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# Foreword--A Symposium

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# Foreword

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We all owe a debt of gratitude to my colleagues, Professors Hal Maier and Jon Charney. Professor Maier founded the Vanderbilt Journal of Transnational Law as part of the law school's transnational law program. The first volume of the Journal was published, under his careful supervision, thirty-four years ago. His efforts, along with those of Professor Charney, enabled the Journal and the program to flourish. Their success in developing a publication and a program of the highest quality is demonstrated by the outstanding qualifications of the speakers at this Symposium. Thanks are due also to the student editors who organized the Symposium, recruited the speakers, edited the papers, and performed the numerous other functions needed for publication of these proceedings in the Journal.

The Authors of the Articles in the Symposium have provided a comprehensive, perceptive, and thoroughly researched analysis of numerous ethical issues in the global practice of law. At the invitation of the editors, I offer some supplemental remarks.

*Choice of Rules*

By practicing in a host country, a U.S. law firm subjects itself to the rules of that country on numerous issues, including what is the practice of law, who may engage in it, what rules of professional conduct apply, whether the rules apply to law firms as well as to individual lawyers, and how the rules are enforced. If the applicable rules of the host country are incompatible with those of the firm's home state, the firm must find a way to resolve the resulting

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conflicts; if the conflicts cannot be resolved, the firm must decline or withdraw from the matter.

In choosing whether to apply the rules of the home state or those of the host country, the firm may use whatever guidance is available in both sets of rules, as well as in the more general system of choice of law. The ABA Model Rules of Professional Conduct provide guidance on choice of law in interstate practice within the United States, but a comment indicates this guidance does not apply to transnational practice.[1]

Differences between the rules of the home state and those of the host country may be reduced as a result of harmonization. A global lawyer or law firm may participate, for various purposes, in attempts to harmonize the rules of the host country with those of the home state. The primary purpose may be to help one or more specific clients, to facilitate the conduct of the law firm and other U.S. law firms in the host country, or to participate as a disinterested public citizen in the development of the host country's legal system. The last-mentioned purpose—participation as a public citizen—is discussed later.

*Choice of Roles*

The most obvious role of lawyers and law firms is the representation of clients, but this is by no means the only role of the U.S. lawyer or law firm. Other roles include participation in the self-regulation of the legal profession, participation in developing the profession's core values, participation as a public citizen, and participation in interpreting and developing the social compact between the legal profession and society.

These roles are generally optional. One significant exception is the required participation of U.S. lawyers in some aspects of professional self-regulation—for example, the obligation to report another lawyer's serious misconduct to bar disciplinary authorities.[2]

U.S. lawyers and law firms who practice in their home states are therefore generally free to choose the level of their performance of the optional roles. U.S. lawyers and law firms practicing in a host country should ascertain whether that country offers similar choices to its lawyers and whether different versions of these roles apply to foreign lawyers and law firms. This discussion starts by assuming that the global law firm is structured as a single entity. The final

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1. MODEL RULES OF PROF'L CONDUCT, R. 8.5, cmt. 6: "The choice of law provision [in this rule] is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law." The pending project of the ABA Commission on Multijurisdictional Practice may address choice of law in transnational practice.

2. *Id.* R. 8.3; Wieder v. Skala, *infra* note 3.

paragraphs briefly explore additional concerns that may arise if the structure is more complex.

*Self-Regulation*

Lawyers in U.S. states generally have the privilege of self-regulation. According to this privilege, lawyers are: (a) "officers of the court"—even if they never litigate; (b) regulated primarily by the court—with the possibility of some additional regulation by the legislature; (c) advisors to the court—expressing their preferences regarding proposed rulemaking and other regulatory issues, generally through the activities of bar associations, and perhaps participating in the enforcement process by serving on disciplinary boards; and (d) constituents of the court—expressing their preferences regarding judicial selection and retention and perhaps becoming candidates for election or appointment to judicial office. Lawyers who practice federal law are also officers of the federal courts and administrative agencies before which they practice, and all lawyers have opportunities to participate in organizations such as the ABA.

In contrast, a global law firm that applies the rules of the host country—rather than those of the firm's home state—may not thereby qualify as a participant in the ongoing processes by which these rules are developed or in the broader task of self-regulation. Participation may be limited—formally or informally—to local lawyers.

Although a global law firm may not participate in the profession's self-regulation to the extent that law firms of the host country participate, a global law firm may participate with other foreign law firms, or with associations of global firms, in limited types of self-regulation in the host country. Further, a U.S. law firm may attempt to influence U.S. decision makers or negotiators at the federal or international level—such as GATS—regarding issues that could affect transnational practice by U.S. law firms. One such issue is whether the current prohibition against non-lawyer partners in U.S. law firms is a trade barrier, in violation of GATS, when applied to transnational law practice. This issue has already produced echoes in the debate on multidisciplinary practice in the United States.

*Core Values*

The concept of core values was invoked in *Wieder v. Skala* to differentiate between disciplinary rules whose violation can result in civil liability and rules that cannot be enforced in that manner.[3]

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3. Wieder v. Skala, 609 N.E.2d 105, 109 (N.Y. 1992) (the rule requiring a lawyer to report another lawyer's misconduct to bar disciplinary authorities is one of the "core Disciplinary Rules," the violation of which can provide the basis for civil relief by an associate against a law firm, although violation of some other rules does not).

More recently the debate on multidisciplinary practice has produced various lists of core values, in contexts purporting to give the core values moral superiority over the enforceable rules, with the assertion that the rules must conform to the core values. Perhaps the most influential list of this type is the one contained in Resolution 10F, adopted by the ABA House of Delegates in July 2000;[4] some items on this list were subsequently inserted into the Preamble to the Model Rules of Professional Conduct.[5]

Resolution 10F provides the following open-ended list of core values:

> a. The lawyer's duty of undivided loyalty to the client;
>
> b. The lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
>
> c. The lawyer's duty to hold client confidences inviolate;
>
> d. The lawyer's duty to avoid conflicts of interest with the client;
>
> e. The lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice;
>
> f. The lawyer's duty to promote access to justice.[6]

The same resolution declares:

> 7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession.
>
> 8. The law governing lawyers, that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law, should not be revised.[7]

Until a core value is incorporated in an enforceable rule, that value may be regarded as a highly persuasive component of the "lore of lawyering."[8] If a core value is incorporated in an enforceable rule, that value is a combination of law and lore: law because of its incorporation in a rule, lore because its preferred position purports to prevent any change in the rules in which it is incorporated.

Global lawyers and law firms may profitably explore the law and lore of the host countries in which they practice, with special attention to the recognition and significance of core values, as well as

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4. American Bar Association, *Recommendation 10F, at* http://www.abanet.org/cpr/mdprecom10F.html.

5. *See infra* note 9 and accompanying text.

6. American Bar Association, *Recommendation 10F, at* http://www.abanet.org/cpr/mdprecom10F.html.

7. *Id.*

8. *See infra* note 11 and accompanying text.

the public citizen role and the theory of the social compact. While the lore is not legally binding, it serves as a cultural base as well as a significant source of interpretation and prediction.

*Public Citizen*

U.S. lawyers are expected to perform a role as public citizens in addition to representing clients. The ABA's formulation of the "public citizen" role is expressed in the Preamble to the Model Rules of Professional Conduct; most American states have adopted similar declarations. Inevitably, some lawyers and law firms take this formulation more seriously than others. Recent amendments to the Preamble, in context of the debate on multidisciplinary practice, suggest that the leaders of the bar are taking it quite seriously. As amended, the Preamble declares:

> [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . .
>
> [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal systems in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should help the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. . . .
>
> [13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.[9]

The Reporter's explanation of the changes observes that they are derived from resolutions adopted by the ABA House of Delegates in

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9. American Bar Association, *Ethics 2000 Final Rules, at* http://www.abanet.org/cpr/e2K-final_rules2.html. Underscored language was tentatively adopted by the ABA House of Delegates in August 2001, subject to approval of a package including these and other amendments at a subsequent meeting. The package of proposed amendments was submitted to the House of Delegates by the ABA Commission on Evaluation of the Rules of Professional Conduct, generally known as the Ethics 2000 Commission.

2000.[10] Those resolutions did not purport to adopt rules of conduct; they merely expressed the views of the House. The subsequent action of the House in August 2001, tentatively incorporating selected parts of these resolutions into the Preamble to the Model Rules, gives them additional visibility and significance, although they are still not enforceable through the disciplinary process. The resolutions have, in effect, been upgraded to occupy a more prominent position in the vast and constantly evolving "lore" of the legal profession in the United States.[11]

A U.S. law firm engaged in global practice may be unable, for practical reasons, to perform the public citizen role in the firm's home state. For example, that role may conflict with standards or values of influential foreign partners in the firm. The firm may also be unable or unwilling to perform the equivalent role as understood in the host country, especially if influential U.S. partners have conflicting values or policy preferences. Further, the global law firm may be unable or unwilling to participate in the legal profession's self-regulation, in whatever form it exists in the host country.

These risks may be a matter of concern to the law firm and its lawyers. The host country may react with regret—or with relief—to any limitations on the law firm's participation as public citizen and as active constituent in the regulation of the legal profession.

*Social Compact*

These risks, regarding possible limitations on the global law firm's participation as public citizen and as constituent in the regulation of the profession, evoke a deeper concern—that the home state and the host country may have differing views of the social compact between the legal profession and society. This compact, I suggest, allows lawyers to enjoy unique privileges in exchange for incurring unique obligations. Every other occupation has its own social compact, with its own combination of privileges and obligations.

U.S. society generally tolerates its social compact with the legal profession—as well as those with other occupations—but society retains the power to change its compacts with the professions. Society could change its compact with the legal profession by significant shifts in the market demand for legal services or by regulatory means. As an example of regulatory changes, a U.S. state could adopt a constitutional amendment transferring jurisdiction to regulate lawyers from the courts to the legislatures; the legislature

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10. *Id.*

11. *See In re* Snyder, 472 U.S. 634, 645 (1985) ("conduct unbecoming a member of the bar," for purposes of attorney discipline under Fed. R. App. P. 46(c), must be interpreted in light of the "lore" of the legal profession).

could then reinvent the regulation of lawyers, in a manner that would be highly unlikely if the courts retained regulatory jurisdiction over the legal profession. The legal profession also has the power to affect its social compact, either by defaulting on some of its existing obligations or by supporting proposals to change the regulation of the profession—for example, by allowing passive investors to own interests in law firms. Although not always spelled out in formal terms, the essence of the compact can be gleaned from the law and lore of lawyering, including such sources as the Preamble to the ABA Model Rules of Professional Conduct discussed above.

A European perspective on the social compact was recently expressed by an Advocate General of the European Court of Justice:

> 173. It is established that the European Union and its Member States are based on the principle of the rule of law. The Community and national legal systems confer upon individuals rights which become part of their legal heritage. In order to guarantee the principle of a State governed by the rule of law, the Member States have set up various institutions of a judicial nature. They have also laid down the principle that individuals must in any circumstances be able to turn to those authorities for recognition or enforcement of their rights.
>
> 174. Nevertheless, on account of the complexity of legislation and of the organization of judicial power, individuals are rarely in a position to defend by themselves the rights they enjoy. Lawyers lend them the assistance which is essential for that purpose.
>
> In conjunction with their activities as legal advisors, lawyers help their clients organize their various activities in compliance with the law. They also undertake the defence of their clients' rights against other individuals and the public authorities. They may also provide information as to whether it is advisable or necessary to bring proceedings before the courts. In connection with their assistance and representation activities, lawyers must ensure that individuals are adequately and efficiently defended. By virtue of their qualifications, they must be acquainted with the rules that enable them to present their client's point of view to advantage before the courts. To that effect, lawyers occupy a central position in the administration of justice as intermediaries between the public and the courts. Furthermore, the Court describes lawyers as assisting and collaborating in justice:
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> 175. It follows that lawyers perform activities which are essential in a State governed by the rule of law. . . .
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> 180. In order to enable lawyers to carry out their public service tasks, as I have defined them, the State authorities have given them certain professional powers and duties. These include three attributes which in all the Member States form part of the very essence of the legal profession. They are the duties relating to the independence of lawyers, respect of professional secrecy and the need to avoid conflicts of interest. . . .[12]

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12. Wouters v. Netherlands Order of Advocates, Case C-309-99, Opinion of Advocate General Leger, July 10, 2001 (subject to final action by the court) (paragraph numbers in the original, footnotes omitted).

Based on this analysis, the Advocate General opined that a state may prohibit lawyers from participating in multidisciplinary practice, without violating the treaties of the European Community, if certain tests are satisfied. This analysis evidently reflects a harmonized view of the social compact, based on the perceived consensus of the European member states.[13]

Some features of this European analysis reveal a view of the state as source of rights that may not fully coincide with U.S. views on sovereignty of the people. The analysis, however, illustrates an approach to the role of lawyers based on a social compact theory. It also illustrates an attempt to identify the basic duties of lawyers—an exercise that brings to mind the recent attempts in the United States to articulate the "core values" of the legal profession. It is noteworthy that the European and U.S. articulations of core values arose in the debate on multidisciplinary practice.

*Organization and Structure of Law Firms*

The preceding discussion has assumed that the global law firm is a single entity. This, however, is not always the case. Global law firms should ascertain whether their organizational structure has a bearing on how these optional roles may be appropriately performed. For example, a global law firm may have a resident managing partner in the firm's branch office in the host country who is a member of the legal profession of that country. This resident managing partner may perform an acceptable combination of the host country's optional roles—if that country articulates any. The remainder of the law firm may then be at liberty to ignore these roles completely in the host country—or may even be required to ignore them—but may still be expected to perform an acceptable combination of optional roles in the home state.

The global law firm may be structured, instead, as a strategic alliance, as a de facto partnership in which the substance is essentially equivalent to a partnership although the form is not, or even as a franchise of local independent firms using similar names. These various types of structures may lead to various types of friction within the global firm regarding the extent of each constituent firm's freedom to determine its own level of participation and its own choice of positions on policy issues. The risk of friction within the firm can be reduced if these issues are explored at the inception of the firm and are addressed in the documents establishing the global law firm and its affiliates.

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13. *Accord* Lawline v. ABA, 956 F.2d 1378 (7th Cir. 1992), *cert. denied*, 510 U.S. 992 (1993) (upholding Illinois rule (based on ABA Model Rule 5.4) that prohibits lawyers from practicing law in partnership with non-lawyers, with much less analysis than in the Wouters case).

*Conclusion*

This Symposium makes an invaluable contribution to the literature. I congratulate the authors, editors, and faculty advisors, and I am confident that readers will benefit from its combination of current information and timeless analysis.

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