

January 2014

## Selecting a Foreign Attorney: Avoiding “Legal Pirates” and Effectively Managing the Attorney-Client Relationship

By Natasha A. Moskvina, Esq. \*\*

U.S. businesses are increasingly looking for growth opportunities abroad. A recent study showed that global businesses based in upstate New York achieved almost three times the growth rate and earned over 10% more in revenue between 2007 and 2011 than their regional domestic peers.<sup>[1]</sup> Global opportunities have attracted over 300,000 U.S. companies to export goods in 2011,<sup>[2]</sup> with New York ranking third among leading state exporters.<sup>[3]</sup> Both exports and imports are on the rise, increasing in 2012 by 3.6% from 2011 and 40% from the low in 2009.<sup>[4]</sup> The trend is clear: international commerce is on the rise, providing opportunities for better returns than domestic-only businesses.

The increase in international commerce has also resulted in an increase in the need for legal services abroad. Indeed, U.S. businesses must ensure that they comply with foreign laws and protect their interests abroad.

However, the market for retaining attorneys abroad has a variety of unpleasant surprises: legal pirates, overbilling attorneys, unethical attorneys, mismanaged client-attorney relationships. On the basis of the author’s experience of working with attorneys in nearly thirty countries, below are some helpful hints on how to avoid traps in selecting foreign attorneys and how to ensure the effectiveness of the attorney-client relationship during legal representation.

A list briefly summarizing the points described below appears on the last page of this article.

### **I. Selecting A Foreign Attorney**

#### **A. Identifying a foreign attorney who practices in the relevant area of law**

The task of selecting a foreign attorney can be challenging because language barriers and unfamiliarity with the foreign legal system can make it difficult to identify and use



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trustworthy sources of legal referral. The patchwork of available sources of referral ranges from traditional personal recommendations to Internet-based databases, with varying degrees of reliability. As described below, caution is warranted when relying on the Internet, not the least due to the emergence of Internet "law pirates," as they are called in France, that prey on unsophisticated potential legal clients.

The most reliable source of foreign attorney referral remains the classic personal recommendation by a trusted adviser. Many law firms in the United States have developed vetted relationships with law firms abroad to better serve their clients' needs in a global economy. The first step in the search for a foreign attorney could be to contact trusted attorneys in the United States and request references for attorneys abroad. On the basis of their established professional relationships, the U.S. attorneys should be able to attest to the foreign attorney's competence and ethics.

Such personal recommendations can come from attorneys who have already established their reputation as trusted advisers of the U.S. company that is looking for legal representation abroad, from leaders of local bar association committees, or from the networks of professional associations such as the Association of Corporate Counsel.

Other sources of recommendations include the Economic Sections of U.S. Embassies and American Chambers of Commerce abroad. US Embassies typically employ staff dedicated to promoting the development of U.S. businesses abroad. Their staff is often knowledgeable about the attorneys who provide legal services to U.S. companies in the foreign country. Similarly, employees of American Chambers of Commerce are typically well-connected with top players of various industries, including foreign attorneys who represent U.S. companies abroad. References from these sources could be a good start, however, it is important to keep in mind that the people providing the references are probably not attorneys themselves, and are therefore less able to gauge the competence of the foreign attorneys they recommend than practicing attorneys.

The Internet may appear to be an obvious resource in the search for a foreign attorney, and to some extent it is indeed useful. For example, professional rating companies such as Martindale and Legal 500 publish lists of top law firms or individual attorneys, by country and by practice area, based on attorneys' reputation in the legal community. These rating companies are respected by attorneys, and their websites and recommendations are considered reliable.

However, the Internet has also created opportunities for fraud and abuse in the field of legal referral. For example, the Paris Bar is currently investigating seven complaints transmitted to it by judges related to Internet "law pirates." The websites under investigation advertise on-line attorney services available immediately upon payment that collect personal information, fail

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to mention attorney names or telephone numbers, or charge users for revealing attorney contact information. One investigation has uncovered that the law pirates that marketed "attorney services" in France were not even located in France, but operated out of Poland.

While in many cases it is easy to spot red flags on the Internet, some unethical attorneys use perfectly legitimate websites to lure unwitting clients. For example, websites of U.S. Embassies frequently contain lists of attorneys who speak English. This resource used to be cited often by U.S. attorneys as a valuable tool for identifying attorneys who practice abroad. However, appearance of a foreign attorney's name on a U.S. Embassy website is not a stamp of approval by the Embassy nor is it a guaranty of competence or ethics. The author has seen reports of lawyers listed on U.S. Embassy websites having acted less than ethically toward foreign clients.

In summary, among the various resources available to a U.S. company to search for a foreign attorney, the most reliable are U.S. attorneys who have personally worked with foreign attorneys and who can attest to their competence. The other resources mentioned above could also be helpful, on the condition that the U.S. company conducts significantly more due diligence to ensure that it is dealing with a competent and ethical foreign attorney.

## **B. Assessing professional competence of the foreign attorney**

Once the U.S. company identifies a potential foreign attorney, the next step is to make sure that the attorney has the technical skills required to represent the U.S. company abroad. A decision not to conduct extensive due diligence of the foreign attorney's competence and bar admission can expose the U.S. company to risk. For example, the author has witnessed one U.S. company retain a foreign attorney in Europe to manage the termination of employees at a manufacturing facility abroad. The U.S. client did not realize how little experience the foreign attorney had in the field of labor law. That inexperience led the foreign attorney to make technical errors in the termination process of dozens of employees. Four out of the forty terminated employees seized the opportunity to profit from the legal mistakes, filed law suits, and won. The U.S. company was ordered to pay over two hundred thousand dollars in damages to the four terminated employees that filed law suits. The other terminated employees are likely to follow the lead of these four former employees and to file their own law suits based on wrongful termination, exposing the U.S. company to liability in excess of one million dollars. The result for this U.S. company could have been different if it had realized ahead of time the foreign attorney's unfamiliarity with labor law and selected a different attorney.

To help avoid such costly mistakes, it is advisable to evaluate the foreign attorney's competence in the area of law

affecting U.S. company's interests abroad. In addition to a number of traditional steps usually taken to screen potential attorneys as described below, the author recommends making several other inquiries, based on her experience of selecting foreign counsel, that are aimed to further assess the attorney's competence.

Before interviewing the foreign attorney, it is advisable to gain a minimum of knowledge about the areas of foreign law that could be relevant to the U.S. company, for example through the Internet or by talking with U.S. attorneys who have worked with foreign attorneys in those areas of law (but that should not be a substitute for seeking legal advice).

The next step is to contact the foreign attorney and request a written summary of their experience in the legal field and industry involved, samples of their work, and an interview by telephone or other means. You will need your trusted adviser on the telephone. In addition to discussing the attorney's background and experience, the U.S. company should consider addressing two other topics. First, it should inquire about the legal developments in the foreign country that could affect the company's interests. Competent attorneys easily identify the latest changes in regulations, case law, or other significant actual or potential legal developments that could be relevant in representing the U.S. company.

Second, the U.S. company should inquire about how the foreign laws affecting its interests are implemented in practice. Some legal requirements initially appear highly burdensome, as is the case with national merger control filings in certain EU Member States. However, experienced attorneys may have the skills to lighten the regulatory burden by identifying the legal requirements that are avoidable without compromising the U.S. company's full compliance with the law. In addition, the attorney's familiarity with the working styles of the legal decision-makers who will examine the U.S. company's case may also lead to the U.S. company's ability to satisfy its regulatory burdens at a lower cost and in less time.

The above assumes that the U.S. company has obtained some independent verification that the foreign attorney who will handle the company's case is authorized to practice law. In some cases it will be necessary to call the local bar association to verify that the attorney in fact is licensed to practice law. As experience suggests, disaster looms where non-attorneys perform attorney work. The Moscow Bar, for example, earlier this year sanctioned an attorney who was retained to perform legal services, but who outsourced the entire project to a non-attorney. That non-attorney committed numerous technical errors and filed defective court documents, to the detriment of the client's interests.

In selecting its foreign counsel, the U.S. company would therefore be wise to inquire about the competence of not only the attorney who takes the lead in communicating with the U.S. company, but of all others at the firm who will handle the

substantive aspects of the company's matter. In addition, the U.S. company should be alerted in advance of any matter being referred out and given the choice to vet that new attorney (this point should be included in the engagement letter).

### **C. Evaluating the attorney's reputation in the local legal community**

In the universe of foreign attorneys who are technically capable of performing the necessary legal work for the U.S. company, certain attorneys will stand out by virtue of their reputation in the legal community. That reputation can serve as a value added to the U.S. company by facilitating representation before legal decision-makers and in negotiations with opposing parties. For example, the author is familiar with a U.S. company facing litigation in a small city in Europe hire a local attorney from a small firm who was the president of the local bar association because that attorney knew the local judges well, and that familiarity was a great asset.

Signs of leadership in the local community include leadership positions at local bar associations and professional organizations, speaking engagements and authorship of professional articles.

The quest for a foreign attorney may lead the U.S. company to large law firms with offices world-wide, or to smaller local firms. The U.S. company may be tempted to presume that a law firm's global footprint is a measure of its ability to represent the U.S. company abroad. The author's experience, however, suggests that the size of the law firm or the number of its foreign offices does not necessarily correlate with that law firm being the best choice for any particular client. It is prudent to look beyond appearances and determine whether, on the substance, the particular attorney who will work on the U.S. company's matter is the best choice as its the legal representative. It is possible that the foreign attorneys considered as leaders in their practice area are partners at smaller firms, with local connections and lower billing rates. Smaller, local firms should therefore not be dismissed from consideration just because of their size because they may bring the same or better value to the U.S. company than a global law firm.

### **D. Clarifying and controlling the cost of legal services**

In Russian card games, when cheating occurs, it's not the cheater who is to blame, but the other player who allowed himself to be taken advantage of. This dynamic can be translated to the need for the U.S. client to take active measures to ensure they are not "cheated" by overbilling foreign lawyers.

Indeed, unfamiliarity with the market for legal services abroad can lead the U.S. company to select foreign attorneys who will overcharge them. The author is aware of numerous

instances of foreign law firms charging 200% and 300% more than their competitors for the same services for various reasons, including because the foreign attorneys knew that the client was not familiar with the market rate for the legal services.

The only solution to protect a U.S. company's budget is to seek pricing information from several law firms, and to ask very specific questions about the firms' billing practices.

While U.S. attorneys frequently bill the clients based on hourly rates and provide detailed descriptions of the work accomplished to justify the bills, in some countries, attorneys provide less disclosure, making it more difficult to detect and dispute overcharges. In France, for example, money is a taboo subject. Negotiating or disputing legal fees used to be unheard of, until the recent economic crisis. It is still an uncomfortable subject for many clients and attorneys. A typical bill for legal services by French attorneys contains one line: "Legal services for the month of \_\_\_: X euro." Controlling legal costs under such conditions is obviously difficult. This point also has to be addressed in the engagement letter.

It is therefore advisable for the U.S. company to make it clear to the foreign attorney early in the relationship that it intends to control legal costs, and that in order to do that, it needs a reasonable description in the bills of the work performed.

Another related issue the U.S. company should be aware of is that in some countries, such as France, Russia, and certain middle eastern countries, the mentality "if it's not expensive, it's not good" prevails across many aspects of life, including the cost of legal services. In such countries, local businesses apply the rule of thumb that the quality of legal services is directly proportional to its cost: the more expensive – the better. Many businesses retain the most expensive attorneys they can afford based on the belief that they are paying for top of the line legal services, and as a means to show off a status symbol. Attorneys in such countries may be used to billing high amounts which do not necessarily correlate with the time spent on the case or the actual cost of providing legal services.

The relationship of quality of services to its cost is true only to a certain point, however. It can be a wise investment of the U.S. business' time to interview several law firms and inquire about their rates. If a certain law firm charges significantly more than its competitors for the same services, it may be a sign that the law firm is simply overcharging, leveraging the common belief that "if it's not expensive, it's not good."

### **E. Avoiding unethical and illegal conduct**

A U.S. company facing difficult legal issues abroad may be surprised by a foreign attorney's suggestion that its troubles can go away if key information is hidden from the legal decision-makers, or if a sum of money is paid to a third party as a

bribe.

As Albert Einstein said years ago, relativity applies to physics, not ethics. Certain basic, overarching principles of legal ethics apply in all foreign jurisdictions, even if the particular rules differ from country to country: bribes are not allowed and legal documents should not contain lies. A foreign attorney's proposal to violate ethics rules and the law to obtain a favorable outcome for the U.S. company should obviously be rejected because such conduct is not only unethical, but is also sanctionable abroad and may well be also in the United States, for example through the Foreign Corrupt Practices Act.

#### **F. Protecting the U.S. company's confidential information**

Under U.S. law, the attorney-client privilege protects from disclosure confidential communications between a client and its attorney from disclosure. As long as the communications are made for the purpose of obtaining or providing legal assistance, communications with in-house counsel are protected to the same extent as communications with outside counsel.

The protection afforded by the attorney-client privilege is broader in the United States than in many other countries. For example, in most member states of the European Union, a company's in-house counsel does not enjoy the attorney-client privilege or work-product protection for conversations and work done with others inside the company. Although some form of a legal privilege is recognized in such countries for communications between foreign attorneys who are outside counsel and their U.S. clients, the extent of the protection depends on the particular rules of the individual countries.

Therefore, before divulging confidential business information or providing any documents to the foreign attorney, it is advisable to request a detailed explanation of how the attorney-client, attorney work-product and any other privileges apply in that country to shield confidential information from potential discovery by third parties.

The U.S. company will also have to consider how the disclosure of documents in a foreign country (for example in the context of legal discovery in a litigation proceeding) affects the attorney-client privilege in the United States, specifically under what circumstances the attorney-client privilege in the United States is lost.

Finally, the U.S. company should inquire as to how its confidential information will be handled (for example where and how it will be stored) in the foreign attorney's office to ensure that confidentiality is not breached.

### **II. Managing The Relationship With The Foreign Attorney**

Once the U.S. company selects a competent foreign attorney, the next step is to ensure that the attorney is aware of

the U.S. company's expectations of the logistics of the legal representation. Issues related to language and cultural barriers can lead to a disappointment in the attorney-client relationship, and therefore it is best to set the stage of expectations early in the process.

It is recommended that the retention letter, signed by the U.S. company and the foreign attorney, address the following points:

- (i) All communications with the U.S. company should be in English;
- (ii) The U.S. company should receive courtesy copies, in English, of all important documents, such as communications with adverse parties, court submissions and decisions;
- (iii) Negotiate at the beginning of the representation who will translate the documents (internal informal translation or official professional translation) and how the cost of translation will be covered;
- (iv) Demand timely written updates, for example at least once per week;
- (v) Demand pedagogical explanations of the proposed legal course of action. Make sure that the attorney is aware that legal differences between the U.S. and the foreign country will necessitate the attorney to explain to the U.S. company why a certain action is required in greater detail than to a client native to the foreign country.
- (vi) Demand the foreign attorney to cite the legal basis for the proposed course of action, and obtain translations of the main laws applicable to the U.S. company's matter. The in-house counsel of the U.S. business will not be an expert in the law of the foreign country, but even a brief review of the foreign law can enable the in-house counsel to verify that at least the main provisions of the applicable law are followed correctly. For example, procedures for terminating employment in numerous E.U. Member States are notoriously complicated. A mistake in the timing of a certain step in the termination process could lead the U.S. company to be liable for wrongful termination, costing the company hundreds of thousands of dollars in damages. Even a brief review by the U.S. company of the foreign legal requirements could help avoid such costly mistakes.

Often the in-house counsel of the U.S. company can effectively manage the relationship with the foreign counsel. In some cases, however, the complexity of the legal work abroad may require the assistance of an outside U.S. attorney. This is particularly true with respect to the filing of merger control



notifications to foreign Competition Authorities, or for example conducting surveys of the legal requirements implicated in establishing distribution partnerships in foreign countries.

In situations where the U.S. business has made significant investments abroad, and especially where there is a risk of liability (such as related to employment law), having a U.S. legal crew overseeing the performance of foreign counsel may save the U.S. company from costly mistakes and may be well worth the money.

In conclusion, selecting a foreign attorney can be tricky. However, with the exercise of caution and good planning ahead of time, the U.S. company can reduce the risks of pitfalls and can manage its legal assistance in an effective and economical manner.

The list below summarizes key points discussed above.

### **Issues and points to keep in mind:**

#### Identifying the foreign attorney

Sources of attorney referral include:

- Personal references (the most reliable source)
- Recommendations by Economic Sections of U.S. Embassies and American Chambers of Commerce
- Reputable Internet-based databases such as Martindale and Legal 500
- Other Internet sites: beware of Internet law pirates
- U.S. Embassy websites listing English-speaking attorneys:  
caution  
because the listing is not a stamp of approval of the Embassy

#### Assessing the foreign attorney's professional competence

- Familiarize yourself, at least at a minimum level, with the foreign law affecting U.S. company's interests because it will help assess competence of the foreign attorney
- Request a written summary of experience in the relevant area, samples of work and an interview
- Ask about recent developments in the relevant legal field and how the relevant law is applied in practice
- Ensure that the attorney is qualified to practice law in the foreign country
- Ensure competence of those who will handle the case on a day-to-day basis

#### Evaluate the attorney's professional reputation in the local community

- Ensure Look for leadership positions with local bar associations and other professional organizations, past speaking engagements, authorship of articles

### Clarify and control the cost of legal services

- Seek pricing information from several law firms
- Establish early in the relationship what information legal bills will contain
- Beware of the mentality “if it’s not expensive, it’s not good” prevalent in certain countries

### Avoid unethical and illegal conduct

- Offering bribes or hiding relevant legal information is sanctionable abroad and in the United States

### Protect confidential information

- Inquire about how the attorney-client privilege, and other relevant privileges, apply in the foreign country before disclosing confidential information or documents
- Inquire about how your company’s documents and information will be stored to ensure confidentiality

### Managing the relationship with the foreign attorney

- Establish early in the course of legal representation the frequency, style and content of communications with the attorney
- For complicated matters, consider hiring a U.S. counsel to manage matters with cross-border dimensions

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[1] Economics Week, HSBC Launches \$1 Billion Loan Program for Small and Medium Size US Businesses Seeking International Growth, Aug. 2, 2013.

[2] As of October 2013, the latest data available for the number of exporting U.S. companies is from 2011. Id. at 3.

[3] Id. at 2.

[4] U.S. Dept. of Commerce, Int’l Trade Admin., U.S. Trade Overview 2012, p. 3.

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