

International Law Practicum

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Practicing the Law of the World from New York

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Professional Responsibility: Ethical Dilemmas Across Borders in a “Borderless World”

By James P. Duffy, III

(The following is an edited version of introductory remarks made by Mr. Duffy in conjunction with a discussion panel on ethical matters at the Fall Meeting of the International Law and Practice Section of the NYSBA held in Shanghai on 21 October 2006.)

In this panel, we are going to explore various facets of the “The Rule of Law,” as it is known and understood by our panelists. In the process, we will explore and discuss the differences between the American and common law notions (as expressed in New York) of professional responsibility, attorney-client privilege, preservation of client confidences, and the like in contrast with the comparable obligations of major bars of Asia, particularly, the Shanghai Bar and Thailand.

Before we begin, I would like to set the stage, as it were, and give you a brief overview of how we are going to approach today’s presentations.

First, I would like to emphasize that the Rule of Law is quite different from being “ruled by laws.” It is important that we all understand this difference and what it means. For example, Nazi Germany was ruled by laws, but the Nazi regime did not observe the Rule of Law.

Under Nazi rule, it was never a crime to be Jewish in Nazi Germany. However, it was a crime to be Jewish and not prominently wear, when in public, a large yellow Star of David. Similarly, it was a crime for a Jewish person to be in a public place without proper documentation.

It was through laws such as these that the Nazi government was able to concentrate enormous power over its populace and achieve some of the most horrific consequences in history.

Typically, all dictatorships rule by law and never by the Rule of Law. This is because ruling by laws helps the dictator concentrate power in his hands at the expense of those the dictatorship governs. Ruling by laws helps the dictator maintain rigid control over those governed and prevents them from challenging the laws that rule them.

Previously in our meeting we have heard from three prominent speakers, one from the New York State Bar Association, one from the Chinese National Council for Social Security, and one from the Chinese Communist Party. Each speaker acknowledged the need for the Rule of Law and stressed its importance to them, to the constituencies they serve, and to the society in which they func-

tion. We also observed that, while each speaker invoked the Rule of Law, each speaker also sometimes gave different weight to the various components of the Rule of Law. This is not at all surprising, because the Rule of Law, like democracy, can mean different things to different people, even though there is a core of basic understanding.

In a recent address to the American Bar Association at its annual meeting in Hawaii on 5 August 2006, Mr. Justice Anthony M. Kennedy offered his views on the Rule of Law as follows:

The Law is superior to, and thus binds, the government and all its officials.

The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends, the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.

The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfill just expectations and seek redress of grievances without fear of penalty or retaliation.

Gilbert Keith Chesterton, who was an English lawyer, is best known as a prolific novelist and essayist in the late 1800s and early 1900s. He is also known for his so-called paradoxes. One of his paradoxes is very relevant to the discussion of the Rule of Law. Chesterton wrote: “Man is never so free as when he is governed by just laws.” Chesterton’s paradox is, of course, that Chesterton equates freedom with being governed, but with the qualifier of being governed by just laws. This is another workable definition of the Rule of Law.

The Rule of Law applies with equal force and effect to those who govern and those who are governed. The Rule of Law does not discriminate for or against government or the people who are governed. Among its other qualities, the Rule of Law protects:

- The strong and the weak
- The rich and the poor

- The popular and the unpopular
- The government and the governed

One could just as easily reverse the order of each pair above – e.g., the weak and the strong: The Rule of Law protects the weak and the strong. In any case, the Rule of Law is blind, just like the statue of Justice (the Greek goddess Themis), who is typically shown as blindfolded. The Rule of Law plays no favorites. Everyone is equal before the Law; everyone is bound by the Rule of Law.

The Rule of Law does not just happen. It comes about from conscious and deliberate decisions of an enlightened society that is committed to its establishment and preservation. All areas of society need to participate in the process. However, certain components are more effective than others. These components include a democratically elected legislature and an independent judiciary, among others.

The legal profession also plays an important and special role in protecting and preserving the Rule of Law. This is a fundamental duty of the lawyer, the legal profession, and the organized bar.

In promoting the Rule of Law in society, an independent bar is, in fact, a *sine qua non*. A united legal profession offers greater strength against, as well as independence from, government, business, clients, and corruption. As such, the organized bar helps prevent the concentration of power in government, business, and elsewhere in society, a concentration that normally has a corrosive effect on the Rule of Law.

While there are clearly other factors that are essential for the Rule of Law to flourish, such as a free press and uncorrupted legislators, we want to focus on the role of the profession in today's rapidly changing world.

An independent bar can only exist with strong and clearly defined core values. This then necessitates a closer look at what the core values are and should be. In taking that closer look during our discussion today, we will follow an outline that is closely based upon a publication of the European Union outlining the role of the lawyer in the European Union. I have chosen this as a model so that we do not necessarily have a bias toward the common law. The EU document divides the practice of law into seven main areas:

- Independence
- Trust and Personal Integrity
- Confidentiality
- Respect for the Rules of Other Bars and Law Societies

- Incompatible Occupations
- Personal Publicity
- The Client's Interests

In our discussion today, we will focus on these core values: what they are; why we have them; how they apply to the problems we encounter each day in our practices; and whether they need to change or be adapted as our world becomes increasingly more integrated and interdependent.

Independence. Independence is a value that should not be required of lawyers alone. Independence is important to be able to maintain objectivity and also to prevent an unhealthy concentration of power in any area of government or society. An independent bar is best able to prevent the concentration of power when there is an independent judiciary. Independence of the various elements of society assures a healthy competition among them and respect for them.

Trust and Integrity. Not too much need be said about this value, since it is rather self-explanatory. A lawyer must be trustworthy and have the highest degree of integrity, not only in his or her professional life but also in his or her personal life. If a lawyer does not have personal integrity and cannot be trusted in his or her personal life, it is highly unlikely he or she will have these attributes in his or her professional life.

Confidentiality. The preservation of client confidences is the essence of being a lawyer. Without the preservation of client confidences, it would be impossible for the lawyer to gain the information necessary to render proper and effective legal advice. While there are many different aspects to this value, such as the "attorney-client privilege" of common law and the obligation of "professional secrecy" of civil law, these are just varied devices for implementing the same value.

Respect for Rules. Lawyers must first and foremost uphold the law. They must also respect the needs and interests of other lawyers and not put them in jeopardy of violating their own rules, especially when they might be different. A lawyer is the servant of the law rather than its master.

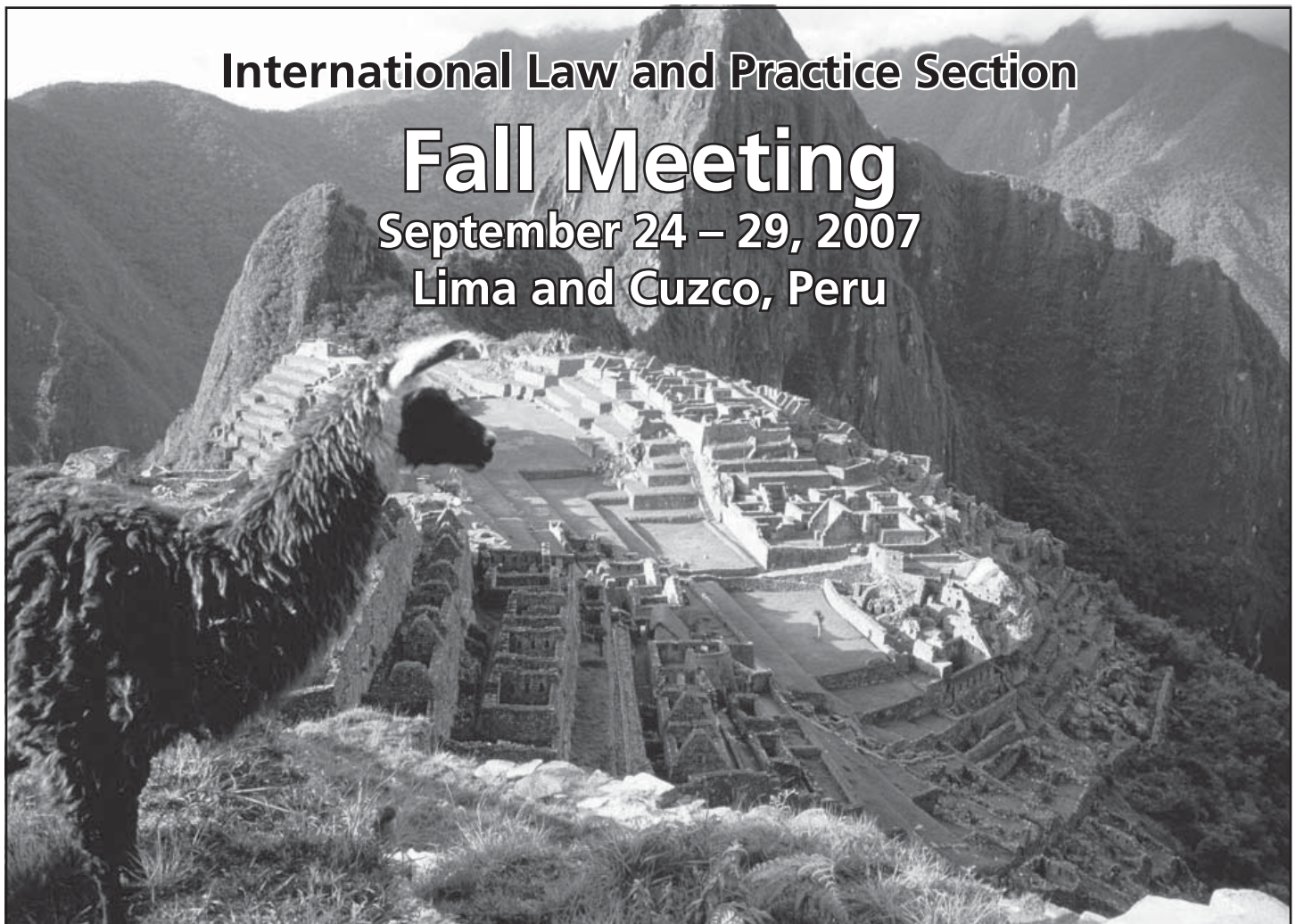
Incompatible Occupations. Certain activities are inconsistent with being a lawyer, and they must be avoided in dealings with clients, in order to ensure there are no direct or indirect conflicts between a lawyer's obligations as a lawyer and his or her obligations in another occupation. One good test for the propriety of lawyer activities with clients is to whom the lawyer owes a duty in the other activity. If the duty does not directly run to the client, the activity is ripe for a review.

Personal Publicity. Many jurisdictions do not permit lawyer advertising. Since the *Bates* case in 1972, lawyers in the US can advertise, subject to reasonable limitations on their right of free speech. Where advertising is permitted, it should be tasteful, professional, and above all truthful.

Client Interests. Every client is entitled to diligent, independent representation within the limits of the law from his or her lawyer. A lawyer must not allow a client to pursue frivolous or vexatious claims. A lawyer must not let a client mislead or deceive a court. A lawyer must make sure that the client knows and understands his or her obligations to the judicial process.

There is also another core value that The New York State Bar Association has emphasized as being especially important, namely, doing the public good, or *pro bono*. This is consistent with our profession's commitment to ensure equal access to procedural and substantive justice. Access to justice must involve both the procedures necessary to achieve it as well as the substantive provisions that establish its parameters.

Our panelists will now give us their prepared remarks.



International Law and Practice Section

Fall Meeting

September 24 – 29, 2007
Lima and Cuzco, Peru

Pictured above: Machu Picchu—an ancient Inca ruin

Please mark your calendars, as the New York State Bar Association's International Law and Practice Section returns to the Latin American region for its 2007 seasonal meeting, September 24 - 29, in Peru. Lawyers from around the world will gather in Lima from September 24 to 27, then ascend to Cuzco to conclude the meeting in high style.

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