

NATHAN M. CRYSTAL HANDOUT

Comparative Ethics Program, NY City Bar, November 19, 2013

N.Y. Rule of Prof. Conduct 8.5: DISCIPLINARY AUTHORITY AND CHOICE OF LAW

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Conflict of Law Principles Applicable to Claims of Attorney-Client Privilege

Anwar v. Fairfield Greenwich Ltd., 2013 U.S. Dist. LEXIS 96721, 2013 WL 3369084 (S.D.N.Y. July 8, 2013):

In determining which country's law applies to a privilege dispute involving foreign attorney-client communications, courts in this Circuit consider the country with which the communications "touch base." *Gucci America, Inc. v. Guess?, Inc.* ("Gucci I"), 271 F.R.D. 58, 64-65 (S.D.N.Y. 2010). Under this analysis, the Court applies "the law of the country that has the 'predominant' or 'the most direct and compelling interest' in whether [the] communications should remain confidential, unless that foreign law is contrary to the public policy of this forum." *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002) (quoting *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 522 (S.D.N.Y. 1992)). "The jurisdiction with the 'predominant interest' is either 'the place where the allegedly privileged relationship was entered into' or 'the place in which that relationship was centered at the time the communication was sent.'" *Id.* Thus, American law typically applies to communications concerning "legal proceedings in the United States" or "advice regarding American [23] law," while communications relating to "foreign legal proceeding[s] or foreign law" are generally governed by foreign privilege law. *Gucci I*, 271 F.R.D. at 65.

For material on the ethics rules applicable in international commercial arbitration see Nathan M. Crystal & Francesca Giannoni-Crystal, "One, No One and One Hundred Thousand" . . . Which Ethical Rule To Apply? *Conflict Of Ethical Rules In International Arbitration*, Fall 2013 Symposium issue of the Mississippi College Law Review.

For discussion of the application of the attorney-client privilege to in-house counsel in Europe, see Nathan M. Crystal & Francesca Giannoni-Crystal, *Understanding Akzo Nobel: A Comparison of the Status of In-House Counsel, the Scope of the Attorney-Client Privilege, and*

**Summary of International Bar Association Guidelines On Party
Representation in International Arbitration**

Adopted by the IBA May 25, 2013

Summary nonofficial prepared by Nathan M. Crystal

Application of Guidelines

1. Scope – by agreement or Tribunal determination
2. Power of tribunal to interpret
3. Nonderogation

Party Representation

4. Identification to Tribunal
5. Nonacceptance of representation when conflict with tribunal would arise
6. Remedial measures for violation of Guideline 5

Communications with Arbitrators

7. Ex Parte Communications prohibited subject to exceptions
8. Exceptions

Submissions to Arbitral Tribunal

9. Prohibition on knowingly false submissions of fact
10. Duty to correct subject to countervailing considerations of confidentiality and privilege
11. Duty not to submit witness or expert testimony known to be false; remedial measures

Information Exchange and Disclosure

12. Duty to inform client of need for “Arbitral Hold”
13. Duty not to make requests or objections to produce for improper purpose, including harassment and delay
14. Duty to counsel client about necessity to produce and consequences of nonproducing
15. Duty to advise and assist client in making reasonable searches for responsive and nonprivileged documents
16. Duty not to counsel or assist client in suppressing or concealing responsive documents
17. Duty to counsel client about correcting failure to produce

Witnesses and Experts

18. Duty to identify when communicating with potential witness
19. Duty to make potential witness aware of right to inform witness’s counsel and to discontinue communications
20. Right to assist witnesses and experts in their statements and reports
21. Duty to seek to insure that witness statement reflects witness’s testimony
22. Duty to seek to insure that expert report reflects expert analysis
23. Duty not to invite or encourage false testimony by witness
24. Subject to duty not to assist in false testimony, counsel may meet and assist witnesses and experts in preparing their testimony
25. Permissible payment to witnesses and experts

Remedies for Misconduct

26. Possible remedies after notice and opportunity to be heard
27. Factors to consider in determining remedy for misconduct