

A Model for International Choice of Law and Coordination of Attorney Regulation

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Why Ethics “Choice of Law” Issues Exist

- Lawyers follow clients. Thus, global commerce has led to global law practice.
- Different jurisdictions have different ethics rules
- Which ethics rules apply when lawyers cross national borders or work with “foreign” lawyers?
- While nat’l solutions may differ, all global lawyers face this “choice of law” dilemma [aka “double deontology” problems]
- I will review the US response to this issue
- I will also review the efforts to develop a more global, international response

2

Preview of this Session

1. **Laurel Terry:** Existing US choice of law rules for international practice and international initiatives
2. **Catherine Rogers:** Some problems with ABA Rule 8.5, some solutions, and international models to consider
3. **Stephen Denyer:** A practitioner's perspective on international initiatives and choice of law issues
4. Our introduction of **proposed Rule 8.6**, which proposes international cooperation
5. **Audience discussion**



3

Overview Part 1: How Has the U.S. Responded to this Issue?

- US lawyers are licensed by US states, not nationally; US state ethics rule include substantial variations
- As commerce expanded, US lawyers crossed state borders, creating pressure for new rules
- In 2002, the ABA added MJP “safe harbors” to Rule 5.5 and revised Rule 8.5’s accountability rules
- In 2002, the ABA also revised comment [7] to Rule 8.5 to include globally outbound U.S. lawyers:

“[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities⁴ in the affected jurisdictions provide otherwise.”

Additional 2002 Changes to ABA Model Rule 8.5

- Lawyers who practice in, but aren't licensed by, a state are subject to discipline in that state
- Rule 8.5(b) provides a choice of law rule for lawyers subject to multiple ethics rules
 - Rule 8.5(b)(1) applies to adjudication and says apply the tribunal's rules or, if none, the rules of the jurisdiction where the tribunal sits
 - Rule 8.5(b)(2) applies to other [transactional] situations and basically says "apply the rules of the jurisdiction where the action occurred or where the action will have its predominant effect"

5

The Need to Improve ABA Model Rule 8.5

- Catherine Rogers will explain why Rule 8.5 works poorly in an international setting
- We have proposed a new ABA Rule 8.6 for US lawyers engaged in international practice
- Our proposed Rule 8.6 includes international cooperation and coordination mechanisms
- We plan to submit Rule 8.6 to the ABA 20-20 Commission so we invite your comments
- We hope that proposed Rule 8.6 contains ideas that might be useful in other countries

6

Overview Part 2: How Have Others Responded to Rule 8.5-Type Issues?

- There is relatively little information about national ethics choice of law rules
- The IBA conducted a survey seeking this information, but few responded and even fewer had such rules
 - (see, e.g., several EU countries, Hong Kong, and the US)
- In my view, greater information sharing is needed.
- The *Matrix* of the Project on International Courts and Tribunals provides a possible model for info-sharing:

7

A Model to Consider? The PICT Matrix

A		B	C	D	E	F
Jurisdictions with Universal Scope		Jurisdictions with Universal Scope				
		ICJ		ITLOS		
Introductory Criteria	Permanent	Yes	Yes			
	Independent Judges	Yes	Yes			
Core Criteria	Binding Outcome	Yes	Yes			
	Predetermined Rules of Procedure	Yes	Yes			
Access	Applicable Law	International treaties and conventions in force; international customary law; the general principles of law; and, as subsidiary means, judicial decisions and the teachings of the most highly qualified publicists. The Court may also decide a case ex aequo et bono, if the parties agree thereto	The ITLOS decides cases before it in accordance with the substantive provisions of the UNCLC and other rules of international law not incompatible with it. The SBDC also applies the rules, regulations and procedures of the International Seabed Authority and the terms contracts concerning activities in the Area in matters relating to those contracts			
	Legal and Procedural Aspects					

8

<http://www.pict-pcti.org/matrix/Matrix-main.html>

Some of the Suggested (or Actual) Responses to Choice of Law Issues

- ABA Model Rule 8.5(b) (and its many US variations)
- An issue-by-issue approach (e.g. the UK Solicitors Regulation Authority Rule 15:Overseas Practice)
- EU Directives 77/249 & 98/5 (they specify home or host rules but also state “without prejudice to”)
- EU “Country of Origin” Principle
- Allow law firms to establish a home jurisdiction & use that jurisdiction’s rules for all firm lawyers [See, e.g., Ribstein]
- Let parties and/or counsel select the governing rules

9

Overview Part 3: The “Unilateral Solution” Problem

(see also Terry 5-08 APRL Amsterdam slides)

Is there a problem if lawyers from different countries have different choice of law rules (or no such rule?)

- In theory?yes
- In practice? ...maybe
 - It is relatively clear that there are some problems in international adjudication (e.g., witness preparation rules)
 - It is less clear what problems arise in transactional work as a result of lawyers using different jurisdictions’ rules
 - Academics and lawyers should document any problems
- **Query:** If harmonization isn’t possible, is it better to have differing choice of law rules or no rules?

10

Some Possible Responses to the “Unilateral Solution” Problem

- International tribunal rules and orders (ICC Code)
- Harmonized domestic ethics rules (CCBE, IBA)
- Harmonized choice of law rules
- Cooperation and coordination on a case-by-case basis (Rogers cites the cross-border bankruptcy model as an example of successful coordination)
- Other solutions (e.g., a “compact” among global firms?)
- A super-regulator?
- “Soft law” solutions?

11

Entities Working on this Problem

- **International Law Association (ILA):**
 - 2010 Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals
- **Union Internationale des Avocats (UIA):**
 - Worldwide Code of Ethics Project (Sept. 2010 Istanbul)
- **International Bar Association (IBA):**
 - Statement of General Principles of the Legal Profession
 - ICC Code of Professional Conduct for Counsel
 - IBA Group Law Firms’ Committee on Rule Conflicts (Stephen Denyer will discuss this in more detail)
 - Cf. Guidelines on Conflicts of Interest in Internat’l Arbitration

12

Existing Lawyer Discipline Cooperation-Coordination Models

- **Domestically in the U.S.:**
 - ABA Rule of Disciplinary Enforcement 22
 - ABA Lawyer Regulatory Data Bank
- **Internationally:**
 - [US] Conference of Chief Justices Resolution + CCBE Statement
 - [US] Conference of Chief Justices' Resolution and Protocol and Law Council of Australia
 - CCBE Summary of disciplinary proceedings and contacts
 - Recommendations from the UN, IBA, Council of Europe, CCBE, and the ABA (and perhaps others?)
 - Potentially: the EU E-Justice Project?
 - Potentially: the Asia Pacific Economic Cooperation (APEC) Legal Services Initiative?

In Other Fields: Choice of Law Rules and Cooperation-Coordination Models

- Commentators recommend cross-cultural and cross-professional ethics rule comparisons
- Thus, we should consider the choice-of-law approaches used in other fields
- We should also take note of efforts to develop international cooperation and coordination in international insolvency and intellectual property matters
- ***Are you aware of other examples we should consider?*** [Email LTerry@psu.edu]

14

Conclusion

- **In the US:** Consider proposed Rule 8.6 for US lawyers doing international legal work
- **Internationally:**
 - Encourage transparency with respect to:
 - Ethical issues that create cross-border problems
 - Available choice of law models
 - Whether a jurisdiction has a choice of law rule
 - Encourage, help (& perhaps shame) international tribunals into adopting lawyer codes of conduct
 - Begin the slow process of developing multilateral solutions for transactional work

15

Terry-Rogers' Proposed Rule 8.6

[Proposed] RULE 8.6: DISCIPLINARY AUTHORITY; CHOICE OF LAW FOR ACTIVITIES OUTSIDE THE UNITED STATES OR BEFORE INTERNATIONAL TRIBUNALS SEATED IN THE UNITED STATES

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction with respect to conduct that occurs outside the United States or in a matter before an international tribunal seated in the United States. A lawyer may be subject to the disciplinary authority of both this jurisdiction and a foreign jurisdiction, a foreign or international administrative institution or a foreign or international tribunal for the same conduct.

16

Terry-Rogers' Proposed Rule 8.6 (cont.)

(b) Choice of Law. Subject to the provisions of paragraph (c), 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 foreign or international tribunal seated outside the United States, or an international tribunal seated in the United States:

- (i) the pre-established written rules, if any, promulgated by either by the tribunal or an entity authorized to promulgate such rules for the tribunal;**
- (ii) if there are no pre-established written rules promulgated either by the tribunal or an entity authorized to promulgate such rules for the tribunal, any rules established by the tribunal as part of its effort to manage the proceedings. Such rules may include actions or rulings by a tribunal that take account of or ratify any agreements between the parties that may affect the ethical obligations of their counsel in the proceedings; or**
- (iii) if the provisions of neither (i) nor (ii) apply, the rules of this jurisdiction, including Rule 8.5.**¹⁷

Terry-Rogers' Proposed Rule 8.6 (cont.).

(b)(2) for conduct that physically occurs outside the United States or before an international tribunal seated in the United States, but is undertaken in connection with a matter that is pending before a tribunal in this jurisdiction:

- (i) if the rules of both this jurisdiction and the relevant foreign jurisdiction or foreign or international tribunal do not directly conflict, both sets of rules apply.**
- (ii) if the rules directly conflict, such that a lawyer cannot comply with both sets of rules, the rules that are most directly related to the relevant conduct apply.**
- (iii) if a lawyer cannot comply with the rules that would otherwise apply to proceedings before a particular tribunal under paragraph (ii), that lawyer shall provide timely notice, both to the tribunal and to opposing counsel, of the lawyer's intention not to comply and cite the conflict between the rules.**⁸

**Terry-Rogers' Proposed Rule 8.6 (cont).
[applies to transactional work]**

(b)(3) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

19

Terry-Rogers' Proposed Rule 8.6 (cont).

(c) Enforcement. In evaluating whether discipline is appropriate under this rule when the rules of a foreign jurisdiction or an international or foreign tribunal apply under Section (b), this jurisdiction may seek or rely on appropriate guidance from the relevant foreign or international regulatory authority, tribunal or institution, including translations, authoritative interpretations of the foreign rule, and any written findings or recommendations contained in orders, awards or judgments of such entities. In making any final determination, this jurisdiction may consider whether the imposition of discipline would result in grave injustice, be contrary to the reasonable and good faith expectations of the lawyer regarding the applicable rules, or be offensive to the public policy of this jurisdiction.

Proposed Rule 8.6's Choice of Law Provision for Transnational Transactional Matters

- We opted to keep the same rule in 8.6 (b)(3) as is found in ABA Model Rule 8.5(b)(2)
- We drafted two alternatives that permit all transactional clients and lawyers to agree to the governing rules (see Gillers; Legal Ethics Forum thread)
- We ultimately abandoned this approach under a cost-benefit analysis
- Some expressed “race to the bottom” concerns
- We weren't sure there was a great need in the transactional setting to have uniform rules for all counsel
- But...some of these ideas may be worth exploring further

21

Terry-Rogers' Proposed Rule 8.6 (cont).

- **ALTERNATIVE A]:** (b)(3): for any other conduct, unless all parties and their counsel agree otherwise, and such agreement is confirmed in writing, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.
- [ALTERNATIVE B]:** (b)(3): for any other conduct:
- (i) except as specified in 8.6(b)(3)(ii), the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.
 - (ii) if all parties and all counsel involved in the transaction agree in writing to follow standards developed by international bodies whose membership is open to the relevant bodies of at least all Members of the World Trade Organization, and if those standards and the applicable rules under Rule 8.6(b)(3)(i) do not directly conflict, then both apply. If those standards and the rules of the applicable jurisdiction under Rule 8.6(b)(3)(i) directly conflict, the standards that the parties have agreed to in writing apply.

To Read More About It:



U.S. State Ethics Rules, including choice of law rules

Links to U.S. state ethics rules,

<http://www.nobc.org/default.asp> (See Ethics link menu item at top)

Information about ABA Model Rule 8.5 Implementation,

<http://www.abanet.org/cpr/mjp/home.html>

Ethics Rules of CCBE Member & Observer States

<http://ccbe.ntc.be/index.php?id=107&L=0>

CCBE Deontology Committee:

http://www.ccbe.eu/index.php?id=94&id_comite=7&L=0

EU Directives,

http://www.ccbe.eu/index.php?id=94&id_comite=8&L=0

US/CCJ Discipline Cooperation Initiatives:

<http://www.abanet.org/cpr/gats/misc.html> (CCJ resolutions)

<http://www.abanet.org/cpr/regulation/home.html> (Data bank, ABA rules) ²³

GATS & Trade Agreements: <http://www.abanet.org/cpr/gats/home.html>

To Read More About It...By Laurel Terry

Global Legal Practice Resources Webpage:

<http://www.personal.psu.edu/faculty/l/s/lst3/globalprac.htm>

Links to Publications by Topic:

<http://www.personal.psu.edu/faculty/l/s/lst3/>



Presentations Page:

<http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm>

SSRN page: <http://ssrn.com/author=340745> [Laurel Terry]

See also <http://papers.ssrn.com/author=281268> [Catherine Rogers]

Appendix Items

25

Current ABA Model Rule 8.5(b)(1)

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 jurisdiction in which the tribunal sits,** unless the rules of the tribunal provide otherwise; and

26

Current ABA Model Rule 8.5(b)(2)

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: ...

(2) for any other conduct, ***the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction,*** the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

27

Variations in ABA Rule 8.5 Adoption



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STATE IMPLEMENTATION OF ABA MODEL RULE 8.5 (DISCIPLINARY AUTHORITY; CHOICE OF LAW)

Highest Court has adopted a rule identical to ABA Model Rule 8.5	Highest Court has adopted a rule similar to ABA Model Rule 8.5	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 8.5	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 8.5	States whose MJLP study committees have recommended adoption of a rule identical to ABA Model Rule 8.5	States whose MJLP study committees have recommended adoption of a rule similar to ABA Model Rule 8.5	States that have created committees to study ABA MJLP recommendations
(23)	(21)	(1)	(1)	(1)	(0)	(3)

28

Adoption Variations for 8.5, Cmt 7

The ABA reports that as of Nov. 9, 2009, 31 states had adopted ABA Comment 7 (AK, AR, CO, CT, DE, DC, GA+, ID, IL, IN, IA, KY, MD, ME, MI, MN, MO, NE, NH, NY, NC, OH, OK, PA, RI, SC, SD, UT, WA, WI)

American Bar Association
CPR Policy Implementation Committee

Variations of the ABA Model Rules of Professional Conduct Rule 8.5 Comment [7]

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Variations from ABA Model Rule Comment are noted. Based on list of states that have adopted revised Model Rule 8.5 from chart on [State Implementation of ABA Model Rule 8.5](#).

http://www.abanet.org/cpr/pic/8_5_cmt_7.pdf

The Old New York Rule

NY DR 1-105: If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be **the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however**, that if particular conduct clearly has its **predominant effect** in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

30

SRA Solicitors Code of Conduct **Rule 15: Overseas Practice (2009)**

Modification of these rules in relation to overseas practice

- (3) If this rule states that a rule or a provision of these rules does not apply to your overseas practice, you may disregard that rule or provision in relation to your overseas practice, but you must comply with any alternative provision which is substituted by this rule.
- (4) If compliance with any applicable provision of these rules would result in your breaching local law, you may disregard that provision to the extent necessary to comply with that local law.

Rule 15 has rule-by-rule choice of law provisions

31

Hong Kong Solicitors' Rule 1.06

PRACTICE OUTSIDE HONG KONG: A Hong Kong solicitor when practising as a Hong Kong solicitor outside Hong Kong remains bound by the general principles of professional conduct which apply to him as a Hong Kong solicitor.

Commentary

1. The principles and commentaries in this Guide apply to practice outside Hong Kong with any modification necessitated by local conditions.
2. In addition to the provisions of commentary 1, the Council has adopted as the basic code for solicitors practising outside Hong Kong the International Bar Association's International Code of Ethics (set out below) whenever the same are not inconsistent with this principle.
3. In the absence of an express application of local rules to the solicitor as a foreign lawyer, the solicitor should nevertheless respect the rules of conduct applied to local lawyers. Where the structure and sphere of activity of the local legal profession or professions differ substantially from those of Hong Kong solicitors, it may be inappropriate or impossible for a solicitor to comply in every particular with the rules of conduct applicable to the local profession or professions, or it may be doubtful which rules of conduct should be applied. In such circumstances, the solicitor should observe the standards of conduct applicable to the local lawyers to the extent this can be done without infringing the rules

EC [77 Services] Directive Art. 4

1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State...
2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

33

EC [77 Services] Directive Art. 4

4. A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity.

34

EC [Establishment] Directive 98/5

Art. 6(1): Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory

Art. 7(3): Without prejudice to the decision-making power of the competent authority in the host Member State, that authority shall cooperate throughout the disciplinary proceedings with the competent authority in the home Member State. In particular, the host Member State shall take the measures necessary to ensure that the competent authority in the home Member State can make submissions to the bodies responsible for hearing any appeal.

35

EC Country of Origin Principle

Originally in a draft of EC Directive
2006/123:

16(1): Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.



36

EXCERPTS FROM THE 1994 U.S. GATS SCHEDULE (and offer), GATS/SC/90

Modes of supply: 1) Cross-border supply; 2) Consumption abroad; 3) Commercial presence; 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
a) 1) Legal Services: practice as or through a qualified US lawyer	<p>For the following jurisdiction, the following commitments apply: in (all states)</p> <p>1) Services must be supplied by a natural person</p> <p>An in-state office must be maintained for licensure in: District of Columbia, Indiana (or an affiliate with an office and with other attorneys in the state), Michigan, Minnesota (or maintain individual residency in Minnesota), Mississippi, New Jersey, Ohio, South Dakota and Tennessee.</p>	<p>1) In-state or US residency is required for licensure in: Hawaii, Iowa, Kansas, Massachusetts, Michigan, Minnesota (or maintain an office in Minnesota), Mississippi, Nebraska, New Jersey, New Hampshire, Oklahoma, Rhode Island, South Dakota, Vermont, Virginia, Wyoming.</p>	

Note: a(1) Mode 2 was identical. Had an a(2) category for foreign legal consultant (FLC) rules