

Global Thinking

Ethical issues that may come into play when Texas lawyers deal with clients that have international interests.

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The concept of “international human rights” is based on the International Bill of Human Rights, which is derived from the Universal Declaration of Human Rights—adopted by the U.N. General Assembly in 1948—and two international treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Although these are public international law documents, you do not need to be an “international human rights lawyer” to encounter related issues.

For Texas lawyers, matters related to international human rights can arise in what may appear to be a simple assignment from a client. For instance, you receive an email from a longtime client saying he or she is thrilled to have a new project in a small country in Asia but that there are many dangers in the region for his or her workers ranging from armed conflict to tigers. Therefore, your client intends to hire a security company as the project develops and has attached a draft contract for its selected security company for your review.

As a preliminary matter, you conduct some research about the security company in hopes of finding other agreements online it has entered into. Instead, you find a number of reports from nongovernmental human rights organizations alleging that this security company has mistreated workers in various Asian countries. The allegations include confiscating passports from migrant workers and otherwise blocking their ability to leave the workforce and return home. Additionally, you see reports linking the company to the forced removal of indigenous people from their homelands. News stories even indicate that it has been accused of incidents of violence against both indigenous people and migrant workers.

The current ethical rules applicable to Texas-licensed lawyers speak extensively about your duty to represent your clients. In the scenario described above, what is your ethical obligation to advise your client about the issues related to his or her chosen security company? Is there even an ethical

obligation to conduct a due diligence background search if you anticipate potential human rights problems in the country where your client operates? If you suspect such human rights issues, do you then have an obligation to revise the agreement with an eye toward controlling these types of abuses? The preamble to Texas Disciplinary Rules of Professional Conduct states that “lawyers, as guardians of the law, play a vital role in the preservation of society.” Rule 1.02 makes it clear that Texas lawyers may not assist or counsel a client to engage in conduct that is known by the lawyer to be criminal or fraudulent. The rules also state that when the lawyer knows that the client expects representation not permitted by the conduct regulations, he or she should consult with the client regarding the relevant limitations on the lawyer’s conduct. Comments 7 and 8 to Rule 1.02 make it clear that Texas lawyers are required to give an honest opinion to the client about the actual consequences that appear likely to result from the conduct and make reasonable efforts to dissuade the client from committing a crime or fraud.

While we may try to apply the Texas Disciplinary Rules to the scenario described earlier, it is difficult to discern exactly what the ethical duties are when a client is not directly involved in any crime or fraud. Some types of activities considered violations of international human rights are not crimes in some jurisdictions. For instance, while slavery or human trafficking is a crime under international law and in most countries, other actions—such as excessive limitations on migrant workers’ ability to leave a worksite because of confiscation of passports, child labor, and forced relocation of indigenous people—may not violate local law even when such actions do violate the so-called “soft law” described by the United Nations Guiding Principles on Business and Human Rights issued in 2011 or the hard law of other countries such as the United States and the United Kingdom. These issues are even more complicated because, as in the scenario described previously, it is often

the client’s subcontractors or even subcontractors of subcontractors who may be involved in human rights violations. Under the current rules, you may question whether your ethical obligation is solely to reduce the liability and exposure of your client or to go further in attempting to eliminate the possibility of human rights abuses by trying to persuade your client to avoid entering into a potentially harmful contractual relationship.

Recognizing the disciplinary rules of many jurisdictions do not clearly address a lawyer’s ethical obligations in regards to international human rights concerns, the International Bar Association issued its Business and Human Rights Guidance for Bar Associations in October 2014. Then, following 18 months of research, the IBA published in June 2016 its Practical Guide on Business and Human Rights for Business Lawyers, which uses scenarios similar to the one highlighted in this article to illustrate the circumstances in which international human rights issues may arise and the issues a lawyer could face.

The International Law Section of the State Bar of Texas established the International Human Rights Committee in August 2015 to study and inform members about these issues. The committee intends to provide guidance to Texas lawyers on the U.N. Guiding Principles in relation to the Texas Disciplinary Rules. In the past year, the committee has made presentations to a number of local bar associations and organizations, published articles, and debated within the committee about the ethical questions posed earlier in this article.

The committee’s website, ilstexas.org/human-rights-committee, includes educational information on these issues, the section’s recent guide, and a list of committee members with contact information. Please feel free to reach out if you seek more information on the topic or wish for members of the committee to make a presentation to any organization, your law firm, or company. **TBJ**

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