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Vexing Situations: Ethics and International Practice

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Vexing Situations: Ethics and International Practice

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Practicing law, especially in the international context, often involves non-legal dilemmas which must be considered and resolved. Sometimes the situations involve legal ethics and can be resolved by referring to the rulings promulgated by various bar associations and other lawyer licensing organizations. However, often times these situations arise in a context that can only be understood when historical events or social norms are considered. Accordingly, there may be no clear answer. In such cases, the attorney must rely on his or her common sense, and appreciation of the feelings of the parties involved.

This article presents six situations that, at onetime, substantially confronted a practicing attorney. Two respected law professors, Greg Keating from USC Law School and Bob Lutz from Southwestern Law School, who teach Professional Responsibility and International Business Law courses, respectively, comment on these six situations and give their opinions as to how they might be resolved. Hopefully the reader will consider the analysis helpful to reach a resolution. At the end of each discussion, I will explain how the situation was actually handled.

Situation #1:

The American attorney, partner in a large firm, practices estate planning and is approached by a husband and wife with the request that the attorney prepare a will on behalf of the husband's 74 year old mother. The mother has just moved to the United States from South Africa. The husband and wife mentioned that the mother lost her parents in a raid on her farm by neighboring blacks who were protesting apartheid. She survived by hiding in a closet. Many years later, her husband was killed by a similar group while he was coming home from a visit to Johannesburg. In consideration of what the mother has gone through, the husband and wife indicated that it would be best if the American partner handled this work by himself. The American partner surmised that the husband and wife wanted to make sure that a white attorney handled the estate planning and interfaced with the mother. The firm has two black associates. What should the American partner do?

Responses To Situation #1:

Keating: To my mind, the place to begin thinking about what the American partner should do is with the following five premises. First, the client—whom I take to be the mother, not the son and daughter-in-law—is responsible for her own actions and attitudes; these are not the responsibility of the American partner. Second, even if the horrors of the mother's life history explain and partially excuse her desire not to employ any black lawyers, those horrors do not make it morally justifiable for the mother to discriminate against blacks in her choice of an estate planning lawyer. The discrimination is wrong even if it is understandable. Third, it follows from the first premise that, if the mother discriminates against black lawyers when she hires an estate planning lawyer, the wrong involved in doing so belongs to her and not to the lawyer she hires. The lawyer that she

hires is not responsible for her motivation in hiring. Fourth, the American partner is likewise responsible for personal attitudes and actions, and it would be wrong for the attorney to discriminate against black lawyers in the assignment of work in connection with this or any other matter that the firm accepts. Fifth, the decision regarding whom to assign to the matter belongs to the law firm not the client.

Suppose that the American partner has the power to select lawyers for estate planning matters. It follows from my fifth premise that if the American partner does not assign a black lawyer to the matter out of deference to the client's wishes, the American partner—not the client—is responsible for the discrimination. Finding a way to delegate the choice to the client will not help; the authority is the attorney's and the firm's, and therefore the attorney is implicated in the discrimination if the attorney empowers the client to select associates based on discriminatory principles.

Because the American partner is responsible for the staffing of the case, the attorney cannot ethically accommodate the son and daughter-in-law's desire that only white lawyers be assigned to the mother's estate planning matter. I also believe that the attorney cannot legally accommodate the client's wishes in light of Title VII, any more than a restaurant can hire only white waiters to satisfy the preferences of its patrons. My understanding is that foreign customer preferences excuse discrimination only in the very rare circumstance where compliance with American employment discrimination law would cause a violation of the law of a foreign country (e.g., when an American company would have to fly non-Muslim helicopter pilots into Mecca, in violation of Saudi Arabian law). In my view the American partner should therefore tell the son and daughter-in-law that the firm is responsible for deciding how to staff matters and that the firm cannot legally discriminate against black lawyers in its internal work assignments. Appealing to the firm's legal obligations under Title VII takes some of the sting of moral superiority out of the American partner's discussion with the son and daughter-in-law.

Matters are different, I think, with respect to "interfacing with the client." The son, the daughter- in-law, and the mother are free to interview individual members of the firm and to hire the individual lawyer of their choice as the lead lawyer on the matter. Whatever ethical problems are raised by hiring a lawyer on the basis of his race—or, more precisely, not hiring a lawyer because of his race—those problems are the responsibility of the son, the daughter-in-law, and the mother, not of the American partner and the firm. And matters are different legally as well: Title VII does not apply to the client's initial choice of lawyer.

My analysis raises a further question: Can the American partner explain to the son and daughter-in-law that the firm cannot discriminate in it assignment of associates, but that they are free to hire the lawyer of their choice? I think so. Explaining to the son and daughter-in-law that they are free to hire the lawyer of their choice does no more than educate them to their legal rights. Unlike the famous "lecture" on the defenses to homicide in Robert Travers' Anatomy of a Murder (where the lecture was designed to enable perjury),this discussion of client rights is not designed to induce a violation of the law. A client's choice of a lawyer is not legally constrained. Clients may choose their lawyers as they see fit and for the reasons they regard as relevant. To be sure, educating the son and daughter-in-law to their legal rights may well assist them in committing the moral wrong of discriminating against black lawyers, but the moral responsibility for that discrimination rest with them not with the American partner.

It is possible that the lawyers who would be the victims of the client's desire to discriminate might not wish to work on behalf of a client with offensive attitudes. This raises two questions: First, does the American partner or his firm have an obligation to alert the associates to the client's attitude, so that they are not blindsided by it? Second, should the American partner (or the firm more generally) offer associates who might otherwise be assigned to the matter the opportunity to decline the assignment? My inclination is that alerting a lawyer who might be affected by the client's attitude to that attitude

is appropriate. Being blindsided is unpleasant and the firm does not want to appear to be setting up it own lawyers for such an unpleasant surprise. (In my view, the class of lawyers who might be affected by the client's attitude is all lawyers, not just black lawyers.

In particular, offering black associates who might otherwise be assigned to the matter the chance to opt out, however, seems a more difficult question. A black associate might well experience the firm's offer to excuse him or her from working on the matter as a covert expression of the firm's desire to honor the client's wish to discriminate. Given the associates subordinate position in the firm hierarchy, this offer might well be experienced as coercive. The associate might feel the need to accept the offer even if the associate did not want to, and to conceal true feelings about this choice. An offer not to assign because of race and the client's attitude towards that race may be unlikely to elicit a candid response from the associate. My sense is that black associates should not be invited to opt out of the representation before any lawyers are assigned to the matter. Instead, after the client's attitude towards blacks is explained to any lawyers assigned to the matter it ought to be made clear to these lawyers—and especially to any black lawyers assigned to the matter—that the American partner has told the client that the firm will not honor her desire to discriminate with respect to the internal staffing of the matter, as that would implicate the firm in the discrimination. Black associates (or any other associates) who do not wish to work for a client with this client's racist attitudes are then free to take the initiative and request reassignment.

Admittedly, this solution has its own coercive possibility: associates informed of the client's attitude and the firm's position and then assigned to the matter may now feel coerced into not seeking reassignment even if they would prefer not to work on the matter. Because the firm has made its own position on the matter clear, they may feel that seeking reassignment goes against firm policy. That, however, seems to me to be the case whenever an associate requests reassignment because the associate objects to working for one of the firm's clients. Request for reassignment on moral or ethical grounds involve asking the firm to reverse a decision that it has already made. Associates are likely to feel or fear unstated disapproval when they make such requests and firm's may well feel implicit moral criticism. If anything, it should be easier than it usually is to request reassignment in a circumstance where the firm has already indicated that the client has desires that the firm is not prepared to honor for ethical reasons.

Lutz: In deciding what advice to give to the American partner in the situations posed in this article, my analytical approach was, first, to evaluate whether there were any professional responsibility obligations or legal rules applicable to how the American partner should respond; second, to consider what practical concerns might attach; and third, to explore the relevance and application of any cultural and/or ethical aspects.

With respect to Situation #I, one should note at the outset some professional conduct ground rules regarding lawyer-client relations and the partner-associate relationship. The husband and wife certainly have the right to select an attorney of their liking to perform the legal service. On the other hand—and without getting into possibly related questions of choice of law and/or prescriptive jurisdiction—when the attorney is specifically asked to discriminate against any associates in the firm in his management of work, the attorney should be cautious so that he does not hedge into areas where his conduct may constitute a violation of law. See, e.g., the California Unruh Civil Rights Act prohibiting discrimination in business, that might conceivably prevent the attorney from choosing someone on the basis of race; California Rules of Professional Conduct, 2-400, which, similar to a number of other states (Illinois, Florida, Idaho, Colorado, New Jersey and New Mexico), generally prohibit unlawful discrimination in the operation or management of a law practice; and Plessinger v. Castleman Haskell 838 F. Supp. 448 (ND. Cal. 1993), holding "State law would not recognize a client's unlimited right to select among associates. . . where selection criteria involves discrimination against a protected class."

From a realistic point of view, the American partner should probably handle this matter himself since as an estate-planning lawyer he is presumably competent to prepare such wills. Of course, since associates of the firm are also available to do so and using them would be less expensive, the difference in cost should be communicated to the client. Another approach would be for the American partner to manage the preparation of the will and undertake any direct contact with the mother that is necessary, while selecting anyone in the firm (e.g., the two black associates) to actually draft the document. In this latter strategy the American partner avoids any conduct that might be considered discriminatory, honors the client's desire to choose counsel , and is acting sensitively with respect to the age and unique nature of the client, which might otherwise materially affect the ability of a lawyer to effectively represent her.

Actual Result: The American partner would have been comfortable handling the matter since he would not normally have used any associates in this situation. On previous occasions other clients have requested that he handle the work by himself so the request was not that unusual, even though he suspected the basis for the request in this case. As he felt uncomfortable, he requested a meeting of the partners in his firm to explain the situation. Since the work would involve the American partner only and did not require the firm to change any of its procedures, the partners in the firm had no problem with the American partner accepting the engagement and performing the work. The main discussion among the partners centered on whether the situation should be disclosed to the associates. In the end, because the firm's procedures were not being altered on account of this particular client, the partners determined that there was no reason to disclose to the associates the American partner's suspicions relating to the client's motives in hiring him. Accordingly, the client was accepted and the American partner drafted the will.

Situation # 2:

The American partner, a partner in a large firm and a female associate in representing a financial institution, travel to Buenos Aires to negotiate financing for a power plant project. The owner of the plant is a partnership consisting of an Italian partner and Argentine partner. The attorneys for the Argentine partner include two local lawyers, a partner and male associate. The Argentine associate is a good-looking young man who is immediately attracted to the American associate. The American associate is married but the young Argentine associate does not seem to care and. continues to make obvious overtures to the American associate, including physical touching. The American associate does her best to avoid him. The American associate does not say anything to the American partner, but the plight of the American associate is obvious to all. The other parties, however, consider it amusing. What should the American partner do?

Responses To Situation #2:

Keating: This situation is structured by a tension between the client-centered character of a lawyer's ethical obligations, and the concerns of Title VII at its outer perimeter. On the one hand, the client-centered character of a lawyer's ethical obligations require the American partner and the American associate to respond in a way which does not undermine the client in the client's pursuit of it objectives, to the extent that it is possible to avoid doing so. The American partner and the American associate are there on behalf of the client, and both lawyers have an obligation to avoid letting "personal" conflicts with other parties undermine their service to the client. Indeed, sexism and clashing cultures aside, the Argentine associate's conduct is unprofessional because it inserts an awkward personal conflict into a professional relationship. That conflict cannot contribute to either party's pursuit of its client's objectives and might seriously interfere with the pursuit of client objectives. Of course , the Argentine associate and the other party's to the transaction apparently do not see any such problem. From this perspective, the predicament of the American associate and the American partner is that they must try to respond in a way which does not further exacerbate personal conflicts and thereby risk endangering the client's pursuit of its business objectives.

Title VII gives the American partner and his firm some exposure to possible sexual harassment

liability however. Third-party harassment can give rise to liability under Title VII if the firm is aware of such harassment, is in a position to control it, and fails to take appropriate action to do so. For example, a restaurant may be liable for sexual harassment if a customer is harassing one of its waitresses and the restaurant fails to take appropriate measures—including, if necessary requiring the customer to leave—to end the harassment. Title VII applies to American firm's doing business outside the country, so it applies to this situation. But we do appear to be at the outer perimeter of its application because the American partner's law firm's capacity to control the behavior of opposing counsel is very limited.

The American partner ought to begin by discussing the matter with the American associate, with a particular eye to discovering how the American associate would like to respond. Among other things, it seems paternalistic and sexist in its own right for the American partner to "protect" the American associate without her input and assent. It is hard for me to know exactly how the American associate perceives her predicament, but if I were in her shoes, I would be concerned that I was not authorized to respond with much vigor. I would feel triply inhibited: First, by my subordinate status as an associate in the company of a partner; second, by my status as an outsider in Argentine culture; and third, by my status as a professional woman in a male-dominated professional culture. Discussion with and support from the American partner can at least contribute to removing the first of these sources of disempowerment.

If the American associate tells the American partner that she finds the Argentine associate's conduct annoying or worse but does not think it is worthwhile to make an issue of it—Title VII concerns aside about documenting her opinion should she change her mind later—I think that the American partner should not take any action. If the American associate indicates that she finds it sufficiently offensive that she would like to see it stop, further considerations come into play: First, though I am utterly ignorant of Argentine sexual and social mores, it would surprise me to learn that Argentine women are themselves helpless to repel unwelcome advances, whether or not those advances are made in business settings. Second, the American associate, however, is in no position to discover the locally acceptable response; her isolation is part of her plight. The American partner, by contra, is in a better position both to familiarize himself with a locally acceptable and effective response and to bring some pressure to bear on the Argentine associate. He is in a better position because he has better access to the ear of the Argentine partner.

Therefore, if the American associate is sufficiently offended by the Argentine associate's advances, the American partner should have a subsequent conversation with. his Argentine counterpart. Part of that conversation should involve explaining that the Argentine associates advances are disrespectful to the American associate both as a married woman and as a professional. I see no reason, moreover, why the American partner should refrain from explaining that this sort of conduct might well be illegal in the United States, should the conduct be held to constitute a hostile environment for which the American partner's firm might be held liable. These points might well influence the Argentine partner, who is in a position to rein in the Argentine associate. It may be, moreover, that a shared sense of professionalism—in that it is unprofessional to let personal matters impede the pursuit of client objectives—provides a common ground from which the American partner can convince the Argentine partner to rein in the Argentine associate.

Failing such a reining in, repulsing the advances in accordance with local custom would seem the most diplomatic way of proceeding—the way of proceeding least likely to endanger the pursuit of client objectives—because repulsing the advances in accordance with local custom is least likely to exacerbate the personal friction between the American and Argentine associates. The Argentine partner ought to have the requisite expertise in Argentine culture, and so ought to be able to advise the American partner as to how the American associate should proceed. If there really is no acceptable way for a married Argentine woman to repulse such

advances—e.g., they are regarded as conclusively flattering, and only husbands can object to them—perhaps the best hope is for the American partner to convince the Argentine partner that deference to American cultural norms would be appropriate because the Argentine associate's overtures are impeding progress on the matter and exposing the American partner to legal liability.

If everything suggested in the preceding paragraphs fails, I am inclined to think that the American partner—after noting that they are both in this predicament in the course of serving a client whose objectives they must do their best to realize even if that means putting up with some behavior they would otherwise object to—should indicate that he will support the American associate in responding as he sees fit, within reason.

Lutz: Professional responsibility obligations attach to a lawyer's conduct wherever he/she may be. Under the Model Rules, the American partner, as the female associate supervisor, is responsible to ensure that those under his supervision conform to the rules of professional conduct. Even though the female associate is not engaged in non-conforming conduct and the Argentine associate is not under the American partner's supervision, the American partner is arguably responsible—as guided by U.S. gender discrimination and antisexual harassment laws even when such actions occur abroad—to not put those under his supervision in situations where harassment can take place. Furthermore, it will be important for the negotiation process to remove the impediment of sexual harassment, which can diminish effective lawyer-to-lawyer communications needed to adequately and competently serve the interests of the client financial institution.

Given the reaction of amusement of the other parties, one notes that in some Latin cultures there tends to be a more open attitude towards sexuality, and sexually aggressive male behavior ("machismo") is not necessarily viewed as unacceptable, even in a professional setting. Accordingly, this may represent a clash of culture in that in the U.S. such uninvited behavior is considered offensive and certainly unprofessional.

Thus, my advice to the American partner is the following. I would advise the American partner to first ask the female associate if she wants him to intervene—whether by speaking to the Argentine partner lawyer or by relieving her of duty on the matter with no negative repercussions from doing so—and would be guided by her preference while making clear that is not your or the firm's policy to expect her to put up with such behavior. Should she ask the American partner to intervene, I would advise him to avoid a direct attack on the Argentine associate's behavior and avoid the risk of offending the clients by approaching the Argentine partner (not the part) and tell him that under U.S. cultural norms the unwanted attention is considered unprofessional and that he must tell his associate to stop the touching and unwanted flirting or replace him. The matter should be handled between the lawyers without getting the Italian and Argentine businessmen involved.

More subtle, but complementary actions suggested by some of my female colleagues include: politely reminding all the parties that they have business to attend to and there will be time for socializing afterwards; and addressing the female associate by a title that emphasizes her marital status, such as "Mrs."or senora , while also speaking of her excellent work with the firm and how impressive it is that she has managed her workload along with her family life.

Actual Result: The American partner, upon noticing the plight of the American associate, went to the American associate in private to inquire as to her feelings under the circumstances. In this particular case , the American associate felt confident of being able to handle the Argentine associate but asked that the American partner make sure that she was not placed in a situation where the Argentine associate could take advantage. Accordingly, the American partner proceeded to physically place himself between the Argentine associate and the American associate at the negotiation table and other places where the parties were seated. He made sure that the American associate was not left alone with the Argentine associate in drafting sessions and other social occasions. In further discussion both the

American partner and the American associate acknowledged that their duty was to get the best deal for their client and that the client's goals were paramount; at the same time, the American associate expressed confidence that she could handle the Argentine associate in a way that would not jeopardize the client's goals but would, in no uncertain terms, make sure that the Argentine associate knew that she had no intention in engaging in this type of conduct on a mutual basis. Based on these discussions and the American associate's wishes, the American partner tried to alleviate uncomfortable physical situations but acceded to the American associate's confirmation that she could handle the situation herself.

Situation #3:

An Israeli in the diamond trade asks the American partner to arrange financing for expansion of the Israeli's business. The American partner learns that the Israeli' son was a victim of a suicide bombing. The American partner would usually call upon the services of on Egyptian associate in the firm's London office to help find financial institutions willing to make the loan. What should the American partner do?

Responses To Situation #3:

Keating: Situation # 3 is a less difficult variation on Situation # I. The client has not expressed a preference for representation by parties who are not of Arab ethnicity. The American partner certainly should not inquire as to whether the client wants representation by a lawyer who is not Arab, as that implies that the American partner and his firm would be prepared to discriminate should the clients desire. The American partner should use the services of the Egyptian associate in his London office as he normally would, explaining the delicate nature of the situation to the Egyptian associate. If the Egyptian associate wants to opt out, the associate may take the initiative and request reassignment.

Lutz: This situation is essentially one in which the American partner appears to be assuming the wishes of the client without having them confirmed. While the attorney is obligated to consult with the client as to the general means by which the objectives of representation will be pursued and keep them reasonably informed about the progress of that representation, clients normally defer to the attorney with respect to how he/she will manage the representation process. In this case, it seems that too many assumptions are being made by the American partner: it is not clear that the Israeli client will have any direct contact with the Egyptian associate in London, would object to having an Egyptian work on the case, or that the suicide bomber who killed the client's son was Egyptian.

My advice to the American partner would be to have the Egyptian associate do the work if this associate is the best person to do it. If more than one associate is qualified to do the work, I would be directed in my selection by consideration of the attorney who would most likely obtain the best result for my client. However, if the Egyptian associate is regularly avoided when it comes to doing certain kinds of work in the firm because of national origin, the associate may have a legitimate claim against the firm for discrimination (e.g., *Lucido* v. *Cravath, Swaine & Moore,* 425 F. Supp. 123 (S.D.N.Y. 1977)); at the least, such treatment would not be consistent with treating all attorneys in a firm as part of a team.

The American partner should view his responsibility to the client as overriding his own interest and those of the Egyptian associate. However, in doing so, a clear line should be drawn between the American partner's professional responsibility to all interests of the client (i.e., peace of mind or happiness about having an Egyptian lawyer working on the case) and the client's legal interests. Would engaging the Egyptian associate be detrimental to the client's legal interests? Under the facts presented, the lack of client contact that would be required by the Egyptian associate, and the ability of the American partner to manage the representation and fully inform the client while using the Egyptian associate, would seem to weigh in favor of using this associate.

Actual Result: In this case, the American partner decided to use the Egyptian associate since the Egyptian associate would have been the attorney in

the London office used under normal circumstances. The attorney did contact the Egyptian associate to explain that the work was being requested by an Israeli and inquired as to whether the Egyptian associate had any difficulty in working for an Israeli client. The Egyptian associate had no objections and was willing to accept the assignment. The American partner contemplated advising the Israeli of using the Egyptian associate but ultimately decided against it since, under normal circumstances, the American partner would not disclose the nationality of any attorney working on a particular project. The Egyptian associate was able to find banks willing to do the financing and the American partner, as was normal practice, took over from there.

Situation #4:

A variation on Situation #3. The American partner represents a Japanese leasing firm which leasing equipment to a Saudi Arabian. In the past, the American partner has used on Israeli associate to prepare the documents for this client. This time, however, the Japanese leasing firm requests that this particular associate not be used, saying it is best simply to avoid concerns that the Saudi Arabian or the associate might have in connection with this transaction. What should the American partner do?

Responses To Situation #4:

Keating: I see Situation # 4 as even more similar to Situation #1. If the American partner and his firm allow the Japanese client to choose associates, it is responsible for wrongful discrimination. Once again, the firm should alert the associates assigned to the matter and leave it to the associates to approach the firm about reassignment, should they so desire.

Lutz: In this situation, since the client specifically "requests" a particular associate not be used, there is a potential conflict between a client's right to select a lawyer of his own choosing and the lawyer's right to exercise his professional judgment in deciding the best means to accomplish the objectives of representation. Like several of the prior cases, there is also the prospect that in bending to the wishes of the Japanese client, the American partner may be engaging in, or facilitating, discrimination cognizable under state or federal law, or—if not—at least engaging in conduct that may be problematic among the firm's attorneys.

Practical and cultural concerns may also inform the course of action here. For example, it is possible that the Japanese client—in its non-confrontational way—may be trying to convey that use of the services of the Israeli is not negotiable because of a perception of the Saudi Arabian's likely position. Looking deeper into the details of the request, the American partner may discover some additional factors dictating the Saudi Arabian's opposition (which may be imposed by the Arab League's boycott of Israeli trade). One should also be aware that compliance with the request would possibly place the American partner in violation of US anti-boycott laws.

If the request is not honored, however, then it may result in the client going elsewhere for legal representation in this transaction. This may be inevitable if the Japanese client's insistence on this condition risks violation of U. S. law. Thus, I would determine if the work could be done by someone else who is equally competent, and if assigning it to that person would not result in any violation of the law. If so, I would reluctantly agree to use that person rather than the Israeli and try to heal any bad feelings that arise within the firm.

Actual Result: The American partner knew that the Japanese leasing firm had absolutely no objection to the Israeli associate working on the American partner's team. The Japanese leasing firm was a good client of the firm and had used this particular associate many times in the past, many times praising his work. The American partner recognized the request of the Japanese leasing firm as a perception of what their customer would prefer. Since the American partner had other associates from whom to choose, he decided he would use another associate but he first went to the associate in question to explain the situation. The associate understood the situation and indicated that he had no problem with the American

partner using another associate under the circumstances. The Israeli associate felt comfortable enough with the Japanese client to know that this was an unusual situation and not a negative reflection of him or his work. He also understood that this was a matter of the Japanese leasing firm trying to avoid the potential loss of a customer based on assumptions that might not even be true.

Situation #5

The American partner, a partner in a law firm, is in Thailand representing an Australian client interested in purchasing a resort. He brings three associates, two females and one male. The client is represented by a group of five business people three males and two females. The head of the client group calls the American partner and invites him and his associates to Pot Pong, the notorious red light district of Bangkok to "take in the shows." What should the American partner do?

Responses To Situation #5:

Keating: It strikes me as quite likely that at least one of the three American associates will experience this social invitation as a "coercive" offer: as an "offer they can't refuse." The American partner needs to prevent this from happening by making it plain to the three associates that they can or cannot attend as they see fit, and that no negative inferences will be drawn either from attending or declining to attend.

Let us start with the premise that it would be unusual and awkward to invite one's lawyers to a parallel event in the United States. This is the case for a number of reasons. First, attendance at such events is unlikely to appeal to people who subscribe to precepts of "traditional morality" and to people who are strongly committed to the equality of women. Traditionalists are likely to regard explicit sexual entertainment as lewd at best and egalitarians are likely to regard such entertainment as exploitative of women at best. Second people who enjoy, or at least are not offended by, explicit sex shows starring mostly women and attended mostly by men may well not wish to disclose this taste. In the United States, a taste for such entertainment is taken at least in the professional classes in our time to be something best kept private. Third, anyone attending an entertainment event as a guest of a business associate or a client must at least feign enjoyment of the event in order not to offend the host. Feigning enjoyment of sexual entertainment may have particularly high cost for people who do not enjoy such entertainment because the attitudes one is feigning are taken to fall into the domain of the intimate and private. Fourth, to the extent that reactions to such entertainment are not entirely subject to conscious control, unwelcome enjoyment of such entertainment may be experienced as deeply embarrassing. Spiraling on, even someone who enjoys such entertainment may not wish to be perceived and known to enjoy it. This is an awkward offer to receive.

Presumably, perceptions are profoundly different in Thailand. It appears that rejection of the invitation may be experienced as offensive, unless the matter is handled with great tact. What is the American partner to do? On the one hand, whatever the American partner thinks of the relative merits of Thai and American views of explicit sexual entertainment, this does not seem like the time for a frank discussion of the matter. On the other hand, it is not appropriate for the American partner simply to accept the invitation both on his own behalf and on behalf of all three associates, because that puts pressure on the associates to attend, and they may very much prefer not to attend. If the American partner simply accepts on behalf of himself and all three associates, the associates are in the position of having to attend or risk offending both the American partner and the client group. The offer becomes a coercive offer that they cannot refuse and accepting it involves placing oneself in an environment one may find profoundly offensive. All in all , accepting the offer on everyone's behalf goes towards creating a hostile work environment.

The correct course of action, I believe, is for the American partner to thank the client, explain that he will be attending—or will not be attending, as he sees fit—but that he cannot speak for his associates. When he relays the offer to his associates, he should tell them that they are free to do whatever they want—attend or not—and that either choice on their part is entirely acceptable to him and to the firm.

Lutz: There are no professional responsibility rules that specify the nature of entertainment one might experience with clients. Nonetheless, considerations of good taste, decency, professionalism, etc, are normally important factors in participating in such events. In addition, special consideration of the feelings of team members (the associates in this case) should be given. The Pat Pong district in Bangkok is notorious for its sex shows, which are often demeaning to women.

I would advise the American partner to politely decline the invitation, indicating that it would be inappropriate—and possibly, embarrassing and humiliating to many or some of the group. I would suggest that other entertainment for the whole group would be more appropriate.

Actual Result: The American partner was comfortable with his team and had no hesitation in explaining the nature of the invitation. He told the associates what the shows entailed and he said that attendance was not mandatory with no consequences attached whether an associate attended or did not attend the event, a point the American partner would emphasize with the Australian client. It was all done professionally and as a matter-of-fact, though the American partner said that this was something best kept among the team. As it turned out all decided to accept the invitation except for one male associate who had prior dinner plans.

Situation #6:

In connection with the acquisition of an American company by a Korean company, the American partner takes his female associate to Seoul for negotiations. The female associate is the only woman involved in the negotiations. The negotiations are successful. A closing dinner is held and at the dinner, the American partner is invited go out drinking with the client and representatives of the Korean company. It is clear that the female associate is not being invited, but that the Korean lawyer and his associates are being invited. What should the American partner do?

Responses To Situation #6:

Keating: In this case, it strikes me as once again important to distinguish between the client's responsibilities and the lawyer responsibilities. The client, not the American partner, is responsible for the invitation; exclusion of the American associate is not the American partner's problem. The American partner should therefore not feel responsible for the invitation's exclusion of the American associate.

To be sure, socializing with clients can be an important aspect of professional life and advancement. "Social" events of a business nature raise questions of discrimination because such events can exclude women from important professional opportunities. There is, therefore, a strong "equal opportunity" antidiscrimination rationale for opening various kinds of men's clubs—the Jonathan Club or the California Club, for instance—to women. But the "discrimination" aspect of this situation strikes me as so attenuated that I don't see the problem as an ethical one. The social event described in situation #6 is a one shot event, in a foreign country. Any impairment of the associate's prospect for professional advancement seems so slight as to be *de minimis*.

Lutz: In this situation , several considerations are appropriate, none of which is required under professional responsibility rules. The first is the extent to which the American partner should feel protective of his firm's personnel, the female associate , and a guide for how the attorney, the firm and its employees are treated in the foreign country. Normally, in support of the concept that they work as a "team," I would think partners of firms traveling with associates would not want to put them in situations where they might be embarrassed, humiliated or victims of prejudice.

Secondly, there may be culturally unique celebrations in some countries that are not gender neutral. Those engaged in transnational legal practice should be aware of them, sensitive to them to ensure that one does not make any faux pas, and realize where—under the circumstances—one might draw the line of participation.

In this case, I would advise the American partner to politely decline the invitation on the basis that you and your associate are in Korea as a team and your successful negotiations—actually the results of the larger U.S. Korean team—should be celebrated by the whole group. To engage in a separate celebration that excludes the only woman team member would be rude, and would make your associate feel "less than equal"and "not really part of the team.

Moreover, since this is an invitation that is not extended personally to the American partner to celebrate "one-on-one" with the leader of the Korean team, but rather to celebrate with all the others involved in the negotiation except the female associate, I would not feel that the American partner is ignoring a culturally important occasion. While Korean society—because of it male-dominated business sector—may have special gender-based celebrations for business successes, the strong needs of the American partner to demonstrate that he and his associate acted as a team in these negotiations (and should celebrate as one) should override any such cultural concerns and would likely be understood by the Korean host.

Actual Result: The American partner recognized this as a male/female division that often occurs in various parts of Asia. It was not meant to be disrespectful to the female associate nor was it a reflection upon the female associate's skills. However, the American partner recognized the sensitivity here and decided to discuss it with the female associate prior to rendering a decision on the invitation itself. As it turned out, since the American partner and female associate had a good relationship, there was no embarrassment in the conversation and the American partner offered to inquire as to whether the female associate was intentionally being excluded. Instead the female associate told the American partner not to bother and suggested that the American partner simply accept the invitation and attend this "after hours" drinking session himself. The American associate did not feel slighted since she was invited to the dinner and was aware of the propensity for certain types of events to be restricted to males only. Accordingly, the American partner accepted the after-dinner invitation to go drinking and attended the festivities by himself.

Conclusion

American laws relating to discrimination and harassment tend to be quite absolute with little regard for historical antecedents or cultural norms. This may not be true for other countries. Thus, behavior that is deemed appropriate in one country is sometimes seen as inappropriate or even illegal in another country. A lawyer engaged in an international practice often times is confronted with this conflict. Professors Keating and Lutz presented their approach to analyzing these conflict under American laws. Perhaps the one general conclusion that can be drawn from all of these situations is to keep the lines of communication open. If one is going to practice in the international arena, it is important to remember that the United States is just one of many countries and its social norms may or may not be observed in other parts of the world. By communicating with the parties involved, and keeping in mind the lawyer's responsibility to the client, the resolution of an uncomfortable situation is generally and usually possible without offending the participants or violating American laws or ethical standards. It is important, however, that both parties understand the circumstances under which the situation occurs and act professionally in response to it. All of the situations set forth above actually occurred, but fortunately, because most of the parties involved were sophisticated and aware of differences between American and local standards, the situations were able to be handled in an open and honest environment without feelings being hurt or client relations being tested.

Invitation To Submit Your Own International Ethical Dilemma

The California International Practitioner and the International Law Section of the State Bar of California are interested in learning about how our section members and readers handle the ethical dilemmas they face in their own international practice. If you have an international ethical dilemma that you have faced and would like to have your situation evaluated, we invite you to submit a write-up of your dilemma and how you analyzed and resolved the problem. The International Law Section may publish an anonymous version of your situation as a case study along with the commentary of experts in either our monthly section newsletter or a future issue of The California International Practitioner.

Please submit your dilemma and a summary of its resolution to ILS@sansanlaw.com and nmillard@la.whitecase. com.