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# Introducing the “Double Deontology” Problem

## *The Intersection of Legal Ethics and Globalization: Choice of Law Issues*

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## Overview

- Is there a problem?
  - In theory?
  - In practice?
  
- Is there a solution?
  - Differing approaches to the issue
  - Is it better to have differing rules or no rule?
  - If some rule is better than no rule, how can one encourage the adoption of such a rule?

## The Theoretical Problem

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- Individual lawyers can be subject to multiple sets of ethics rules
- Many law firms have lawyers who are subject to different sets of ethics rules
- Many jurisdictions do not have a “choice of law” provision like ABA Model Rule 8.5(b)
- Because of competing values, it is not always possible to simply follow the “stricter rule”

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## Is this Problem Only Theoretical?

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- Some problems exist more in theory than in practice
- But there's increased interest in this topic
  - Internat'l Bar Association (IBA) programs
  - IBA Group Law Firms Committee
- Raise your hand if this is a problem you worry about or spend energy on

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## Options for Choice of Law Rules

- ABA Model Rule 8.5(b) Approach
- New York Version of Rule 8.5 (DR 1-105)
- Language in EU Directives 77/249 & 98/5
- EU “Country of Origin” Principle
- Allow law firms to establish a home jurisdiction & use that jurisdiction’s rules for all firm lawyers
- Clients select the governing ethics rules
- Different rules for arbitration, federal courts, etc.
- **Your ideas?** [Offer them during the discussion]

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## ABA Model Rule 8.5(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 jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (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.

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## The Former New York Rule

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.

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## 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.
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.

## EC [1998 Establishment] Directive

- 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.

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## 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.



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## Which is the Lesser of Two Evils?

- How important is uniformity for these rules?
- Which is better:
  - to practice in a jurisdiction without a rule?
  - to practice in two or more jurisdictions that have different choice of law rules?
- Note: ABA stressed the need for uniformity for Rule 8.5 but there's still variation



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## Variations in ABA Rule 8.5 Adoption



As of January 24, 2008  
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[http://www.abanet.org/cpr/mjp/quick-guide\\_8.5.pdf](http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf)

### 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 MJP study committees have recommended adoption of a rule identical to ABA Model Rule 8.5	States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 8.5	States that have created committees to study ABA MJP recommendations
(18)	(18)	(2)	(1)	(5)	(2)	(5)

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# How to Encourage Change

- Identify which jurisdictions have choice of law rules and which ones don't
- Publicize options for choice of law rules
- Make information publicly accessible
- Jurisdictions will implement differently *(cf. CCBE paper)*
- Is there any way to use the GATS process?
  - e.g. the "Additional commitments" column?
  - as part of the "transparency" required by any GATS "Disciplines"?



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

## How to Encourage Change – Part 2

- Identify substantive problem areas
  - *E.g.*, conflicts of interest; confidentiality, others?
- Conferences such as this will help
- Discuss and develop “best practices”?
- Our next speakers will focus on this topic



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

### **GATS and Trade Agreements:**

- The ABA GATS-Legal Services Webpage,  
<http://www.abanet.org/cpr/gats/home.html>
- International Bar Association, GATS Handbook,  
<http://www.ibanet.org/images/downloads/gats.pdf>

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