

BORDERING ON THE EDGE: MULTIJURISDICTIONAL PRACTICE ISSUES FOR INSIDE AND OUTSIDE COUNSEL

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Rubin is an author of, co-author of, and contributing writer to more than a dozen legal books and over forty articles; his works are used in law schools and have been cited as authoritative by state and federal trial and appellate courts, including the U.S. First and Fifth Circuits. He has been honored as the Distinguished Alumnus by the LSU Law School and as the Distinguished Attorney of Louisiana by the Louisiana State Bar Foundation. His latest legal book, on Louisiana finance and real estate, is THE LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS (Carolina Academic Press), now in its second edition. Rubin also is a novelist of two award-winning legal thrillers, THE COTTONCREST CURSE and CASHED OUT.

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BY: MICHAEL H. RUBIN³

1. THE TUGS AND PULLS

Those of us engaged the legal practice involving energy issues must carefully thread our way through a thicket of technicalities, state and federal court rules, state and federal statutes,⁴ regulatory authority, and international laws,⁵ as well as the ABA's

² A portion of this paper consists of adaptations of the author's prior publications, including "Bordering on the Edge: Multijurisdictional Practice Issues for Real Estate and Trust and Estate Practitioners," 32 Annual RPTE Spring Conference Webinar, May 15, 2020; "Bordering, on the Edge," International Conference of Shopping Centers U.S. Shopping Center Law Conference (Oct. 2018), Orlando, Florida; "Bordering on the Edge," ICSC/OKIMP Retail Development and Law Symposium (Feb. 2014); "Multijurisdictional Ethical Traps for Real Estate Lawyers," ALI-CLE Webinar (Dec. 2013); "Who's The Client?," ICSC Annual Law Conference, San Diego, California (Oct. 2013); "The Appellate Ethical Thicket, How to Survive While Traipsing Through the Titillating Tentacles, Tricks and Traps of Ethical Dilemmas," Bar Association of the U.S. Fifth Circuit, 2011; "The Social Media Thicket: Surviving And Thriving In A Tangled Web And The Ethical Issues This Raises for Lawyers," ALI-ABA Webinar (2011); "The Multiplying Multijurisdictional Morass: What's A Transactional Lawyer To Do?" ABA Business Law Section Spring Meeting, March 2012, Las Vegas, Nevada, "The Ethical Utah Lawyer: What Are The Limits In Negotiation?," 21 Utah Bar Journal 15 (March/April, 2008); "Ethics: A Conflict Of Interest? What Conflict?," ABA Real Property Section CLE (2008); "The Intersection of Conflicts of Interest and Imputation of Knowledge," 22 ABA Probate and Property 53 (Nov. 08); "Ethics," The Construction Lawyer, Fall 2006; and "Labor Negotiations: Do Any Rules of Ethics or Professionalism Really Apply?" ALI-ABA Labor Seminar, Spring 2003; "The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties," 26 The Construction Lawyer 12 (2006); "Breaching the Protective Privilege Wall: Expanding Notions of Real Estate Lawyers' Liability to Non-Clients," The ACREL Papers, Fall 2002 (ALI-ABA); "From Screens and Walls to Screams and Wails: A Selective Look at Screening Among The Various Ethics Rules and Cases and "A Consideration of Some Unanswered Questions," The ACREL Papers, Fall, 2001 (ALI-ABA); and "The Ethics of Negotiations: Are There Any?" 56 Louisiana Law Review 447 (1995).

³ The author is licensed to practice law only in Louisiana. This paper, while it refers to and discusses the law of states other than Louisiana, reflects an outsider's view of the laws and jurisprudence of those states.

⁴ For more on these points, which are beyond the scope of this paper, see, for example: D. DeMott, "THE DISCRETE ROLES OF GENERAL COUNSEL," 74 Fordham L. Rev. 955 (2005); Jill Barclift, "CORPORATE RESPONSIBILITY: ENSURING INDEPENDENT JUDGMENT OF THE GENERAL COUNSEL--A LOOK AT STOCK OPTIONS Z," 81 North Dakota Law Review 1 (2005); Frederick M. Gonzalez, "FOURTH ANNUAL DIRECTORS' INSTITUTE ON CORPORATE GOVERNANCE - THE CULTURAL, ETHICAL, AND LEGAL CHALLENGES IN LAWYERING FOR A GLOBAL ORGANIZATION: THE ROLE OF THE GENERAL COUNSEL," Practising Law Institute PLI Order No. 9158 September, 2006; Lewis D. Lowenfels, Alan R. Bromberg, Michael J. Sullivan, "ATTORNEYS AS GATEKEEPERS: SEC ACTIONS AGAINST LAWYERS IN THE AGE OF SARBANES-OXLEY," 37 University of Toledo Law Review Summer 877 (2006); Jason Thompson, "THE PARADOXICAL NATURE OF THE SARBANES-OXLEY ACT AS IT RELATES TO THE PRACTITIONER REPRESENTING A MULTINATIONAL CORPORATION," 15 Journal of Transnational Law and Policy 265 (2006); Anita Indira Anand, "AN ANALYSIS OF ENABLING VS. MANDATORY CORPORATE GOVERNANCE: STRUCTURES POST-SARBANES-OXLEY," 31 Delaware Journal of Corporate Law 229 (2006).

⁵ For example, in addition to treaties and other matters that affect international transactions, there is the Financial Action Task Force (FATF), an inter-governmental body whose purpose is the development and promotion of national

Model Rules of Professional Conduct and the rules as adopted (and sometimes modified) by the various states in which we are licensed to practice. Practical problems abound and the potential ethical problems are huge. There are many Internet resources on ethics that may provide a starting point for research and links to a number of useful sites.⁶

Transactional lawyers exist to do deals. We negotiate with parties concerning the creation of entities. We negotiate with or for corporations and partnerships, lenders and borrowers, developers and contractors, and a myriad of other clients and businesses. We negotiate with local, state, and national governmental entities. We document deals at the front end, work through issues as deals are ongoing, and negotiate work-outs at the back-end if and when things go wrong.

We usually do all of this from the confines of our offices, using land-lines, email, the Internet, smart-phones, and all the accoutrements of modern practice, and, since the advent of Covid19, often while telecommuting from our homes. Yet, regardless of where we sit, our deals often extend around the country and sometimes around the globe.

We tend to think that we are fully conversant with the “ethical” rules that apply within our own state, but can we really rely on these rules when our deals are interstate or international?

This paper focuses on just a few of the ABA Model Rules that relate to multijurisdictional transactional practices today. These involve matters that cross state

and international policies to combat money laundering and terrorist financing. FATF seeks to generate legislative and regulatory changes to combat international money laundering.

⁶ See, for example the following sites: The ABA Center for Professional Responsibility, <http://www.abanet.org/cpr/links.html>; The Thomas Cooley Law School ethics site, http://www.cooley.edu/ethics/other_sites_of_interest.htm; the Cornell Law School Professionalism web links page, <http://www3.lawschool.cornell.edu/faculty-pages/wendel/ethlinks.htm>; the Georgetown Law Library legal ethics link page, http://www.ll.georgetown.edu/guides/legal_ethics.cfm, and the Santa Clara University business ethics links page, <http://scu.edu/ethics/links/links.cfm?cat=BUSI>.

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