MEMORANDUM

TO: ABA 20/20 Ethics Commission

FROM: Laurel S. Terry
       Catherine A. Rogers

DATE: June 12, 2011

RE: Supplemental Comments Regarding Proposed Revisions to Model Rule 8.5

The January 18, 2011 “Issues Paper: Choice of Law in Cross-Border Practice” issued by the ABA Commission on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest included in it our October 1, 2010 proposal (updated Dec. 1, 2010) to revise Model Rule 8.5(b)(1).1 The Commission has now posted online the comments it received. These comments include a March 14, 2011 memorandum from Brian Toohey and Anne Marie Morris (the “Memo”), which suggests that the Commission not adopt our proposed amendment.2 These Supplemental Comments address some issues raised by the Memo.

I. Background

To briefly summarize our proposal, we recommend that the Commission revise the “fallback” provision of ABA Model Rule 8.5(b)(1) that applies when a U.S. licensed lawyer appears before an international tribunal that does not have its own code of ethics. Only a handful of public international tribunals and no international arbitration tribunals have a code of ethics. As a consequence, the fallback provision applies to representation before most international tribunals.

Under the current version of ABA Model Rule 8.5(b)(1), a U.S.-licensed lawyer is required to follow the rules of the jurisdiction in which the tribunal “sits” when that tribunal does not have its own code of ethics.3 Our proposal would change this fallback provision such that, when an international tribunal does not have its own ethical rules, the U.S.-licensed lawyer would be subject to U.S. ethical rules, rather than the rules of the jurisdiction in which the international tribunal sits.

1 See http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/20111801.authcheckdam.pdf.
3 Our original proposal contains other revisions, including suggested provisions that are necessary to distinguish representation before domestic as opposed to international tribunals, provisions to deal with attorneys who are licensed in more than one U.S. jurisdiction, and related explanatory comments and definitions. These Supplemental Comments address only the narrow issue of the fallback provision.
We do not disagree with some of the more general observations in the Memo. Ultimately, however, for the reasons set forth below, we believe that the Memo is predicated on erroneous factual and empirical assertions, which result in an inaccurate analysis regarding the effect of the current version of Model Rule 8.5 as applied to international tribunals. These Supplemental Comments seek to correct these factual and empirical premises.

II. Analysis of the Fallback Provision as Applied to International Tribunals

As set forth in more detail below, the Memo’s recommendation that the Commission retain the current version of the Rule 8.5 fallback provision is predicated on several inaccurate premises regarding the current ABA Model Rule, our proposal, and how both would apply to international tribunals and counsel appearing before them.

A. The Tribunals

As an initial matter, the Memo states that an international “tribunal does not function in a vacuum, and the social and ethical norms of the tribunal’s physical location likely influence the proceedings to some extent.” Even if at some level this assertion seems intuitive, it misunderstands the importance of the location of an international arbitral proceeding. In fact, the physical location where international arbitral proceedings are conducted is generally not important:

…Instead, with public international courts and tribunals, precisely the opposite is true. The physical location of most international tribunals is either a random choice produced through historical accident, negotiation and compromise, or a choice predicated on other non-substantive issues such as convenience. As a result, and in contrast to domestic courts, normally the location of an international tribunal is intentionally and systematically unrelated to the tribunal’s jurisdiction and procedures, or to the presumptive identity of the lawyers who appear before it.4

The only exception to the above description is when the international tribunal is either a foreign national court or an international criminal tribunal. Notably, the only examples specifically cited in the Memo were those of foreign courts or international criminal tribunals, such as including the ICTY and the Special Court of Sierra Leone, which generally have their own code of ethics.5 As a result, the fallback provision in Rule 8.5 is irrelevant to these tribunals. Relatedly, the caseload before international criminal

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5 See, e.g., Laurel S. Terry, Codes of Conduct for International Tribunals and Arbitration (March 27, 2009), available at http://www.personal.psu.edu/faculty/l/s/ls3/presentations%20for%20webpage/ASIL_Terry_Codes_International_Tribunals.pdf (indicating the ICTY and the Special Court for Sierra Leone have adopted codes of conduct for counsel appearing before it).
tribunals is miniscule (and many cases do not involve U.S.-licensed attorneys) in comparison to the number of international arbitration cases.\(^6\)

The detachment of decisionmakers and procedures from the local jurisdiction is most often an intentional feature in the design of an international tribunal. For example, the primary reasons why the U.S.-Iran Claims Tribunal was located in The Hague because of the ready availability of the Peace Palace, financial support from the Dutch government, and The Hague’s history of neutrality.\(^7\) Dutch court procedures, ethical rules and social norms were not part of the calculus and remain largely irrelevant to the Tribunal’s its internal proceedings.

Relatedly, the Memo hypothesizes that “the ethical rules of the local jurisdiction where the tribunal is seated seem more likely to mesh with the norms expected from the judge or arbitrator.”\(^8\) That is incorrect. Instead, international tribunals are usually intentionally composed of multiple decisionmakers from a variety of national legal cultures, and often do not include an arbitrator or judge from the jurisdiction where the tribunal sits. Again, with reference to the Iran-U.S. Claims Tribunal, arbitrators are virtually never, and then only incidentally, Dutch. Arbitrators are most often from the United States, Iran, and other jurisdictions. They generally know little or nothing about Dutch ethical rules, and Dutch substantive or procedural law has little relevance to their internal proceedings.\(^9\) The same is generally true of most international arbitration tribunals, which again constitute the vast majority of international tribunals.

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\(^8\) Notably, this fallback position is not generally an issue in foreign national courts because they have their own ethical rules and therefore if a U.S. attorney were to appear before a foreign court, the attorney would be required under Rule 8.5 (b)(1) to abide by those rules.

\(^9\) There is some debate and disagreement regarding the effect, if any, that Dutch law has on awards rendered by the Tribunal. See David D. Caron, The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution, 84 AM. J. INT’L L. 104, 106-07 (1990) (summarizing different positions). Even those espousing the position that the courts of The Netherlands and Dutch law have some role, however, regard that role as essentially limited to the conventional role of law and courts in an arbitral seat, which is to review challenges to set aside an award. See id. at 110, 114 & 143.
More fundamentally, anecdotal research confirms that virtually nobody (not international arbitrators, not counsel who regularly appear before international tribunals, and not even foreign bar authorities) understands or expects that ethical rules in an international arbitration are to be found in local ethical rules in the arbitral seat. To contrary, in many cases, counsel or arbitrators will not be aware of, and often not even be able to read (in their original language) those rules or the sources that provide context and interpretation of those sources.

B. Counsel

As noted above, informal polling of U.S. counsel who practice before international tribunals indicates that they are not aware that, under the current version of Model Rule 8.5, they are bound by the ethical rules of a foreign jurisdiction if a tribunal is seated there. To the contrary, anecdotal research conducted by Professor Rogers suggests that attorneys are often surprised and dismayed to discover the effect of Model Rule 8.5.

This response is understandable in light of the fact that most foreign jurisdictions that host international arbitrations have choice-of-law rules (either in the rules that regulate the local legal profession or in local arbitration laws) that exempt foreign attorneys appearing as counsel in international arbitrations from being locally licensed or having to abide by local ethical rules. The reason for these exemptions is that foreign jurisdictions recognize that their local ethical rules are largely irrelevant to international arbitrations involving foreign parties and foreign counsel. As a result, Model Rule 8.5 currently requires that U.S. attorneys abide by unfamiliar foreign ethical rules that are not, even under the rules of those jurisdictions, considered applicable to U.S. attorneys.

The Memo also hypothesizes, again incorrectly, that “Non-US attorneys will more likely abide by the rules of the jurisdiction where the tribunal sits, than by US rules.” Professor Rogers has conducted extensive research on this issue and has found that precisely the opposite is true. To our knowledge, no other foreign jurisdiction has a choice-of-law rule comparable to the fallback provision in Model Rule 8.5. Accordingly, no other jurisdiction requires that their locally licensed attorneys be subject to the foreign ethical rules of a jurisdiction where an international arbitral tribunal sits. Instead, their attorneys continue to be subject to their own local rules, consistent with the change that we propose for Model Rule 8.5.

10 This analysis is based on extensive research undertaken for the drafting of a forthcoming book by Professor Rogers, entitled ETHICS IN INTERNATIONAL ARBITRATION (forthcoming 2012, Oxford University Press). Although the relevant chapters are still in draft, they can be made available upon request.

11 The fact that most jurisdictions do not even have the equivalent of Model Rule 8.5(1)(b) means that even when an international tribunal has its own ethical rules, most foreign attorneys remain technically bound by their local rules. See Rogers, supra note 4, at 1079 (noting that, when appearing before the ICTY, some foreign attorneys act as if they are still bound by their home ethical rules and not the ICTY’s code of ethics).
The Memo is correct that local counsel are sometimes retained in connection with international arbitrations. Retention of local counsel is, however, not the case in a very substantial number of international arbitrations. Moreover, when they are retained, the role of local counsel is generally limited to assisting with ancillary proceedings in local courts and often does not include representation in the primary arbitral proceedings. When local counsel are substantively involved in the primary proceedings, it is typically because the governing law in the contract is also that of the arbitral seat. Indeed, the whole point of international arbitration is to insulate decisions from foreign national courts. Accordingly, the Memo is also inaccurate in suggesting that the (occasional) participation of local counsel bodes in favor of application of the ethical rules of the jurisdiction where the international tribunal sits.

III. Practical Problems Applying the Fallback Provision

Requiring U.S. attorneys to abide by foreign ethical rules also raises a number of practical problems. Many of these problems have, to date, remained “under the radar” because there has been little or no effort to seek discipline against U.S. attorneys based on their conduct before international tribunals. We believe, however, that given the “proliferation” of international tribunals and the rising caseloads before international tribunals, such challenges will eventually reach U.S. disciplinary authorities and/or U.S. courts. More fundamentally, even in the absence of actual cases, it is essential both for the protection of U.S. attorneys and their clients that the applicable rules be rational and their application be clear. For the reasons set forth below, we believe that the fallback provision in the current version of Model Rule 8.5 satisfies neither criterion.

First, while the current fallback provision will make foreign ethical rules applicable to U.S. attorney conduct, even the basic text of those rules may not be available in an official English translation and, as noted above, attorneys in an international arbitration do not necessarily speak the local language. Additional materials, beyond the basic text of local ethical rules (such as interpretative rulings, commentary and decisions) are virtually never available in translation to foreign counsel. Moreover, U.S. state bar authorities need to be able to understand the rules to which attorneys under their authority are subject, and to able to apply those rules in a fair and effective manner. U.S. bar authorities, however, are even less likely to be able to comprehend foreign ethical rules and related sources in their original language. As Professor Rogers has explained:

12 See Gary B. Born, International Commercial Arbitration 73 (2009) (mutual distrust between parties usually results in “an agreement to arbitrate … in a neutral forum, pursuant to neutral proceedings”).


14 Notably, U.S. state bar authorities are unlikely to receive a referral from the foreign bar since, as noted above, most foreign jurisdictions do not consider their local ethical rules applicable to U.S. attorneys appearing in international arbitrations.
In the United States, even with respect to purely local practice, there are multiple, often overlapping or inconsistent bodies of rules that purport to regulate particular attorney conduct. When the rules are foreign, written in a foreign language, interpreted through foreign precedents and potentially introduced through competing experts, the room for confusion and uncertainty may be considerable.\textsuperscript{15}

At least one drafter of Rule 8.5 expressed apprehension about the due process implications of ambiguities regarding which rules apply in purely domestic settings.\textsuperscript{16} When Model Rule 8.5 requires the application of foreign ethics rules that have no nexus to the proceedings before an international tribunal, the potential due process implications are much more serious.

Despite these very serious problems with the current approach of Rule 8.5, the Memo suggests that the proposed change to Rule 8.5 has practical disadvantages. Specifically, the Memo posits that application of U.S. ethical rules to practice before international tribunals will “potentially place” U.S. attorneys at a “disadvantage” because U.S. ethical rules are “more stringent” than the rules of many other jurisdictions. Assuming for the moment that “disadvantage” is an appropriate basis for the Commission to act, in many important respects, the precise opposite is true.

U.S. attorneys are ethically permitted to engage in a host of activities—from many types of advertising and solicitation, to accepting contingency fees, to preparing witnesses—that are strictly forbidden under most ethical rules applicable in foreign court proceedings. More importantly, in those areas in which foreign rules are more lax, their application may visit an unfair surprise on clients. For example, a U.S. client may have settled expectations about the confidentiality obligations of its attorney. Many foreign ethical rules, however, are less protective of confidential communications. Perhaps most troubling, many jurisdictions exclude in-house counsel communications altogether from the purview of attorney confidentiality obligations.\textsuperscript{17} It is true that U.S. conflict-of-interest rules are considered stricter than those of many foreign jurisdictions.\textsuperscript{18} However, an American client’s expectations regarding conflicts of interest is likely to be seriously disrupted by application of foreign conflict-of-interest standards, especially if foreign conflict rules are selected because they correspond to the location of where the tribunal

\textsuperscript{15} See Rogers, \textit{supra} note 4, at 1053.


sits rather than because of a substantive connection with one of the parties or the dispute.\footnote{19}

As a final point regarding the practicality of applying Model Rule 8.5, we note that our proposal is consistent with the prevailing interpretation of the current version of New York’s choice-of-law rule.\footnote{20} Many U.S.-licensed lawyers who appear before international tribunals are New York-licensed lawyers. Uncertainty and conflicts can arise for New York attorneys who appear before international tribunals under the current New York rule because of the absence of an international code of ethics. In working through those conflicts, however, at least New York attorneys have the benefit of starting from a baseline of ethical suppositions and rules with which they are familiar.

IV. Conclusion

In sum, the current version of Model Rule 8.5 fallback provision adds uncertainty and confusion to the already complex problems involved in regulation of U.S. attorneys appearing before international tribunals. We therefore urge the Commission to modify the fallback provision in Model Rule 8.5 consistent with our proposed amendments.

\footnote{19} We are aware that there are pending before the Commission proposals to reform current imputation rules under U.S. conflict-of-interest rules. We take no position regarding those proposed amendments. To the extent, however, that there are perceived problems with U.S. conflict-of-interest rules being overly strict, we do not believe the best solution is to adopt a broad-brush choice-of-law rule that subjects U.S. attorneys and their clients to a spectrum of unknown, and in some cases highly objectionable, foreign conflict-of-interest rules.

\footnote{20} NY ST RPC Rule 8.5(b)(1), which contains the fallback provision, is expressly limited to “courts,” while other rules, such as NY Rule 3.3, apply to “tribunals.” Accordingly, instead of the fallback provision in NY Rule 8.5(b)(1), New York Rule 8.5(b)(2) determines which ethical rules apply when an attorney appears before an international arbitral tribunal. For attorneys licensed only in New York, New York rules apply. For dual licensed attorneys, the Rule provides 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.” See \url{http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/RulesofProfessionalConductasamended041511.pdf}