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## Ethics in International Arbitration: Traps for the Unwary

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## ETHICS IN INTERNATIONAL ARBITRATION: TRAPS FOR THE UNWARY

Margaret L. Moses<sup>†</sup>

Ethics in international arbitration is a complex subject. A number of factors contribute to this complexity, including, first, the likelihood that lawyers involved in arbitration in a foreign jurisdiction may be subject to more than one set of ethical rules. Moreover, those rules may not just be different, but may be inconsistent or even incompatible.<sup>1</sup> Thus, it may be impossible for an attorney to comply with the two or more different sets of rules. It is important to remember that in most international arbitrations, a minimum of three jurisdictions will have potentially applicable rules. The parties are each from a different country—that is what makes the arbitration international—and the parties usually choose to have the hearing in a third, neutral country, which is the seat of the arbitration. Therefore, each of these three jurisdictions may have an interest in the ethical conduct of the attorneys.

A second factor is the lack of clarity about what particular rules may govern attorney conduct in an international arbitration and how the determination of the appropriate rules should be made. One possibility is that the governing rules should be the ethical rules from the jurisdiction where the attorney is licensed. If that were the case, however, then because the attorneys are likely to come from different jurisdictions, they would be subject to different rules, which would tend to create an uneven playing field. A second possibility is for all attorneys to be subject to the rules of the jurisdiction where the arbitration takes place. While this might appear to level the playing field, nonetheless the national ethical rules in a particular jurisdiction are intended to deal with local lawyers practicing domestically and may not be particularly appropriate for international dispute resolution. A third possibility is that the ethical rules should be the rules laid down by the particular tribunal. If that appears to be the best solution, then the inevitable question is whether tribunals actually have the power to impose ethical rules on attorneys. Can the rules of the tribunal override the domestic ethical rules of the jurisdiction where the arbitration is being held, as well as the national ethical rules from the home country of the different attorneys?

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<sup>1</sup> See, e.g., Catherine Rogers, *Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 345-46 (2002) (“[I]nternational attorneys remain subject to often conflicting professional obligations.”); Siegfried H. Elsing, *Ethical Issues in International Litigation from a German Perspective*, ARTIGOS JURIDICOS INTERNACIONAIS, [http://www.camarb.com.br/areas/subareas\\_conteudo.aspx?subareano=42](http://www.camarb.com.br/areas/subareas_conteudo.aspx?subareano=42) (last modified 2005) (“[R]egardless of. . . in which country the foreign lawyer is admitted, he has to observe both the German professional rules and the rules of his home country.”).

## Ethics in International Arbitration

A third factor affecting attorney ethical conduct concerns who should be regulating or enforcing ethical rules in this international context. Should it be the licensing authorities, the bar associations, or the courts in the jurisdiction where the attorney is licensed? Or should it be similar authorities in the jurisdiction where the arbitration takes place? Or should the regulating or enforcing authority be international organizations, institutions, or the tribunal that is presiding over the arbitration?

As a framework for dealing with ethical complexities in international arbitration, it is important to consider the purpose of ethical rules. Rules of ethics are supposed to provide parameters for lawyers in making appropriate ethical choices in the conduct of their work, decision-making, and behavior. The rules should promote high standards of conduct and help preserve professional integrity. A set of ethical rules tends to work pretty well to accomplish these goals in a homogeneous legal and cultural environment, but tends to work less well when very different legal cultures come together, as they do in an international commercial arbitration. The concern of ethical rules is to protect and guard the integrity of the profession. They are not supposed to be interpreted in a way that provides an advantage to one side or a disadvantage to the other.

So how can lawyers find and follow the proper ethical path when different legal and cultural backgrounds cause clashes in ethical rules? Legal norms and associated ethical rules may collide, for example, in some of the following areas:

1. Preparation of witnesses for testimony, which is precluded in some jurisdictions, but considered an obligation in others.<sup>2</sup>
2. The issue of privilege for certain documents, and confidentiality of communications with the client, which exist for in-house counsel in some jurisdictions but not in others.<sup>3</sup>
3. The obligation to produce documents, which is required in some jurisdictions but forbidden by blocking statutes in others.<sup>4</sup>
4. The obligation of confidentiality of settlement discussions. In the U.S., an attorney is obliged to communicate any settlement proposal to a client while in other jurisdictions the attorney may be prohibited in certain circumstances from disclosing such information to a client.<sup>5</sup>

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<sup>2</sup> Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, in *The Art of Advocacy in International Arbitration* 49, 52 (Doak Bishop & Edward G. Kehoe eds., 2010), available at <http://ssrn.com/abstract=1559012>; Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT'L & COMP. L. REV. 139, 142 (2007).

<sup>3</sup> See Rogers, *supra* note 2, at 52-3 (explaining the significant national divergences regarding disclosure of certain documents, such as requiring non-privileged document disclosure in the United States, while in other jurisdictions having no requirements regarding this type of disclosure).

<sup>4</sup> Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT'L L. 1035, 1084 n.155.

<sup>5</sup> See Rogers, *supra* note 2, at 53 (pointing out that a French attorney may be ethically required to keep confidential from his own client a settlement proposal by opposing counsel, whereas U.S. ethical rules mandate disclosure to the client of any such settlement proposal).

## Ethics in International Arbitration

5. The obligation to report client perjury to the tribunal. An attorney from the U.S. may have such an obligation,<sup>6</sup> but attorneys from other jurisdictions may have an obligation not to disclose such information.<sup>7</sup>

6. The obligation not to have *ex parte* communications with a member of the tribunal. In the U.S., such communications with a member of the tribunal are prohibited, whereas in other jurisdictions, such as Germany, they may be permitted.<sup>8</sup>

7. The question of who may appear as a fact witness. Some jurisdictions prohibit a party from being a witness.<sup>9</sup>

8. The obligation not to present as fact to the tribunal statements not supported by any known evidence. In some states, such presentations by counsel are permitted.<sup>10</sup>

In dealing with these various situations, some arbitration tribunals, international rules, and national rules have tried to level the playing field among the parties and have succeeded to some extent, but a myriad of problems still exist. However, focusing on all of these areas is beyond the scope of this article. This article will concentrate on just one of the situations referred to above—witness preparation. In particular, this article will deal with the application of Rule 8.5 of the Model Rules of Professional Conduct to witness preparation in an international context.

In the United States, lawyers spend a great deal of time, effort, and energy preparing a witness to testify. An American attorney who did not prepare her witnesses carefully would be considered quite remiss.<sup>11</sup> In other jurisdictions, however, an attorney may be prohibited from even interviewing a witness prior to that witness providing testimony.<sup>12</sup> If each attorney follows the different rules of her home country, there could be substantial differences in the performances of the witnesses, possibly giving an advantage to the side that had expended more effort to prepare the witness. If, on the other hand, the tribunal finds that the ethical rules of the seat of arbitration should govern, and those rules do not permit any interviews or preparation of witnesses, an American attorney unaware of this prohibition would risk a violation of those ethical rules.

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<sup>6</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3 (a)(3) (2009).

<sup>7</sup> Rogers, *supra* note 1, at 361.

<sup>8</sup> Doak Bishop and Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, in *ARBITRATION ADVOCACY IN CHANGING TIMES*, ICCA CONGRESS SERIES NO. 15 391, 395 (Albert Jan Van Den Berg ed., 2011).

<sup>9</sup> *Id.*

<sup>10</sup> See INTERNATIONAL CODE OF ETHICS FOR LAWYERS PRACTICING BEFORE INTERNATIONAL ARBITRAL TRIBUNALS, in *ARBITRATION ADVOCACY IN CHANGING TIMES*, ICCA CONGRESS SERIES NO. 15 408, 417 (Albert Jan Van Den Berg ed., 2011) ("In some states (such as Mexico and Saudi Arabia) a lawyer may make statements to the tribunal about the facts, even if this statement is not supported by any known evidence.").

<sup>11</sup> See McMorow, *supra* note 2, at 142 ("For U.S.-trained defense counsel, however, it would be considered inappropriate not to interview and prepare a witness for the rigors of trial if there were an opportunity to do so.")

<sup>12</sup> Bishop and Stevens, *supra* note 8, at 395.

## Ethics in International Arbitration

Efforts are being made in the arbitration community to try to achieve equality of arms—that is, to try to keep one side from having an unfair advantage because of limitations imposed by different ethical rules. In some countries where court cases have stated that all contact with witnesses is prohibited, such as Belgium, France, Italy and Switzerland, specific carve-outs, or exceptions, have been made to permit witness contact in international arbitration proceedings.<sup>13</sup> Moreover, the International Bar Association Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”), which are frequently referred to for guidance if not specifically adopted in an arbitration, provide in Rule 4(3) that it shall not be improper to interview witnesses or potential witnesses and to discuss their prospective testimony with them.<sup>14</sup> Thus, there is a growing consensus that some contact between counsel and witnesses is permissible in an international arbitration proceeding. But it is not clear that the IBA Rules will necessarily prevail over contrary national rules that would prohibit such contact. Nor is it clear that if the national rules of the arbitration seat prohibit contact with witnesses, the carve-outs in an attorney’s home country permitting such contact will prevail over the local rules. As some commentators have noted, “[a]ttorneys’ home ethical rules continue to cast a ‘shadow’ that ‘is omnipresent for the lawyers and judges.’”<sup>15</sup>

So how does Rule 8.5 of The American Bar Institute (“ABA”) Model Rules of Professional Conduct apply with respect to the witness preparation situation? Rule 8.5 has been adopted by twenty-four states in the U.S., and similar rules have been adopted by another twenty-one states.<sup>16</sup> The first premise of the rule is that “a lawyer admitted to practice in [the] jurisdiction is subject to the disciplinary action of that jurisdiction, regardless of where the lawyer’s conduct occurs.”<sup>17</sup> Therefore, an Illinois attorney is subject to disciplinary action in Illinois for improper conduct occurring outside Illinois.

The rule then goes on to state, “[F]or conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits are the rules to be applied [to the attorney’s conduct], unless the rules of the tribunal provide otherwise.”<sup>18</sup> This appears to impose the rules of the seat in most cases, unless the tribunal has its own rules.

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<sup>13</sup> See Ian Meredith and Hussain Khan, *Witness Preparation in International Arbitration – A Cross Cultural Minefield*, MEALEY’S INT’L ARB. REP. September 2011, at 3 (“In court cases in Belgium, France, Italy, and Switzerland, all contact with witnesses is prohibited.”).

<sup>14</sup> INT’L BAR ASS’N [IBA], IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), available at [www.ibanet.org/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/publications_IBA_guides_and_free_materials.aspx).

<sup>15</sup> McMorrow, *supra* note 2, at 142; Rogers, *supra* note 4, at 1081.

<sup>16</sup> See STATE IMPLEMENTATION OF MODEL RULE 8.5 (Oct. 2010), available at [http://www.abanet.org/cpr/mjp/quick-guide\\_8.5.pdf](http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf).

<sup>17</sup> MODEL RULES OF PROF’L CONDUCT R. 8.5(a) (2009).

<sup>18</sup> *Id.* R. 8.5(b)(1). Interestingly, when this rule was first adopted, it had excluded lawyers practicing internationally, and said that international lawyers should be subject to agreements between jurisdictions or subject to appropriate international law. However, there were not any relevant agreements between jurisdictions or appropriate international laws that governed attorney conduct. By 2002, when the rule was revised, international lawyers lobbied to be included. They wanted more certainty as to what rules governed their conduct. So new Comment 7 now provides that section 8.5 (b)(1), the choice of law

## Ethics in International Arbitration

However, there may be complications in the case of witness preparation. First, assume the tribunal sits in a country whose rule is that attorneys can have no contact with witnesses about their testimony, and no carve-outs exist for international arbitration. It seemingly follows that an American attorney in that case cannot meet with the witnesses for his clients before they testify. Rule 8.5 applies the rules of the jurisdiction where the tribunal sits. As previously noted, however, there is an exception, permitting application of the tribunal's rules if the tribunal has adopted different rules. So suppose that the parties and the tribunal have agreed that the IBA Rules apply. Remember that Rule 4(3) of the IBA Rules says it is not improper to interview witnesses and discuss their prospective testimony with them. Thus, from the American attorney's perspective, adoption of these rules is an improvement because they are more flexible. However, it is still not clear whether the tribunal in the particular jurisdiction has the right to override a local ethical rule that says there can be no contact with witnesses. So the lawyer who decides to meet with a witness will be in accord with ABA Model Rule 8.5, which permits application of the tribunal's rules, but may not be in compliance with the local jurisdiction's rule.

Here is another murky issue. Even if the IBA Rules can be said to govern, what does it mean to say one can interview the witness and discuss his prospective testimony with him? Is "interviewing" and "discussing" different from a full-blown American "preparation of the witness," which may include extensive time in mock examination and cross-examination? The answer is that the American practice is probably much more extensive than what the IBA Rule envisions.

As an example, the English, although they permit contact by attorneys with witnesses before they testify, nonetheless do not permit the same kind of interaction with witnesses that American attorneys have in the normal course of their practice. English cases have distinguished between three kinds of interactions with witnesses: interviewing, familiarization, and coaching.<sup>19</sup> *Interviewing* is basically interaction with a witness for the purpose of obtaining evidence needed for production of a witness statement. *Familiarization* involves explaining the process and such techniques as cross-examination. The British will even permit mock cross-examination, but only on hypothetical facts—just to help the witness understand how cross-examination works—and not on the actual facts of the case at hand.<sup>20</sup> That would be coaching. *Coaching* is viewed as a detailed discussion of the specific facts in order to rehearse the witness with respect to questions likely to be asked, and with respect to witness responses that would be appropriate. Although English courts permit interviewing and familiarization, they have expressly stated that coaching is not permitted.<sup>21</sup> They think a witness should testify without that testimony having been influenced by others, and particularly

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provision, applies to lawyers engaged in transnational practice, unless international law treaties or other agreements between regulatory authorities in the affected jurisdiction provide otherwise. See Rogers, *supra* note 4, at 1037 (explaining the evolution of Rule 8.5 and its express extension to transnational activities).

<sup>19</sup> Meredith & Khan, *supra* note 13, at 1.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 2.

## Ethics in International Arbitration

not by counsel.<sup>22</sup> Other countries, such as Australia and New Zealand, have similar rules including a specific prohibition on witness coaching.<sup>23</sup>

So even if everyone agreed that the IBA Rules applied and allowed counsel to talk with witnesses, in a situation where one attorney is British and another is American, it is not clear that they will interpret the rule in the same way. Moreover, it is not clear whether one of those interpretations might lead to an ethical violation.

In addition, in countries such as France and Switzerland, where there is now a carve-out for contact with witnesses in an international arbitration, the proper level of interaction between attorney and witness is not spelled out.<sup>24</sup> Therefore, attorneys from these countries do not have the same restraints found in the English system (no coaching allowed) or even in the U.S. system, in which the Model Rules of Professional Conduct impose certain restrictions.<sup>25</sup> Because the restrictions on witness contact vary greatly, and because now some countries have removed the restriction against speaking with witnesses but have not cabined this new freedom in any way, there remains an enormous variation in what different attorneys may perceive to be ethical conduct in dealing with witnesses.

The drafters of ABA Model Rule 8.5 were trying to make the rule simple and straightforward, but their concept of how things work internationally did not encompass the many complexities that arise from the convergence of different legal norms and practices in international arbitration. For example, Comment 3 to Rule 8.5 states that the rule provides that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct. That sounds good, but it is not that simple. For example, assume the arbitral tribunal is in the U.S., but the American attorney has to do something abroad. Further assume a deposition has to be taken in Brazil, because a witness there cannot come to the U.S. for a hearing. In Brazil, a civil law country, the deposition will essentially be taken by a judge, and there will thus be a matter pending before a tribunal in Brazil.<sup>26</sup> Remember that the U.S. requirement under ABA Model Rule 8.5 is that attorney conduct in connection with a matter pending before a tribunal is governed by the rules of the jurisdiction where the tribunal sits. In this case, however, there will be both a matter pending in the U.S., where the arbitral hearings are, and a matter pending in Brazil, where the deposition is being taken under the auspices of a

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<sup>22</sup> *Id.* at 1.

<sup>23</sup> *Id.* at 1.

<sup>24</sup> *See* Rogers, *supra* note 2, at 7-8 (giving examples of some specific exceptions that have been created to deal with these issues, but explaining there is still no straightforward guidance on this conflict).

<sup>25</sup> Some restrictions include the following: Model Rule 3.3 provides that “a lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.” MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2009). Moreover, if a lawyer is aware that a witness has offered false material evidence he must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. *Id.* In addition, an attorney must not “falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.” *Id.* R. 3.4(b).

<sup>26</sup> Rogers, *supra* note 4, at 1056-57.

## Ethics in International Arbitration

judge.<sup>27</sup> It appears that ethical rules in each jurisdiction will apply, and may well be incompatible.

Increasingly, scholars and practitioners are urging that a uniform, binding international code of ethics be developed for attorneys engaged in international arbitration.<sup>28</sup> They urge that international rules should trump both the ethical rules of the seat and the national ethical rules, which tend to function in a totally different procedural and cultural context. Such international codes could be developed through international organizations, arbitral institutions, or by specific international tribunals. In the last few years, there have been a number of initiatives by institutions. The American Bar Association, the International Bar Association, the American Society of International Law, and the International Law Association have all begun to consider standards of conduct for lawyers practicing in the field of international arbitration.<sup>29</sup> There is also a Code of Conduct for European Lawyers (the CCBE), amended in 2006, which was created to address issues of cross-border practice, but deals with arbitral proceedings in a fairly limited fashion.<sup>30</sup>

Assuming one or more international ethics codes are developed, how might they be enforced? Various proposals include having arbitral institutions adopt a code of ethics, incorporate it into their rules, and thus make the code binding as a matter of the parties' consent.<sup>31</sup> If the code is incorporated into the institutional rules, it should be able to be enforced by the institution or by the tribunal.

Another approach for enforcement of ethical violations would be to have national authorities coordinate their enforcement efforts with international tribunals that have first identified and evaluated conduct believed to be unethical.<sup>32</sup>

Some tribunals have viewed their power over the attorneys before them as limited. However, Professor Catherine Rogers, one of the foremost scholars of ethics in international arbitration, has said that adjudicatory tribunals "must have the ability to sanction and control the behavior of attorneys appearing before them. . . . [T]ribunals and their rules of conduct . . . cannot be held 'captive to out-of-state disciplinary authorities.'" <sup>33</sup> Professor Rogers argues that arbitrators must have not only the power to regulate the proceedings before them but also the

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<sup>27</sup> See *id.* (discussing the change in the rule from the term "proceeding" to "matter," which broadens the application of the rule to depositions, thus making ethical rules of both jurisdictions apply to depositions).

<sup>28</sup> Rogers, *supra* note 1, at 350, 423; see, e.g., Doak Bishop, *Ethics in International Arbitration*, in *ARBITRATION AND ADVOCACY IN CHANGING TIMES*, ICCA CONGRESS SERIES 15, 383, 388 (Albert Jan van den Burg ed., 2011).

<sup>29</sup> Bishop & Stevens, *supra* note 8, at 397.

<sup>30</sup> CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS (2010), available at <http://www.ccbe.eu/index.php?id=32>.

<sup>31</sup> See, e.g., Bishop, *supra* note 28, at 389.

<sup>32</sup> Rogers, *supra* note 4, at 1083.

<sup>33</sup> See *id.* at 1085 (quoting Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer or no Answer at All?*, 36 S. TEX. L. REV. 715, 778 (1995)).



## Ethics in International Arbitration

power to regulate the conduct of the attorneys who are an integral part of those proceedings.<sup>34</sup>

Although there are no easy solutions in this complex area of ethics in international arbitration, it is at least conceivable that the adoption and enforcement of a uniform code of ethics for international commercial arbitration would help bring sunshine to a cloudy area. An international code would help provide transparency and certainty for proper attorney conduct, help level the playing field, contribute to the fairness of the procedure, and improve the confidence of the participants and the public in the arbitration process.

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<sup>34</sup> *Id.*