

---

---

# WHEN BAD GUYS ARE WEARING WHITE HATS

Catherine A. Rogers\*

|   |     |
|---|-----|
| INTRODUCTION .....  | 487 |
| I. ASYMMETRICAL ETHICAL RISKS IN TRANSNATIONAL CLASS LITIGATION ..... | 489 |
| A. <i>International Ad Hoc-ism</i> .....                              | 489 |
| B. <i>Structural and Institutional Differences</i> .....              | 491 |
| C. <i>Regulatory Void</i> .....                                       | 492 |
| II. WOBBLY ETHICAL CORNERSTONES .....                                 | 495 |
| A. <i>Loyalty to Clients</i> .....                                    | 495 |
| B. <i>Duties as Officers of the Court</i> .....                       | 499 |
| III. SHIFTING POLITICAL SANDS .....                                   | 502 |
| CONCLUSION .....  | 506 |

## INTRODUCTION

Allegations of ethical misconduct by lawyers have all but completely overshadowed the substantive claims in the *Chevron* case. Although each side has accused the other of flagrant wrongdoing, the charges against plaintiffs’ counsel appear to have captured more headlines and garnered more attention.<sup>1</sup>

---

\* Professor of Law and International Affairs, Penn State Law; Chair of Ethics, Regulation & the Rule of Law, Queen Mary, University of London. For comments and input, I would like to thank Gary Born, Chris Drahozal, Michael Goldhaber, Rick Marcus, Michael McIlwrath, Chris Mondics, Morris Ratner, and David Wilkins. I would also like to thank Benjamin Van Noy and Alex Wiker for their excellent research assistance, the students of the Complex Litigation Journal for organizing the conference that occasioned this Article, and to Matt Woleske for his editorial support.

1. This Article does not take any position regarding the accuracy of or culpability for alleged ethical misconduct by either plaintiff or defense counsel. There have been some formal findings of misconduct by Chevron’s counsel on relatively peripheral issues, but most allegations are still subject to final judicial assessment. *See* *Aguinda v. Chevron Corp.*, Case No. 2003-0002, at 185-87 (Super. Ct. of Nueva Loja, Feb. 14, 2011) (Ecuador) [hereinafter “Lago Agrio Judgment”] (issuing sanctions for a range of conduct, including failure to appear at the exhibition of documents ordered and repeated motions on issues already ruled upon and motions that by operation of law are inadmissible); *Chevron v. Salazar* No. 11–0691–LAK, 2011 WL 7112979, at \*3 (D. Or. Nov. 30, 2011). (finding Chevron’s conduct in discovery “was, at least in part, meant to harass” and therefore sanctionable under Rule 45(c)(1) and awarding \$32,945.20 in attorneys fees in favor of ELAW, a non-profit network

---

---

The primary reason why the focus seems lopsided is that plaintiffs' counsel were presumed to be the ones wearing white hats in this epic drama.

Mr. Steven Donziger, lead counsel for the plaintiffs, cast himself as the daring hero in a tale that resembles the stark morality of an old spaghetti Western. In *Chevron*, the roles of good guys and bad guys were indelibly cast in a compelling story of romanticized victims who had suffered terrible harms at the hands of a mustache-twirling corporate monolith. The irony, of course, is that now, instead of being plaintiffs' greatest champion, plaintiffs' lead attorney appears to be their greatest obstacle to obtaining compensation for their alleged harms.

The allegations leveled against plaintiffs' counsel also receive disproportionate focus because they were captured on film by a documentary filmmaker who, piling on the irony, had originally aimed at presenting a particularly sympathetic portrayal of plaintiffs' case. Instead of focusing public attention on an "Amazon Chernobyl,"<sup>2</sup> however, the film instead became a battleground for allegations of plaintiffs' counsel's alleged misconduct. Outtakes from the film are now among Chevron's most powerful weapons against enforcement of the \$18 billion judgment from the Ecuador because they document the alleged ethical misconduct by plaintiffs' counsel.

This Article explores structural and institutional reasons why alleged ethical violations are not simply an ironic epilogue in this case, but an occupational hazard for plaintiffs' counsel in transnational class actions more generally. Some of the reasons for these special challenges, explored in Part I, relate to the relative size and newness of plaintiff firms to transnational legal practice, particularly in comparison to the legal conglomerates that generally represent multi-national defendants. Additional reasons, which are the topic of Part II, are inherent in the international nature of the *Chevron* case. Transnational class litigation destabilizes the essential cornerstones of attorneys' ethical obligations to both clients and the legal system. This untethering from the essential foundations of legal ethics complicates the already uncertain and often irrational choice-of-law questions regarding which ethical rules apply to conduct abroad in such cases. In Part III, I explain how the politicization of high-profile transnational class litigation can add to the ethical perils already present. Finally, in conclusion, I offer a few observations about lessons for attorneys and regulators to insulate future transnational litigation from the problems and perils that have undermined the search for justice in *Chevron*.

---

of environmental lawyers).

2. *Festival Updates My Premier: CRUDE*, SUNDANCE CHANNEL, <http://www.sundancechannel.com/blog/2009/01/festival-updates-my-premiere-crude/> (last visited July 5, 2013).

## I. ASYMMETRICAL ETHICAL RISKS IN TRANSNATIONAL CLASS LITIGATION

Plaintiffs' counsel confront asymmetrical ethical risks in transnational litigation.<sup>3</sup> Some reasons for this asymmetry relate to the nature of international litigation and others to the history, demographics, and logistics of transnational legal practice more generally.

Transnational litigation does not simply involve parties from different legal systems. It inevitably involves interaction among multiple national legal systems. This interaction often translates into complex interrelationships among the law, procedures, politics, and legal cultures of different jurisdictions. Effective representation of clients in transnational litigation therefore requires not only a passport and a plane ticket, but "knowledge about the relevant foreign procedure, institutions, and jurisprudential values . . . ."<sup>4</sup>

The necessary skills and knowledge for this type of practice were not historically taught in law schools, and are not easy to acquire except through direct experience. Moreover, bar authorities have only recently come to appreciate the need to regulate such practice, but historically provided little guidance or oversight. This Part explains how that regulatory void has created potential perils for plaintiffs' counsel in transnational litigation.

A. *International Ad Hoc-ism*

If litigation can be analogized to chess, transnational litigation is like three-dimensional chess, but with profoundly different cultural and legal rules applying on each board.<sup>5</sup> Players who enter the game without a meaningful appreciation of these complexities can find themselves not only at a strategic disadvantage, but at a heightened risk of violating unknown rules or known rules whose application or interpretation is uncertain in a transnational setting.

Attorneys new to transnational litigation have more than occasionally found themselves inadvertently violating foreign local laws or customs. For instance, U.S. attorneys have been arrested or fined for engaging in such seeming banalities as serving process or taking depositions abroad because they did not know that such practices were illegal in certain foreign jurisdictions.<sup>6</sup>

---

3. Although legitimate distinctions can be drawn between "transnational" and "international" litigation and legal practice, this Article uses the terms interchangeably. For the sake of simplicity, this Article refers to the "*Chevron* case," though in fact it is not a single case, but multiple, inter-related disputes being pursued in various national and international venues.

4. Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 *Nw. J. INT'L L. & BUS.* 301, 303 (2007).

5. Gary Born refers to these problems collectively as "the peculiar uncertainties of transnational litigation." GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 31-32 (2009).

6. *Service of Legal Documents Abroad*, U.S. DEPT. OF STATE,

More complex ethical and practical issues arise in jurisdictions in which the rule of law is not firmly entrenched and corruption is common in judicial and legal institutions. In addition to creating challenges for U.S. attorneys, these risks also put a premium on selecting effective and reliable local counsel. Even that relatively simple task, however, can be a challenging proposition and trap for the unwary.

Plaintiffs' firms find themselves at greater risk because they tend to be considerably smaller than firms that represent corporate clients. "Plaintiffs are rarely represented by the many lawyer mega-firms that generally represent national and multi-national corporations."<sup>7</sup> Apart from a few counter-examples, "[t]he largest plaintiffs' firms employ fewer than one hundred lawyers, and the typical firm employs fewer than ten."<sup>8</sup> It is relatively unusual for attorneys in smaller firms, and particularly those who specialize in a practice as uniquely American as class action litigation, to have extensive experience with foreign legal systems or maintain professional networks abroad.

Instead, smaller plaintiff firms generally engage in overseas activities on an ad hoc basis in response to specific client needs. By all accounts, for example, *Chevron* was the first international litigation for plaintiffs' U.S. counsel. Similarly, *Bhopal*, another transnational litigation case involving accusations of ethical misconduct, was a first for most of plaintiffs' counsel. As newbies, plaintiffs' counsel tend to respond to the complex cultural, procedural, and ethical issues that arise in transnational litigation as practical problems to be resolved on an individualized basis and as they arise in the context of pursuing their clients' case strategy. In sum, when plaintiffs' counsel take up a transnational litigation case, they are usually more like 'accidental tourists' than savvy travelers.

While corporate law firms can face similar challenges, their learning curve began long ago and by now they can anticipate many of the problems that would otherwise be a surprise to the newly initiated. Moreover, large multinational law firms that represent corporate clients also have several structural and institutional advantages, described in the next section, which helped flatten the otherwise steep curve.

---

[http://travel.state.gov/law/judicial/judicial\\_680.html](http://travel.state.gov/law/judicial/judicial_680.html) (last visited July 5, 2013) ("It may be prudent to consult local foreign counsel early in the process on this point. American process servers and other agents may not be authorized by the laws of the foreign country to effect service abroad, and such action could result in their arrest and/or deportation.").

7. Elizabeth J. Cabraser, *The Essentials Of Democratic Mass Litigation*, 45 COLUM. J.L. & SOC. PROBS. 499 (2012). This profile may be changing. See Morris Ratner, *A New Model of Plaintiffs' Class Action Counsel*, 31 REV. LITIG. 1 (2012) (arguing that some of the leading class action law firms are "relatively large and internally complex").

8. *Id.*

B. *Structural and Institutional Differences*

The ad hoc-ism that most often characterizes plaintiffs' counsel's efforts in transnational litigation contrasts sharply with the comprehensive case management and law firm management strategies employed by most multinational firms. These firms are usually somewhere between huge and gigantic.<sup>9</sup> But this is not simply another David-Meets-Goliath situation. Multinational law firms are not only bigger; they are, for the most part, also more geographically diverse, culturally agile, and transnationally experienced than their plaintiff-firm counterparts.

To take just a few representative statistics, since 2000, "the 250 largest U.S.-based law firms have more than doubled the number of lawyers in Europe and increased their headcount in Asia by more than sixty percent."<sup>10</sup> Most of the attorneys employed in these outlying offices have their primary legal education and licensing in a foreign jurisdiction,<sup>11</sup> and they work integrally with U.S. attorneys in the same office<sup>12</sup> and within the larger firm. These institutional structures and related networks provide numerous advantages for corporate firms in transnational litigation, even down to something as preliminary as identifying local counsel.<sup>13</sup>

Corporate law firms also usually have experience with, and internal procedures for responding to, issues of corruption and legal instability in jurisdictions in which the rule of law is not firmly entrenched. The structure of a large-multinational law firm means that misconduct in one jurisdiction may affect the firm as whole, either through liability,<sup>14</sup> regulatory sanction, or damage to its reputation. Policies for avoiding these potential problems are often conceived of and implemented as self-interested risk-management strategies.

---

9. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067, 2089-90 (2010) (documenting the how "the median size of the nation's 250 largest firms ha[s] ballooned" in recent years).

10. *Id.* at 2080.

11. Carol Silver et al., *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global*, 22 *GEO. J. LEGAL ETHICS* 1431, 1448-51 (2009).

12. *Id.* at 1450.

13. "According to the Global Counsel Survey, 74% of respondents indicated that when seeking outside counsel in a country where they do not have an established relationship, in-house lawyers start by asking someone they know, including in-house lawyers at other companies and current local counsel with international offices and capabilities." See LEXISNEXIS, *2011 Global Corporate Counsel Survey: Selecting Outside Counsel in Foreign Jurisdictions* 10, available at <http://www.lexmundi.com/ccsurvey2011> (cited in THOMAS A. DECKER, LAWRENCE T. HOYLE, JR. & ARLENE FICKLER, *1 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 4:21 (2012)).

14. *Complaint, Watts Water Tech. v. Sidley Austin LLP*, No. 0004847-12 (D.C. Super. Ct. June 6, 2012) (alleging that law firm failed in due diligence to alert client of potential FCPA issue in acquisition of a Chinese company).

---

---

In sum, large multi-national law firms have a complex set of skills, resources, and self-interested incentives for avoiding violations of local laws in foreign jurisdictions or getting caught up in corruption. Together, these resources may make them less inclined to ethical deviations in the heat of pursuing client goals.<sup>15</sup>

All this is not to say that large firms do not have their own limitations on competence, cultural blinders, and countervailing incentives (discussed in greater detail below) that mean they too engage in lawless or unethical behavior in order to promote client interests. Despite the potential effect of countervailing incentives, however, these firms generally have a better sense of where, in foreign jurisdiction, the line is between conduct that legal and illegal, or ethical and unethical. They also have a clearer self-interest in staying on the right side of that line. As a result, these firms are arguably better able to adjust their conduct to avoid inadvertent or counter-productive transgressions in transnational litigation than their plaintiff law firm counterparts.

### C. *Regulatory Void*

The ethical naivety that can characterize legal adventurism abroad has been facilitated, if not encouraged, by a historic indifference of bar authorities and the resulting regulatory void. The apparent absence of any meaningful professional regulation when attorneys cross borders means that attorneys have little or no incentive to analyze and assess potential ethical issues in transnational legal practice. Meanwhile, even well-intentioned attorneys have few tools to self-assess in the absence of any meaningful guidance by bar authorities.

One of the most prominent examples of what happens in a regulatory void occurred in the aftermath of the disastrous gas leak at the Union Carbide facility in Bhopal, India in 1984. Within hours after gruesome details became public, dozens of American attorneys descended en masse on distressed, unsophisticated, and often illiterate Indian victims. U.S. attorneys directly solicited victims and convinced them to sign contingent fee retainer agreements for tort actions to be brought in the United States.

The fact that many victims did not speak English or understand what the agreements were did not obviously influence attorneys' efforts. One attorney boasted that he had obtained more than 7,000 signed contingency fee agreements within five working days of the gas leak, meaning approximately

---

15. Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1966 (2006) (arguing that "conceptualizing ethics as a matter of avoiding liability can influence dispositions, attitudes, and motives, and, therefore, how someone exercises her [ethical] discretion"); see also William H. Simon, *The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management*, 94 GEO. L.J. 1985 (2006).

one agreement every 60 seconds.<sup>16</sup> These events became known as the Greatest Ambulance Chase in History. They were in apparent violation of several U.S. ethical rules, and in clear violation of Indian ethical rules.<sup>17</sup>

Despite the obvious ethical violations,<sup>18</sup> neither bar authorities in India nor the United States ever sought to discipline these attorneys.<sup>19</sup> Whatever other reasons may have contributed, one explanation for this inaction was likely that none of the relevant regulatory authorities regarded the attorney conduct at issue as within the purview of their disciplinary power. For the American authorities, their rules and disciplinary jurisdiction did not apply overseas in 1984.<sup>20</sup> For the Indian authorities, their ethical rules did not apply to attorneys acting in court cases pending in the United States.<sup>21</sup>

In 2002, the American Bar Association finally extended application of the Model Rules to transnational practice. It did so by taking an already problematic choice-of-law rule designed to deal with domestic multi-jurisdictional practice and extending it, through a minor revision to the Comments, to international law practice. As a result of this rather haphazard amendment, Rule 8.5 contains a number of ambiguities that are uniquely problematic in transnational litigation.<sup>22</sup>

---

16. David T. Austern, *Is Lawyer Solicitation of Bhopal Clients Ethical?*, LEGAL TIMES, Jan. 21, 1985, at 16. “In the Bhopal litigation, for example, one American attorney managed to obtain retainer agreements from over 7,000 individual clients in less than a week; other individual attorneys claimed to represent as many as 57,000 clients.” John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 886 (1987).

17. In India there was “an absolute bar” on attorney advertising and solicitation, which would even preclude Indian attorneys from being listed on a referral website. Michael A. Gollin, *Answering the Call: Public Interest Intellectual Advisors*, 17 WASH. U. J.L. & POL’Y 187, 209 (2005).

18. *See id.*; *Bhopal Is for Lawyers*, NAT’L REV., Jan. 11, 1985, at 20.

19. Perceptions of opportunism by U.S. attorneys may have contributed to India’s decision to become the sole representative of the Bhopal victims and its opposition to any compensation being paid to attorneys who initiated the cases in the United States.

20. For an extended discussion of the jurisdiction and choice-of-law issues related to regulation of U.S. attorneys engaged in law practice outside the United States, see Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. INT’L L. REV. 1035 (2009).

21. Contingency fees are generally prohibited in most other countries, although recently there has been some softening as many European jurisdictions are exploring. Mark A. Behrens et al., *Global Litigation Trends*, 17 MICH. ST. J. INT’L L. 165, 183-84 (2009).

22. The relevant text of Rule 8.5 is as follows:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

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

(1) for conduct in connection with a matter pending before a tribunal, the rules of the

At a literal level, Model Rule 8.5 subjects counsel to rules of a foreign jurisdiction whenever the conduct is “in connection with a matter pending before a tribunal” in that jurisdiction.<sup>23</sup> It is uncertain whether this rule would apply when the “connection” to a pending case is only coordination and publicity-related activities, not actual court appearances, as was the case for plaintiffs’ counsel in the Ecuadorian proceedings in *Chevron*. In addition, the language and drafting history of the Rule 8.5 are similarly ambiguous about which rules apply to conduct related to a “matter” that is being litigated in multiple parallel proceedings in national and international venues, which is often the case in transnational litigation and certainly the case in *Chevron*.<sup>24</sup>

Another, more structural concern with Rule 8.5 is that it adopts a very crude omnibus choice-of-law approach to ethical rules. Apart from producing some peculiar substantive outcomes, this approach obviates the need for attorneys to exercise any professional judgment in identifying and interpreting their ethical obligations.

Attorneys may sometimes be justified in violating foreign law. The Federal Rules of Civil Procedure expressly contemplate this possibility, with the approval of a court, if the foreign law would significantly impede or prevent a just result in a U.S. legal proceeding.<sup>25</sup> Rule 8.5, however, does not simply allow for the possibility that a violation of foreign laws or ethical rules can sometimes be justified.<sup>26</sup> Instead, Rule 8.5 implicitly authorizes attorneys to violate—with ethical impunity—foreign laws and rules. This authorization comes without any obligation that attorneys expend even a moment of professional reflection in assessing the value of the prescribed activity to the case or the relative importance of the foreign law or ethical rule being violated. For example, in a case like *Bhopal*, because the action was pending in a U.S. court, under Rule 8.5, attorneys need only consider the permissibility of Bhopal-style advertising under U.S. ethical rules, and are not required to

---

jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise. MODEL RULE OF PROF’L CONDUCT 8.5 (2002). For a discussion of the ambiguities in the text and its application to international contexts, see generally Rogers, *supra* note 20.

23. For an extended analysis of the ambiguities regarding the term “matter” and phrase “in connection with” in Rule 8.5, see Rogers, *supra* note 20, at 1056-57.

24. Notably, Model Rule 8.5 did not apply to plaintiffs’ lead counsel in *Chevron*. He was licensed in New York, which has adopted a different choice-of-law rule that made him subject to New York ethical rules. New York Rule 8.5(b)(1) is limited to courts in which an attorney is admitted to practice (either generally or *pro hac vice*). As a result, under New York Rule 8.5(b)(2), New York ethical rules continue to apply to an attorney’s conduct connected to foreign proceedings in which the attorney is not licensed.

25. See, e.g., Fed. R. Civ. P. 4(f)(3) (authorizing service by other means not prohibited by international agreement, as the court orders” including means prohibited by a foreign country’s law).

26. For further discussion of the need for attorney discretion in navigating ethical obligations when conduct implicates multiple jurisdictions, see Rogers, *supra* note 20, at 1059-61.



consider at all the fact such conduct is illegal and unethical in India.

The best that can be said about Model Rule 8.5 is that it represents the ABA's recognition that U.S. bar authorities can and should play a role in regulating attorney conduct abroad. In this regard, it puts attorneys on notice that they may be subject to discipline at home for misconduct abroad. Rule 8.5 does not, however, provide meaningful guidance about which rules apply in transnational litigation or how attorneys should understand their ethical duties. The reasons for these inadequacies are not simply because of ambiguities in the text of the rule, but in special challenges that are raised in regulating transnational legal practice, particularly in transnational litigation, which are described in greater detail in the next part.

## II. WOBBLY ETHICAL CORNERSTONES

In addition to practical and institutional challenges, described above, plaintiffs' counsel also face heightened ethical challenges because the two essential cornerstones of attorney ethics—duties of loyalty to the client and duties as officers of the court<sup>27</sup>—rest on infirm ground in transnational class litigation. While creating risks for both sides, for the reasons described below, the resulting instability is particularly perilous for plaintiffs' counsel.

### A. *Loyalty to Clients*

Even in domestic cases, class actions invert the conventional structure of the attorney-client agency relationship with respect to plaintiffs' counsel. Class litigation is often lawyer-initiated<sup>28</sup> and lawyer-driven:<sup>29</sup>

Unlike most litigation, where an injured claimant seeks the attorney, in class

---

27. "In addition to being faithful agents who pursued their client's interests, lawyers have traditionally also been expected to be "officers of the court" who promote and uphold the public purposes of the legal framework." *Id.* As Wilkins notes, the old Model Code typified this view in stating that "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law." See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1982) (footnotes omitted).

28. Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 492 (2001) (stating that "many [class actions] arise simply as a result of the creativity of entrepreneurial contingency fee lawyers" and noting that, in one newspaper report of Alabama class action, "plaintiffs had no plans to sue, and no idea they might have cause to, until a lawyer or a friend of a lawyer told them they'd been wronged").

29. Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1929 (2000) ("The normal lawsuit might involve the typical agency-principal relationship in which the client is the principal and the attorney the agent. In contrast, the class action reverses these roles because the client takes on attributes of an agent and the entrepreneurial attorney seems to be in the position of a principal.").

actions, the attorney seeks the claimants. From the initial investigation of a claim, to class certification, and finally settlement, class actions are attorney-driven.<sup>30</sup>

The consequence is that plaintiff lawyers in class actions generally have a greater stake in the outcome of the case than their clients and, relatedly, exercise greater control over case strategy at critical junctures.

Based on these features, plaintiffs' counsel in cases such as securities fraud, consumer fraud, and toxic tort class actions have been dubbed 'bounty hunters.'<sup>31</sup> The term signals that their primary interest in class litigation is entrepreneurial and self-interested, even if their activities provide incidental benefits for their clients and the public good. In these cases, "individual plaintiffs have weak to nonexistent control over their attorneys across the mass tort context for reasons that are inherent to the economics of mass tort litigation."<sup>32</sup> This dilution of client control raises numerous potential ethical hazards regarding client loyalty, which have been well-documented by various commentators.<sup>33</sup>

A similar inversion of the agency relationship also occurs with cause lawyers who bring aggregate public interest litigation. As David Luban explains, the cause lawyer is a double agent: "[T]he lawyer is an agent for both the client and the cause" and as a result faces a "kind of dirty hands dilemma" when the interests of one subset of claimants differs from the political objectives of other claimants or the lawyers.<sup>34</sup> Cause lawyers often serve as leaders of emerging movements and focus more on improving the movement's position in society through litigation than on the interests of individual clients'

---

30. Mohsen Manesh, Note, *The New Class Action Rule: Procedural Reforms in an Ethical Vacuum*, 18 GEO. J. LEGAL ETHICS 923, 924-25 (2005); see also Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77-83 (2003) (concluding that many class actions are attorney driven and amount "to little more than private attorneys acting as bounty hunters").

31. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 218 (1983)

32. John Beisner, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441 (2005); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1462 (1995) (writing critically of results in mass tort class actions); Charles W. Wolfram, *Mass Torts—Messy Ethics*, 80 CORNELL L. REV. 1228, 1231 (1995).

33. Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis*, 49 OSGOODE HALL L.J. 1, 13-24 (2011) (discussing a similar issue under Canadian law); Natalie C. Scott, *Don't Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 573-83 (2002); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 924, 929, 939-40 (1998).

34. DAVID LUBAN, *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 319 (1983)

interests and need.<sup>35</sup> Although the reasons are different, cause lawyers in transnational class litigation may face an attenuation of client loyalty similar to bounty-hunter lawyers.

In domestic litigation, important checks exist to counterbalance the attenuation of client loyalty that occurs in class actions and public interest aggregate litigation. Judges experienced with class actions provide “close . . . scrutiny of counsel’s conduct and [demonstrate] a lack of tolerance for any significant appearance of impropriety.”<sup>36</sup> This judicial oversight is institutionalized in rules regarding in class certification, pleading standards, and settlement, all of which have been tinkered with over the 60-year history of class actions and aggregate litigation.<sup>37</sup> In addition to these structural controls, in domestic contexts clients can file claims with bar disciplinary authorities, even if they rarely do.<sup>38</sup>

These various mechanisms provide institutional safeguards—however muted—to protect client interests when client loyalty is attenuated. Client control in domestic class actions is diluted and attenuated, but not utterly impossible.

In transnational class actions, judicial oversight and client control is closer to a real impossibility. As a starting point, as described in greater below,<sup>39</sup> few foreign systems have a similarly extensive history of experimentation with class actions that produced the admittedly weak, but nevertheless important, client safeguards that exist in the United States. This institutional hole is especially gaping in foreign systems, described in greater detail below, that adopt class or aggregate claim procedures hastily and in response to dismissals from the U.S. courts under *forum non conveniens*. As a result, difficult obstacles to protecting client loyalty obligations in the United States become insurmountable hurdles in foreign class actions.

In addition to structural challenges to judicial control in international class action and aggregate litigation, the prospect of clients exercising any control is also further diluted. The lack of incentives that individual class members have in domestic litigation is aggravated by linguistic, cultural, geographic, and

---

35. Michael McCann & Helen Silverstein, *Rethinking Law’s “Allurement”*: A Relational Analysis of Social Movement Lawyers in the United States, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261 (Austin Sarat & Stuart A. Scheingold eds., 1998).

36. Ronald E. Mallen and Jeffrey M. Smith with Allison D. Rhodes, 2 *LEGAL MALPRACTICE* § 17:7 (2013 ed.).

37. Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 *J. LEGAL STUD.* 47, 48 (1975) (explaining and surveying policies for reforming class action rules); Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 *BUFF. L. REV.* 749 (2012) (tracing history of class action).

38. Deborah L. Rhode, *Institutionalizing Ethics*, 44 *CASE W. RES. L. REV.* 665, 694 (1994).

39. See *infra* notes 62-76, and accompanying text.

informational barriers that exist in transnational settings.

These risks have, according to the intervenors in *Chevron*, metastasized into reality. Even in the abstract, it would be difficult to imagine clients from an indigenous rainforest community in the Ecuadorian jungle complaining to the New York bar about an attorney who may be the clients' only connection to New York or the U.S. legal system. Such clients would be unlikely to even know that such a mechanism exists, or could be invoked by foreign clients. The ultimate attenuation of client control in *Chevron*, however, occurred upon transfer of the case back to Ecuador.

The case was originally brought in the United States to provide remedies for personal injury claims. When the case was refiled in Ecuador, however, it became an environmental cleanup case.<sup>40</sup> Individual clients were effectively replaced with an organization that purported to represent their interests, but whose exact nature and relationship to individual clients is difficult to discern from public records.

Judith Kimerling, a law professor at City University of New York and author *Amazon Crude*, the book that is touted as having brought problems underlying the *Chevron* litigation to light, has represented members of the Huaorani community of Ecuador. Members of the Huaorani tribe appear to have credible, compelling claims of personal injury attributable to Chevron's (then-Texaco's) activities in Ecuador and were originally part of the Alien Tort case brought in the United States. According to Kimerling, however, now the tribe members "have reason to believe" that the Donziger-led team "will not properly distribute any portion of the judgment proceeds to compensate, mitigate, and remediate the harm to [the] plaintiffs."<sup>41</sup>

Although arguably the Huaorani and other individual plaintiffs' interests were harmed by the alleged misconduct by counsel, they never raised questions of ethical misconduct. It was instead Chevron that raised these questions, and later Professor Kimerling as part of her efforts to intervene in U.S. proceedings on behalf of individual Huaorani plaintiffs. Perhaps most importantly, the alleged misconduct only came to light when the case was 're-domesticated' to U.S. courts in Section 1782 proceedings and an action to enforce the judgment.

---

40. This transformation is in part tied to the fact that class actions per se are not recognized in Ecuador. The procedures that facilitated claims against Chevron were introduced through legislative reforms but, as noted below, those reforms were orchestrated by plaintiffs' counsel. There is no available record for why the legal reforms focused on enabling environmental clean-up claims instead of class litigation to vindicate personal injury claims. It might be imagined, however, that larger dollar values attached to the former rather than the latter and the prospect of a larger recovery provided some incentive for the choice among reform options.

41. Paul M. Barrett, *The Chevron Oil Pollution Mess Gets Messier*, FORBES, July 25, 2012, available at <http://www.businessweek.com/articles/2012-07-24/the-chevron-oil-pollution-mess-gets-messier>

For large corporate clients such as Chevron, there is no similar risk of attenuated client control. Instead, the opposite may be true. “When [corporate] clients are dissatisfied, they can afford to change attorneys, negotiate for a reduction in fees, or litigate.”<sup>42</sup> Unlike individual plaintiffs, corporate clients do not generally need bar authorities to ensure their attorneys abide by client loyalty obligations.

The risk instead is that law firms representing multi-national companies will be excessively committed to client objectives. As David Wilkins describes, the nature of corporate representation turns “the agency model in its head.”<sup>43</sup> Wilkins posits that “[b]y withholding information and manipulating incentives, sophisticated corporate clients now have the power to pressure their lawyers into taking risky or unethical actions that threaten to throw their law firms ‘into confusion’ in the form of legal peril or financial ruin.”<sup>44</sup> While corporate attorneys will seek to avoid putting their firms in peril, pressures from clients that represent a significant portion of the firm’s revenues undoubtedly can and have clouded attorneys’ ethical judgment. Notably, the most cavalier statements by Mr. Donziger have a fight-fire-with-fire sense of urgency to them, suggesting that he believed he was dealing with counsel who had crossed ethical lines on behalf of a big corporate client.<sup>45</sup>

#### B. *Duties as Officers of the Court*

Turning to an attorney’s role as officer of the court, transnational class actions such as *Chevron* have a similarly destabilizing effect on this essential cornerstone. When a case such as *Chevron* is dismissed from U.S. courts under the doctrine of forum non conveniens, a change in representation necessarily and inevitably results. Attorneys are licensed and admitted to practice in one or more national legal systems. As noted above, plaintiffs’ counsel are seldom licensed in foreign jurisdictions and even large corporate firms almost always rely on locally licensed attorneys in foreign proceedings. As a consequence, when transnational litigation is dismissed from U.S. courts and sent to a foreign jurisdiction, U.S. counsel become professionally untethered from any court

---

42. STATE BAR OF CAL., INVESTIGATION AND PROSECUTION OF DISCIPLINARY COMPLAINTS AGAINST ATTORNEYS IN SOLO PRACTICE, SMALL SIZE LAW FIRMS AND LARGE SIZE LAW FIRMS (June 2001) (cited in Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593, 599 n.24 (2002)).

43. See Wilkins, *supra* note 9, at 2072.

44. See *id.* While this Article focuses primarily on alleged misconduct of plaintiffs’ counsel, Professor Wilkins’ explanation of the inversion of the agency model raises other potentially significant quandaries for the defense side in transnational litigation that are worthy of future exploration.

45. See, e.g., *infra* note 48, and accompanying text.

proceedings. They may continue to serve as lawyers for their clients, but their role, as perceived by others and even themselves, is decidedly different.

Lead plaintiffs' counsel in *Chevron* seems to be a good example. After dismissal from U.S. courts, news reports continued to refer to Mr. Donziger as "plaintiffs' counsel."<sup>46</sup> At least for that period when no related actions were pending in U.S. courts, however, Mr. Donziger was not formally counsel of record for plaintiffs anywhere. He was not licensed in Ecuador nor admitted to appear *pro hac vice*.<sup>47</sup>

The disengagement of plaintiffs' attorney from any court proceedings raised questions, even for plaintiffs' own counsel, whether he was acting as an attorney for plaintiffs in work related to the Ecuadorian proceedings. For example, in an outtake caught on film, Mr. Donziger stated:

The only language that I believe this judge is going to understand is one of pressure, intimidation and humiliation . . . . *As a lawyer, I never do this.* You don't have to do this in the United States. It's dirty . . . . It's necessary. I'm not letting them get away with this stuff.<sup>48</sup>

The negative implication of the emphasized phrase seems to be that the speaker does not consider himself to be acting as a lawyer in the proceedings in Ecuador.

This apparent understanding of his own role seems consistent with the view of one of plaintiffs' Ecuadorian attorneys, who wrote in an email to Mr. Donziger regarding disclosure of emails in U.S. litigation about the prospect that "all of us, *your attorneys* [in Ecuador], might go to jail."<sup>49</sup> The emphasized

---

46. See, e.g., Walter Olson, *Chevron can depose opposing lawyer in Ecuador case*, OVERLAWYERED (Oct. 24, 2010), <http://overlawyered.com/2010/10/chevron-can-depose-opposing-lawyer-in-ecuador-case/>; see also Daniel Fisher, *Chevron Says Plaintiffs Offered Ecuador Judge \$500,000 For Verdict*, FORBES, Jan. 28, 2013, <http://www.forbes.com/sites/danielfisher/2013/01/28/chevron-says-plaintiffs-offered-ecuador-judge-500000-for-verdict/> (summarizing Chevron's accusation that plaintiff lawyers, led by Donziger, bribed and offered to bribe an Ecuadorian judge to allow them to ghost write his opinion); Peter S. Lubin & Vincent L. DiTommaso, *A New York City Federal Judge Allows Chevron to Depose Opposing Counsel*, CHICAGO BUS. LITIG. LAWYER BLOG (Oct. 30, 2010), [http://www.chicagobusinesslitigationlawyerblog.com/2010/10/a\\_new\\_york\\_city\\_federal\\_judge.html](http://www.chicagobusinesslitigationlawyerblog.com/2010/10/a_new_york_city_federal_judge.html) (using evidence from the documentary *Crude* to show how "plaintiffs' counsel," Donziger, worked with a court expert on the case).

47. Daniel Fisher, *Kaplan Orders Deposition of Attorney Donziger in Chevron Ecuador Case*, FORBES, Oct. 21, 2010, <http://www.forbes.com/sites/danielfisher/2010/10/21/kaplan-orders-deposition-of-attorney-donziger-in-chevron-ecuador-case/> (explaining how Donziger cannot directly represent Amazonian villagers since he is not licensed to practice law in Ecuador); see also Adam Klasfeld, *Chevron Gets Restraining Order for Trial in Ecuador*, COURTHOUSE NEWS SERV., Feb. 8, 2011, <http://www.courthousenews.com/2011/02/08/34014.htm> (clarifying that Steven Donziger is an attorney licensed to practice in New York).

48. *In re Chevron Corp.*, 749 F. Supp. 2d 141, 147 (S.D.N.Y. 2010) *aff'd sub nom.* Lago Agrio Plaintiffs v. Chevron Corp., 409 F. App'x 393 (2d Cir. 2010) (emphasis added).

49. E-mail from Julio Prieto to Steve Donziger, et al., (Mar. 30, 2010, 2:02 PM)

language seems to imply that the email's author regarded the recipient not functioning as an attorney in the case in Ecuador, but rather as a supervisor or employer of local attorneys. Under this interpretation, the email suggests that Mr. Donziger would be beyond the reach of Ecuadorian courts.

The apparent ambiguity of Mr. Donziger's role was not lost on Chevron. Seeing a potential opportunity, Chevron argued that because he was primarily engaged in "fund-raising and publicity, rather than lawyering," Mr. Donziger could not invoke the attorney-client privilege.<sup>50</sup> Despite appearances and ambiguities, Mr. Donziger was undoubtedly still performing legal services for clients and therefore acting as their attorney.

It is not unusual, and arguably it is even necessary, for attorneys on both sides in high-profile mass tort litigation to manage publicity. Even when not technically counsel of record in any pending case, Mr. Donziger's activities were much like coordinating counsel in complex multi-jurisdictional litigation in the United States. Coordinating counsel are often, but not always, designated as counsel of record and admitted *pro hac vice* in various jurisdictions. Even if they are not actually designated as counsel of record, however, that fact does not eliminate the existence of an attorney-client relationship, though it may affect, under Rule 8.5, which ethical rules apply to their conduct.

Even if still acting as counsel, however, the unmooring of coordinating counsel from any particular court, even in domestic cases, raises legitimate concerns that they may apply improper pressure on local counsel to behave unethically.<sup>51</sup> In a related vein, attorneys who take on a role that primarily involves coordination and publicity raise concerns that they may become "preoccupied with self-aggrandizement" at the expense of their client's interests.<sup>52</sup> These risks in domestic settings are manageable, however, because attorneys are still unambiguously bound by local ethical rules, many of which impose obligations to the legal system even when an attorney is not formally appearing in any court proceedings.

For example, under Model Rule 3.6, an attorney who "is participating or has participated in . . . a litigation shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of

---

(emphasis added) available at <http://www.theamazonpost.com/wp-content/uploads/FAC-Ex.-11.pdf>.

50. Patrick Radden Keefe, *Reversal of Fortune: The Lago Agrio Litigation*, 1 STAN. J. COMPLEX LITIG. 199 (2013) (reprinting Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER (Jan. 9, 2012)).

51. *In re Estrada*, 143 P.3d 731, 735-36 (N.M. 2006) (finding sanctionable discovery misconduct by an attorney who was "consistently and forcefully instructed by out-of-state counsel" and underscoring that "any attorney who is licensed to practice in this state—regardless of the pressures imposed when working with out-of-state counsel—has an independent duty to the New Mexico judiciary to obey New Mexico's ethical and discovery rules").

52. McCann & Silverstein, *supra* note 35, at 261.

public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”<sup>53</sup> The rule clearly extends beyond cases in which an attorney is acting as attorney of record to include cases in which the lawyer “has participated.” Similarly, definitions of “misconduct” in Model Rule 8.4 extend obligations to courts and the legal system beyond activities specifically related to pending court proceedings.<sup>54</sup>

As described above, it is uncertain under Model Rule 8.5 which ethical rules could or should apply to attorney conduct in relation to foreign proceedings when their role is primarily one of coordination.<sup>55</sup> Whatever rules might apply as a technical matter, however, there are also significant questions (analyzed above) about how these rules can provide meaningful guidance in the complex setting of transnational litigation.

### III. SHIFTING POLITICAL SANDS

The ethical ambiguities and challenges described in the first two Parts are worsened when transnational litigation involves legal systems that are known for corruption and may have a questionable commitment to the rule of law. These problems are also aggravated when legal proceedings become politicized, as is the case when newly enacted procedural reforms are either ill-suited or simply too new to be effectively managed in a legal system.

In *Chevron*, plaintiffs originally circumvented litigation at home in Ecuador to seek justice in the United States. The main reasons for their choice of forum are, by now, well-known—the availability of class actions, contingency fees, extensive discovery, and punitive damages. Foreign jurisdictions have not only permitted, but often encouraged, this kind of forum shopping by their citizens. For example, in *Bhopal* the Government of India first supported filing in the United States, and even resisted forum non conveniens dismissal from U.S. courts. In a sign of more systemic support for allowing aggrieved citizens to pursue their claims in U.S. courts, several Latin American jurisdictions not only supported U.S. litigation to redress local

---

53. MODEL RULE OF PROF'L CONDUCT 3.6.

54. For example, Model Rule 8.4(d) provides that any “conduct that is prejudicial to the administration of justice” is also professional misconduct.

55. Under the most standard interpretation of Model Rule 8.5, which provides choice-of-law rules for determining which ethical rules apply to professional conduct abroad, the ethical rules of a foreign court control if an attorney is participating in proceedings in that court. It is unclear whether, under Rule 8.5, the definition of a “matter” would include foreign proceedings in Ecuador that arise out of the same facts as the litigation dismissed from a U.S. court. One additional wrinkle is in New York, where lead counsel for plaintiff is licensed, the ethics choice-of-law rule differs from Model Rule 8.5 and would make New York ethical rules continue to apply to the professional conduct of a New York licensed attorney in Ecuador. For this and other ambiguities in Model Rule 8.5, see Rogers, *supra* note 20.



injuries, but enacted legislation intended to prevent cases brought by their citizens from being dismissed from U.S. courts under *forum non conveniens*.<sup>56</sup>

When high-profile cases were dismissed from U.S. courts, however, foreign jurisdictions in several cases passed special legislation to allow local plaintiffs some of the same procedural advantages they would have had in the United States. For example, when the *Bhopal* case was ultimately dismissed, the Government of India passed legislation to, among other things, facilitate class procedures in Indian courts. In dismissing under *forum non conveniens*, the court expressly relied on the fact that the Indian legislature could enact “a specific law for class actions” and the “Indian district court could adopt the rule for use in a newly created class of injured [victims].”<sup>57</sup> Similarly, in class action involving alleged harms to farm workers at Dole Food Co., Nicaragua enacted new legislation to facilitate litigation at home.<sup>58</sup>

Coming back to *Chevron*, while the *forum non conveniens* motion was pending in the district court for the Southern District of New York, Ecuador enacted in 1999 the Environmental Management Law (the “EML”), apparently at the behest of, or at least with the cooperation of, plaintiffs’ counsel.<sup>59</sup> The EML provided the legal basis for the case to be refiled in Ecuador if dismissed in the United States. The legislation created a new private right of action for damages for the cost of remediation of environmental harms. While the EML did not create a conventional class action procedure,<sup>60</sup> it did create an analogue

---

56. Winston Anderson, *Forum Non Conveniens Checkmated?—The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT’L L. & POL’Y 183, 184 (2001); Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 45 (2003); Walter W. Heiser, *Forum Non Conveniens And Retaliatory Legislation: The Impact On The Available Alternative Forum Inquiry And On The Desirability Of Forum Non Conveniens As A Defense Tactic* 56 U. KAN. L. REV. 609 (2008); Paul Santoyo, Comment, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability*, 27 HOUS. J. INT’L L. 703, 724-26, 735-36 (2005); Jeff Todd, *Phantom Torts and Forum Non Conveniens Blocking Statutes: Irony and Metonym in Nicaraguan Special Law*, 43 U. MIAMI INTER-AM. L. REV. 291 (2012).

57. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* 634 F. Supp. 842, 851 (S.D.N.Y. 1986).

58. See Todd, *supra* note 56, at 292-93 (reporting on district court finding that U.S. and Nicaraguan attorneys conspired to recruit plaintiffs with fraudulent work histories and medical tests, to train plaintiffs to lie and to threaten and intimidate witnesses and investigators).

59. According to the Associated Press, plaintiff’s Ecuadorian counsel Bonifaz indicated that “his team” had “worked with Ecuadorian lawyers to draft [the EML] similar to the U.S. superfund law” and in contemplation of *forum non conveniens* dismissal from U.S. courts. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 599 (S.D.N.Y. 2011)

60. Notably, some version of class action procedures have been introduced in various Latin American countries. For a discussion of class action reform in Latin America, see Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013).

for representational litigation, which also contemplated pre-trial discovery of a type previously unfamiliar in Ecuadorian courts.

These improvised, ad hoc reforms differ from more sustained transnational efforts at class action reform. Various jurisdictions around the world have been debating,<sup>61</sup> and in many instances adopting, reforms to allow class and aggregate litigation.<sup>62</sup> These debates and reforms not only raise technical issues about rules of civil procedure, but “implicate fundamental values and often rely on untested empirical assumptions.”<sup>63</sup> Because class action and aggregate litigation shifts quasi-legislative functions to unelected judges, it effectuates a shift in the balance of power between courts and legislatures.<sup>64</sup> The appropriateness of this shift in power is still debated in the United States.<sup>65</sup> In systems that are less rights-focused and have less confidence in judicial decision-making, such a shift may be inconsistent with existing constitutional or political structures, less effective, or even counter-productive, at least in the absence of other needed reforms.

Despite the need for caution, in response to forum non conveniens dismissals in *Bhopal*, *Chevron*, and other cases, governments in plaintiffs’ home jurisdictions enacted reactionary procedural reforms to allow the cases to proceed at home. Perhaps not coincidentally, in each instance, by the time of forum non conveniens dismissal, the plaintiffs’ cause had become a political concern for the governments. In Ecuador, for example, the exit of the Texaco-friendly military government, followed by the entrance of left-leaning populist government, generated new political objectives in securing remedies for victims of alleged harms.

The shift in political objectives compounds other political considerations. In many cases involving claims against foreign investors, governments themselves are directly implicated in the conduct underlying the merits of the case and, thus, potentially in any resulting liability. Typical of any large-scale foreign investment, particularly involving natural resources,<sup>66</sup> Ecuador was a

---

61. Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 16 (2009) (arguing that “the United States has been the leading model for class action adoption”); see also Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41 (2003).

62. Hensler, *supra* note 61, at 13 (listing at least eighteen countries that have adopted some form of class action, including “Argentina, Australia, Brazil, Canada, Chile, China, Denmark, Finland, Indonesia, Israel, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Taiwan”).

63. *See id.*

64. *Id.* at 26 (“[C]lass or aggregate procedures also “implicate[]more fundamental debate about the role of the courts in policy making in a representative democracy.”).

65. See generally MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009).

66. Frank J. Schuchat, *Cross-Cultural Ethical Issues In International Mineral*

joint venture partner with Texaco, just as India was a joint venture partner with Union Carbide in Bhopal.<sup>67</sup> States were partners of the corporate defendants and initially supportive, but also potentially liable when things went wrong.

In both these and other instances, by the time litigation was filed at home under the newly minted procedural reforms, the political equation for these partnerships had changed significantly, either as a result of backlash from the case itself or as a result of larger political cycles, or both. The political shift obviously held consequences for the corporate entities. However, it also meant that judicial procedural reforms may not only have lacked systematic evaluation and deliberative debate, but may have been enacted for overtly political reasons.

Among the issues most debated in the United States regarding class actions and aggregate litigation are the seemingly perverse incentives they can create for plaintiffs' counsel and related ambiguities about class counsel's ethical obligations.<sup>68</sup> As already analyzed above, some of these issues have been addressed through statutory reforms and procedural innovations that aim at monitoring and controlling perceived opportunities for excess and abuse by plaintiffs' counsel.<sup>69</sup> Jurisdictions that hastily adopt legal reforms to allow class or aggregate litigation have not had an opportunity to fine-tune the relevant procedures to control for these concerns. The conclusions of a U.S. district court, which found that the Nicaraguan reforms to permit class action litigation against Dole were themselves responsible for encouraging an "industry" of fraudulent claims,<sup>70</sup> seem to give voice to these concerns. These problems perhaps should not be surprising in light of the fact, noted above, that these new procedures must be administered by judges who have little or no experience with, or resources for managing, the complex and often unwieldy issues that can arise.

This highly politicized, legally fragile environment is necessarily ripe for manipulation by foreign attorneys on both sides. Since normally plaintiffs are the ones hoping to obtain a judgment that can be enforced abroad, they arguably have a higher stake in maintaining some semblance of the rule of law

---

*Development—The Foreign Corrupt Practices Act*, 44 ROCKY MTN. MIN. L. INST. 9 (1998) ("In some countries local law requires government or quasi-government partnership in joint ventures from foreign investments, especially where mineral rights are to be awarded.")

67. In addition to Ecuador and Texaco (now Chevron), and India and Union Carbide, the Myanmar Government was partnered with Unocal and the government of Papua New Guinea was partnered with Rio Tinto, among others.

68. Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1162 (1995) ("Our current rules do not provide adequate guidance for resolving these issues, either at the system level or at the individual case level.")

69. *Id.* at 1172 (to ensure ethical settlements, "we must have either very strong process protections or a deeper scrutiny of substantive outcomes in our settlement processes").

70. See Todd, *supra* note 56, at 293.

and effective justice. Plaintiffs' counsel's commitment to the upholding the integrity of the foreign legal system, in other words, should be of elevated importance. However, for the reasons examined in Parts I and II, their formal obligations to that legal system are not only tenuous, but virtually non-existent. Moreover, as counsel new to transnational litigation, like an accidental tourist or the Ugly American,<sup>71</sup> they may be all too willing to assume that antics abroad simply don't count as lawyering or cannot affect them at home.

#### CONCLUSION

This Article has identified why transnational class and aggregate litigation may create for plaintiffs' counsel unique ethical hazards. One lesson from *Chevron* is that entrepreneurial lawyering in class actions is not delimited by national boundaries, and that its movement across borders aggravates existing agency costs and related risks. While many systems are debating, experimenting with, and implementing new class procedures, few if any have expressly contemplated the special challenges that arise when such cases involve multiple legal systems and lawyers from different systems.

The recent *Morrison* and *Kiobel* decisions may mean that fewer such cases are sustainable in U.S. federal courts, but attorneys and their clients will undoubtedly still seek to use U.S. courts to hold U.S. corporations accountable for alleged misdeeds abroad. Moreover, at a minimum, *Chevron* demonstrates that discovery and enforcement may still occur in the U.S., even when cases on the merits are brought in foreign jurisdictions. For these reasons, U.S. courts, U.S. law, U.S. procedural traditions, and U.S. lawyers will remain important features in transnational litigation and transnational legal practice.

These observations drive home another lesson from *Chevron*—that regulatory and institutional frameworks have failed to address special problems that arise in transnational class litigation or to provide guidance to an increasing number of U.S. attorneys who engage in international and transnational legal practice. As globalization has increased movement of goods, people and services across borders, related legal claims and issues inevitably increased as well. Many of those legal claims and issues implicate individuals and smaller business entities. Litigation involving these claims inevitably involve smaller

---

71. *The Ugly American* was a 1958 political novel by Eugene Burdick and William Lederer, which comments on U.S. adventurism abroad. One of the most memorable lines from the book is by a Burmese journalist, who says "For some reason, the [American] people I meet in my country are not the same as the ones I knew in the United States. A mysterious change seems to come over Americans when they go to a foreign land. They isolate themselves socially. They live pretentiously. They're loud and ostentatious." EUGENE BURDICK & WILLIAM LEDERER, *THE UGLY AMERICAN* 145 (W.W. Norton & Co. 1999) (1958).

firms and more vulnerable clients.<sup>72</sup>

More generally, the U.S. legal community sends thousands of U.S. trained lawyers abroad, and now also trains thousands more foreign lawyers through LLM programs. Given how it feeds attorneys into transnational legal practice, and remains an important forum for international litigation, the U.S. must undertake serious and sustained examination of what it means to be an international lawyer. These are lawyers who operate in multiple systems, often simultaneously.

When attorneys are engaged with multiple legal systems at one time, it is an artificial oversimplification to imagine that they owe duties only to one system at the expense of all others. True international lawyers often function as shuttle diplomats among courts of various systems and as translators of legal regimes and legal cultures for both their clients and courts. These unique professional functions necessarily imply unique professional responsibilities. Even ignoring its ambiguities, the crude train-track-switching choice-of-law mechanism in Model Rule 8.5 utterly fails to acknowledge this complexity.

The ABA Ethics 20-20 Commission had an opportunity to amend Model Rule 8.5 to redress some of these problems. It was presented with specific proposed reforms to resolve issues that arise with respect to international tribunals and parallel litigation.<sup>73</sup> Despite being constituted expressly for the purpose of considering issues raised by globalization of legal practice, however, it failed to do anything meaningful to rectify existing ambiguities to redress structural problems with the Rule.<sup>74</sup> The ABA will hopefully rectify this error sooner rather than later.

Clarifying the professional obligations of international lawyers may not eliminate the problems that arose in *Chevron* and other similar cases. It would be an important source, however, to aid attorneys, courts, and clients in understanding how to engage the more difficult professional issues that arise in

---

72. See Carol Silver, *Regulatory Mismatch in the Market for Legal Services*, 23 *Nw. J. INT'L L. & BUS.* 487, 495 (2003) ("The international label is not claimed only by large law firms; even small firms participate in this specialty."). This phenomenon is a logical counterpart of the increased participation of smaller and medium-sized companies in the global economy.

73. See Memorandum from Laurel S. Terry & Catherine A. Rogers to the ABA 20/20 Ethics Commission (June 12, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/terryandrogers\\_choiceoflawincrossborderpracticeissuespaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/terryandrogers_choiceoflawincrossborderpracticeissuespaper.authcheckdam.pdf).

74. With regard to Rule 8.5, the only action taken was an amendment to a Comment allowing some leeway on conflict of interest rules. *About the Commission*, ABA COMMISSION ON ETHICS 20/20, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) (last visited July 16, 2013) ("Created by then ABA President Carolyn B. Lamm in 2009, the Commission will perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.").

such contexts. More importantly, it would at least ensure that when such calamities of justice occur, the response can be something other than a collective shrug of bewilderment.