attorneys may not add provisions that serve to limit their liability to letters of representation, "ordinary principles of contract law do not apply to attorney agreements with clients." [FN99] "The basic contractual relationship between client and lawyer is itself subject to an overriding power in courts to affect the terms of the relationship ... in ways favorable to the client." [FN100] The Model Code of Professional Responsibility stated a "lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." [FN101] Model ***89** Rules Rule 1.8 modified the Code slightly, "allow[ing] prospective limits on attorney liability when 'permitted by law' and when the client is independently represented." [FN102] Courts have suspended, fined and publicly reprimanded attorneys for attempting to limit their liability via contractual provisions. [FN103]

Although an international attorney cannot contractually limit the scope of her potential liability, she may make arrangements to provide for a convenient forum, reducing the potential costs associated with this liability. The international attorney often deals with clients from more than one state or country. She may have many clients from multiple jurisdictions. This means that should clients decide to bring suit, the attorney could find himself being hailed into courts in jurisdictions all across the globe. In addition to inconvenience, courts are likely to apply the local laws of their jurisdiction when deciding such a suit.

An attorney may protect himself under these circumstances by providing mandatory arbitration, choice of law and forum selection provisions in her standard engagement letter. "An agreement to arbitrate does not prospectively limit the lawyer's liability to a client for malpractice, but rather 'merely shift[s] determination of the malpractice claim to a different forum.'" [FN104] Because such a provision does not limit liability, it falls with the "permitted by law" language of Model Rule 1.8(h). These provisions should specify both forum and choice of law. "A mandatory-arbitration clause (or any forum-selection clause) might in a particular case give the lawyer an advantage over the client. But a

clause that has only the possibility of reducing by some small percent the chances of an attorney's being found liable is categorically different from a clause that truly limits liability-for example, a clause that either directly limits liability (e.g., a hold-harmless clause) or a clause that so ***90** handicaps a client in a malpractice suit as to be a practical limitation on liability (e.g., a clause requiring suit to be filed within days of the malpractice's occurring)." [FN105] The Fifth Circuit has held that a "forum-selection clause in the attorney-client agreement is enforceable." [FN106] Here the court seems to use the terms "forum-selection" and "choice-of-law" interchangeably.

Inserting arbitration, choice-of-law, and choice-of-forum provisions materially reduces the potential burden of litigation defense. By doing so, and advising the client of the provision, the attorney can streamline his practice by knowing that he only has to research the laws of one jurisdiction, and that due to a choice-of-forum clause, potential liability suits can only be brought in one jurisdiction. Such clauses also discourage frivolous suits against the attorney. This is especially true of forum selection clauses in international agreements, which are "prima facie valid and should be enforced unless enforcement is shown ... to be unreasonable under the circumstances." [FN107]

Disgruntled clients may ignore forum selection clauses and may file suit in other jurisdictions. In these jurisdictions, the local "court may decline to enforce a choice of law provision [or forum-selection provision] where the chosen law contravenes a public policy ... of the state whose law would otherwise apply and which has a materially greater interest in the matter." [FN108] Because in making this decision the court is likely to ***91** look at whether "the chosen law has a significant or substantial relationship to the contract, the chosen law bears a reasonable relationship to the transaction or the parties, the jurisdiction selected has sufficient contacts with the transaction [and] there is another reasonable basis for the choice," [FN109] Practitioners should associate both forum selection and choice of law clauses with a jurisdiction in which the practitioner maintains substantial contacts, such as the jurisdiction in which he or she is licensed to practice.

V. Conclusion

The international arena can be complicated, complex and difficult to navigate, especially in the context of professional liability. When working in the international arena, whether working abroad, through outsourcing or international clients, the attorney must take into consideration the professional liability laws to which he may be subject, or to which his or her local or outsourced counsel may be subject, as well as which jurisdictions may assert their laws over him. Professional ethics rules, malpractice and other tort theories, contract principles and fiduciary duties, some of which vary or contradict one another by jurisdiction, all must be considered by the international attorney. Given the constraints the courts have placed on attorneys in limiting their own liability, every practicing attorney addressing a representation with international components should be aware of professional liability laws and how they apply in the international arena.

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[FN1]. See, for example, http://www.law.columbia.edu/focusareas/intlaw_ portal; http://www.wcl.american.edu/ilsp/ http://www.law.umaryland.edu/programs/international/; http://www.bc.edu/schools/law/services/academic/programs/curriculum/international.html. These are among the international offerings at ABA credited law schools.

[FN2]. In contrast to professional liability issues, ethical issues involving international practice have been addressed by various articles. See generally, Mark I. Harrison and Mary Gray Davidson, The Ethical Implications of Partnership and Other Associations Involving American and Foreign Lawyers, 22 PENN ST. INT'L L. REV. 639 (2004); M.

McCary, Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective, 35 TEX. INT'L L.J. 289 (2000).

[FN3]. This article addresses issues faced by the United States attorney practicing United States law. This article does not, nor is it intended to, address issues faced by United States educated attorneys (whether U.S. citizens or foreign nationals) practicing the laws of a foreign country, regardless of the attorney's geographical location.

[FN4]. Unless an attorney is responsible for heinous human rights violations or war crimes, he need only concern himself with nationality and territoriality. See Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) ("This 'universality principle' is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people"). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("a state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism").

[FN5]. BRYAN GARNER, BLACKS LAW DICTIONARY, 1610 (9th ed. 2009). "Three maxims formulated by the seventeenth-century Dutch scholar Ulrich Huber undergird the modern concept of territoriality: (1) a state's laws have force only within the state's boundaries; (2) anyone found within the state's boundaries are subject to the state's authority; and (3) comity will discipline sovereign exercises of authority so that the territorial effect of each state's laws is respected." PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT; PRINCIPLES, LAW, AND PRACTICE 64 (Oxford, 2001).

[FN6]. BLACKS LAW DICTIONARY, 1123 (9th ed. 2009).

[FN7]. International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement et al., 326 U.S. 310 (1945). "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it [the forum's jurisdiction] that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)). At least 19 states have adopted some form of the minimum contacts test, under the same name. See, AL ST RCP 4.2 (2003); Batton v. Tennessee Farmers Mut. Ins. Co., 736 P.2d 2 (Ark. 1987); Standard Tallow Corp. v. Jowdy, 459 A.2d 503 (Conn. 1983); Kane v. Coffman, 2001 WL 914016 (Del. Super. Ct. August 10, 2001); Homeway Furniture Co. of Mount Airy, Inc. v. Horne, 822 So.2d 533 (Fla. Dist. Ct. App. 2002); Beasley v. Beasley, 396 S.E.2d 222 (Ga. 1990); E.A. Cox Co. v. Road Savers Int'l Corp., 648 N.E.2d 271 (Ill. App. 1995); Aquadrill Inc. v. Environmental Compliance Consulting Servs., 558 N.W.2d 391 (Iowa 1997); Woodring v. Hall, 438 P.2d 135 (Kan. 1968); A.F. Briggs Co. v. Starrett Corp., 329 A.2d 177 (Me. 1974); State v. Granite Gate Resorts, 568 N.W.2d 715 (Minn. Ct. App. 1997); Telephonic, Inc. v. Rosenblum, 543 P.2d 825 (N.M. 1975); Replacements, Ltd. v. MidweSterling, 515 S.E.2d 46 (N.C. App. 1999); NH ST § 510:4 (2003) (New Hampshire); World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978); Freeman v. Duffy, 983 P.2d 533 (Or. 1999); Kenny v. Alexson Equipment Co., 432 A.2d 974 (Pa. 1981); RI St. § 9-5-33 (2002) (Rhode Island); Bard Building Supply Co. v. United Foam Corp., 400 A.2d 1027 (Vt. 1979).

[FN8]. Sadat v. Mertes, 615 F.2d 1176, 1180 (7th Cir. 1980); Berhalter v. Irmisch, 75 F.R.D. 539, 540 (W.D. N.Y. 1977); Dadzie v. Leslie, 550 F. Supp. 77, 79 (E.D. Pa. 1982).

[FN9]. International Shoe, 326 U.S. at 159.

[FN10]. Most states have adopted professional conduct rules reliant on the Model Rules, some adopting the Model Rules wholesale. However, there are minor variations between states. The Model Rules will be addressed in this article. However, opinions of state bar associations cited address the statutes in effect in their respective jurisdictions.

[FN11]. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2008).

[FN12]. MODEL RULES OF PROF'L CONDUCT R. 5.1(b) (2008).

[FN13]. San Diego County Bar Ass'n, Formal Legal Ethics Op. 2007-1 (2007) (hereinafter SDCBA), http://iusjuris.com/2007_04_SanDiego_ OutsourcingOpinion.pdf.

[FN14]. MODEL RULES OF PROF'L CONDUCT R. 5.1(c) (2008) (emphasis added).

[FN15]. The language and requirements from Model Rules Rule 8.3 uphold this assumption. Under Rule 8.3(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." Rule 8.3(b) makes it clear that this does not apply to matters that fall within Rule 1.6 on Confidentiality of Information. See MODEL RULES OF PROF'L CONDUCT R. 8.3 (2008).

[FN16]. N.Y.C. Bar Ass'n Comm. On Professional and Judicial Ethics, Formal Op. 2006-3, (2006), http://www.abcny.org/Ethics/eth2006.htm, (citing NY St. Bar Ass'n Comm. on Professional Ethics, Opinion 721 (1999)) (hereinafter NYCBA).

[FN17]. MODEL RULES OF PROF'L CONDUCT R. 5.3(a) (2008).

[FN18]. NYCBA Formal Op. 2006-3.

[FN19]. NYCBA Formal Op. 2006-3.

[FN20]. L.A. County Bar Ass'n, Op. 518 (2006) (hereinafter LACBA).

[FN21]. Id.

[FN22]. Steven J. Mintz, Ethics Opinions Allow Foreign Legal Outsourcing, LITIGATION NEWS ONLINE (July 2007) http:// www.abanet.org/litigation/litigationnews/2007/july/0707_article_ outsourcing.html, citing NYCBA Formal Op. 2006-3.

[FN23]. Id.

[FN24]. NYCBA Formal Op. 2006-3.

[FN25]. Id.

[FN26]. Id.

[FN27]. Id. (citing LACBA Ethics Op. 518).

[FN28]. SDCBA Formal Legal Ethics Op. 2007-1 (2007).

[FN29]. Mintz, Ethical Opinions Allow Foreign Legal Outsourcing, supra note 22 (citing SDCBA Formal Legal Ethics Op. 2007-1).

[FN30]. DAN L. GOLDWASSER, M. THOMAS ARNOLD & JOHN H. EICKEMEYER, ACCOUNTANTS' LIABILITY, 4-3 (Practicing Law Institute, 2008).

[FN31]. Morrison v. MacNamara, 407 A.2d 555, 560 (D.C. 1979).

[FN32]. Tormo v. Yormark, 398 F. Supp 1159, 1173 (D. N.J. 1975).

[FN33]. Home v. Peckham, 97 Cal.App.3d 404, 414 (Cal. App. Ct. 1979).

[FN34]. Id. at 415.

[FN35]. Tranor v. Bloomsburg Hospital, 60 F. Supp.2d 412, 416 (M.D. Pa. 1999).

[FN36]. Tormo, 398 F. Supp. at 1174, (citing Wildermann v. Wachtell, 267 N.Y.S. 840 (N.Y. Sup. Ct. 1933)).

[FN37]. See "Liability," BLACK'S LAW DICTIONARY, at 998.

[FN38]. Armor v. Lantz, 535 S.E.2d 737, 739 (W.Va. 2000) (citing Price v. Halstead, 355 S.E.2d 380 (W.Va. 1987)).

[FN39]. Id. at 743.

[FN40]. Id.

[FN41]. Duggins v. Guardianship of Washington Through Huntely, 632 So.2d 420, 426 (Miss. 1993).

[FN42]. GOLDWASSER ET AL, ACCOUNTANTS' LIABILITY, supra note 30, at 3-10.

[FN43]. Id.

[FN44]. See, e.g., Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1963).

[FN45]. Keenan v. D.H. Blair & Co., 838 F. Supp. 82, 89 (S.D.N.Y. 1993).

[FN46]. Paul v. North, 380 P.2d 421, 426 (Kan. 1963).

[FN47]. See "Duty," BLACK'S LAW DICTIONARY, at 581.

[FN48]. GOLDWASSER ET AL, ACCOUNTANTS' LIABILITY, supra note 30, at 7-16.

[FN49]. Id.

[FN50]. GOLDWASSER ET AL, ACCOUNTANTS' LIABILITY, supra note 30, at 7-15.

[FN51]. Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) (discussing fiduciary duties for corporate directors).

[FN52]. See "Duty," BLACK'S LAW DICTIONARY, at 581.

[FN53]. GOLDWASSER ET AL, ACCOUNTANTS' LIABILITY, supra note 30, at 7-14.

[FN54]. Robert Cooter and Bradley J. Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences, 66 N.Y.U. L. REV. 1045, 1074 (1991) (citing Bayer v. Beran, 49 N.Y.S.2d 2, 5 (N.Y. Sup. Ct. 1944); City Bank Farmers Trust Co. v. Gannon, 51 N.E.2d 674, 675-76 (N.Y. 1943)).

[FN55]. See, for example, Australian Securities and Investments Commission v. Citigroup (2007), 62 A.C.S.R. 427 (Fed. Ct. Austl.).

[FN56]. GOLDWASSER ET AL, ACCOUNTANTS' LIABILITY, supra note 30, at 7-2 (discussing contracted liability of accountants).

[FN57]. Id. at 7-3.

[FN58]. Id.

[FN59]. Id.

[FN60]. Id.

[FN61]. Id.

[FN62]. Id.

[FN63]. Russell v. Campbell, 725 S.W.2d 739, 748 (Tex. App. 1987) writ of error refused.

[FN64]. Ethan Burger, International Legal Malpractice: Not Only Will theDog Eventually Bark, It Will Also Bite, 38 ST. MARY'S L.J. 1025, 1034-1035 (2007) (citing Ethan Burger and Carol M. Langford, The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century, 15 WIDENER L.J. 267, 270 (2006) (indicating that terms have different meanings in different legal systems)).

[FN65]. Id.

[FN66]. Id. at 1035, (citing Ethan Burger and Frank Orban III, International Legal Malpractice in a Global Economy: A Growing Phenomenon, 29 INT'L LEGAL PRAC. 157, 160 (July 2004)) (explaining that senior attorneys who lack language capacity rely on local attorneys that may be far less experienced).

[FN67]. Id. at 1034-1035.

[FN68]. Id.

[FN69]. Foster v. Nelson, 27 U.S. 253 (1829).

[FN70]. United States v. de la Maza Arredondo, 31 U.S. 691, 750 (1832) Thompson, J. dissenting.

[FN71]. Id. at 741.

[FN72]. Id. at 742.

[FN73]. Succession of Juan Serralles v. Esbri, 200 U.S. 103, 110 (1906).

[FN74]. Id. at 111.

[FN75]. Id. at 110.

[FN76]. Medellin v. Texas, 128 S.Ct. 1346, 1384 (2008) Breyer, J. dissenting.

[FN77]. Id. at 1384.

[FN78]. Wilson v. Ordre des Avocats du barreau de Luxembourg, [2006] ECR I-8613 paragraph 74, 2006 WL 2682390 (ECJ).

[FN79]. Id.

[FN80]. Harrison, 22 PENN ST. INT'L L. REV. at 644.

[FN81]. Wilson v. Ordre des Avocats, 2006 WL 268239 at para. 74.

[FN82]. Id. at para. 77.

[FN83]. Id. at para. 75.

[FN84]. In re Frazin, 2008 WL 5214036 (Bkrtcy.N.D.Tex. September 23, 2008) (citing Mazuca & Assoc. v. Schumann, 82 S.W.3d 90 (Tex. App. 2002)).

[FN85]. Id. (citing Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525 (Tex. App. 2004)).

[FN86]. Olfe v. Gordon, 286 N.W.2d 573 (Wis. 1980) (citing Hill v. Okay Construction Co., Inc., 252 N.W.2d at 116 (Minn.1977)).

[FN87]. Oxyvital Ltd. v. Deacons, [2008] HKEC 1973, paragraph 23(1); 2008 WL 4928609 (CFI), (emphasis in original) (citing JACKSON & POWELL ON PROFESSIONAL LIABILITY 6-007). 6-008 (6th ed., 2007)).

[FN88]. Id.

[FN89]. Id. at para. 23(2).

[FN90]. Id. at para. 23(3) (citing Midland Bank v. Hett, Stubbs & Kemp [1979] Ch 384E at 402).

[FN91]. Id. at para. 24.

[FN92]. McCary, 35 TEX. INT'L L.J. at 312, (citing LAW WITHOUT FRONTIERS, A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW, Appendix 11, 360-364 (Edwin Godfrey ed., 1995) (International Bar Association Series)).

[FN93]. MODEL RULES OF PROF'L CONDUCT R. 1.6.

[FN94]. Harrison, 22 PENN ST. INT'L L. REV. at 651 (citing Yujie Gu, Note, Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China, 48 DRAKE L. REV. 173, 186-87 nn. 147,148 (1999)); see also China Wants Lawyers' Confidential Info, DOW JONES INT'L NEWS SERV., Sept. 18, 1996 (on file with the Drake Law Review).

[FN95]. M. McCary, 35 TEX. INT'L L.J. at 312.

[FN96]. M. McCary, 35 TEX. INT'L L.J. at 313 (citing Azizah al-Hibri, The Muslim Perspective on the Clergy-Penitent Privilege, 29 LOY. L.A. L. REV. 1723, 1725-26 (1996) (discussing a higher duty of confidentiality for an Imam)).

[FN97]. Id. (citing MODEL. RULES OF PROF'L CONDUCT R. 1.6, cmt. 3).

[FN98]. Id. (citing MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3).

[FN99]. Lawyers' Responses: Shifting the Costs of Liability, 107 HARV. L. REV. 1651 (1994) (citing In re Dunn, 98 N.E. 914, 915-16 (N.Y. 1912)).

[FN100]. Charles W. Wolfram, MODERN LEGAL ETHICS, 235-36 (1986).

[FN101]. Model Code Prof. Resp. DR 6-102(a) (ABA 1978); see also In re Application of Oklahoma Bar Ass'n to Amend Oklahoma Rules of ProfessionalConduct, 171 P.3d 780 (Okla. 2007) (prohibiting agreements which prospectively limit a lawyer's malpractice liability).

[FN102]. Lawyers Responses, 107 HARV. L. REV. at 1665 (citing MODEL RULES OF PROF'L CODE R. 1.8(h)).

[FN103]. See generally In re Cohen, 331 So.2d 306, 307-08 (Fla. 1976) (publicly reprimanding attorney for trying to limit his liability before agreeing to representation); In re Cissna, 444 N.E.2d 851, 852 (Ind. 1983) (per curiam); People v. Foster, 716 P.2d 1069 (Colo. 1986) (suspending lawyer for three years for inserting a provision limiting liability in a stock purchase agreement).

[FN104]. Tolliver v. True, 2007 WL 2909393 (D.Colo. September 28, 2007) (citing McGuire, Cornwell & Blakely v. Grider, 765 F. Supp. 1048, 1051 (D.Colo. 1991)).

[FN105]. Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte, 536 F.3d 439, 443 (5th Cir. 2008); see also Conn. Bar Ass'n, Ethics Op. 99-20, at * 1 n. 2 (1999) (An "arbitration clause addresses only the forum for the adjudication of a malpractice claim, and has no limiting effect on the lawyer's liability to the client"); OH. Bd. Of Comm'rs on Grievances and Discipline, Op. 96-9, at *4 (1996) (noting that arbitration provisions do not limit an attorney's liability but merely "shifts resolution of the ... dispute from a court of law to a different forum"); Ok. Bar Ass'n Legal Ethics Comm., Op. No. 312 at *2-*5 (2000) (determining that arbitration clauses are allowable, but an attorney has a duty to explain the differences between arbitration and court proceedings to the client); NY County Lawyers' Assoc. Comm. On Prof'l Ethics, Op. 723, at *2 (1997).

[FN106]. Ginter, 536 F.3d at 445.

[FN107]. CJS Contracts § 237 (citing Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285 (11th Cir. 1998), cert. denied, 119 S.Ct. 851 (1999)); see also M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (federal law presumes

the validity of forum-selection clauses and the party seeking to invalidate such clauses bears a "heavy burden of proof").

[FN108]. 17A AM. JUR. 2D CONTRACTS § 262.

[FN109]. Id.

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