COMMENTS
Conflicts of Interest, Uniformity and Choice of Law Working Group Issues Paper

"Choice of Law in Cross-Border Practice"

AMERICAN BAR ASSOCIATION

Standing Committee on Client Protection
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To: Commission on Ethics 20/20

From: Daniel J. Crothers, Chair
Standing Committee on Client Protection

Re: Issues Paper: Choice of Law in Cross Border Practice

Date: March 15, 2011

The Commission on Ethics 20/20 has asked for a review of ethics issues that arise as a result of the increase in practice across state borders. The Committee's responses primarily focus on issues related to the protection of the clients' interests.

Regarding Fact pattern #1, the Committee recognizes that a client who seeks legal services from a lawyer not licensed in the client's home state assumes a certain amount of risk; however, it is the responsibility of lawyers to adhere to rules of professional conduct. While an analysis under Model Rule 8.5 is instructive to lawyers and disciplinary authorities, it should not affect the client's rights. A client should be able to file a disciplinary complaint or make a claim for reimbursement in either jurisdiction. It then becomes the responsibility of the disciplinary authorities and client protection funds to determine the applicability of Model Rule 8.5.

The issues presented in fact pattern #2 are complex and often controversial. It is the Committee's position that the best interests of the client should always be a lawyer's primary concern before an analysis of choice of law under Model Rule 8.5 can begin. In this fact pattern, choice of law cannot be decided without an examination of imputed disqualification under the competing jurisdictions' Rule 1.10. It is not the Committee's intention to re-open the debate on Model Rule 1.10. However, when a law firm has offices in more than one jurisdiction, with differing versions of Rule 1.10, or other rules of professional conduct affecting client interests, the firm should focus on the best interests of the clients while making business decisions that are reasonably beneficial to the firm. While it is arguably consistent with Model Rule 8.5 to allow a lawyer with a conflict to move from one firm to another without client consent, when faced with a choice of law question, the lawyer's duty to the client should be the lawyer's priority.

Accordingly, in fact pattern #2, a reading of Model Rule 8.5 alone may allow the lawyer to move firms without client consent, but the best interests of the client would either require the consent of the lateral lawyer's client or withdrawal by the hiring firm.

Likewise in fact pattern # 3, if the firm's lawyers are making decisions in the best interests of clients: a firm's lawyer in one jurisdiction would not take on representation in opposition to another firm client without both clients' consent, regardless of whether a choice of law question is involved.

The Committee is particularly concerned with the concept of contracting with a client for governing rules of professional conduct. The second and third principles of the Commission on Ethics 20/20 are to "preserve core professional values of the American Legal profession" and maintain "a strong, independent and self-regulating profession." The Committee questions whether core professional values of the legal profession would allow a lawyer to contract with a client regarding which professional conduct rules would apply to the lawyer's conduct. That decision rests solely with the highest court of appellate jurisdiction in a state, the body responsible for the regulation of the practice of law.

Assuming without deciding that a lawyer can enter into such an agreement, and that the client has been properly informed of her rights and advised to consult independent counsel before moving forward, it is the Committee's position that it would be reasonable for the lawyers in fact patterns #2 and #3 to rely on those agreements in deciding applicable rules of conduct *only if* there is a reasonable basis to establish "predominant effect" in the underlying representation, as is required by Rule 8.5(b)(2).

The Committee notes that Rule 10 of the ABA *Model Rules for Lawyers' Funds for Client Protection* provide a method for determining payment to clients when there is a choice of law issue. The factors for consideration include whether a client contracted for or waived certain rights. Accordingly, the Commission could consider a comment that requires any choice of law provisions to include the caveat that such agreements may affect other rights of the client, as the ability to claim a loss to a particular jurisdiction's lawyers' fund for client protection.

Finally, making a reasonable assessment of the "predominant effect", as required by Rule 8.5(b)(2), may not always be clear to the lawyer. The Committee suggests the Restatement approach would be instructive. The *Restatement (Third) of the Law Governing Lawyers*, includes a number of factors that could be considered when assessing the applicable jurisdiction's rules: the nature of the charged offense; the nature of the lawyer's work; the impact of the questioned conduct on the interests of third persons and on public institutions such as tribunals, administrative agencies, or legislative bodies; the residence and place of business of any client or third person whose interests are materially affected by the lawyer's actions; the place where the affected conduct occurred; and the nature of the regulatory interest reflected in the different provisions in question. The Committee suggests incorporating specific factors into the comments for Model Rule 8.5, similar to those listed in the Restatement.

The Committee also suggests amending Model Rule 8.5 to include a provision that allows the application of the lawyer's home jurisdiction's rules when the determination of "predominant effect" is not possible. Such an amendment would also be in the spirit of Model Rule 8.5(b)(2) and Comments [5]and [6].

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MEMORANDUM

TO: Ms. Robin Roy, American Bar Association

FROM: Adam J. Sigman, Chairman, Ethics and Professionalism Committee, ABA-RPTE (RP-Side)

Pat Char, Chairwoman, Ethics and Professionalism Committee, ABA-RPTE (TE-Side)

RE: **ABA Commission on Ethics 20/20; Issues Paper: Choices of Law in Cross Border Practice**

CC: Ms. Susan G. Talley
Ms. Pat Char

DATE: March 30, 2011

As requested, the following list combines the comments and concerns raised by the ABA-RPTE Ethics and Professionalism Committees (both the RP and TE sides).

Our group recognizes that many instances of cross-border practice occur every day in our practice area. As mentioned in the paper (copy attached), Rule 8.5 addresses some of these, while missing others. We believe that Rule 8.5 might be the most offended (casually) rule in the books.

For example, if one of us were fortunate enough to have a client that wanted to purchase a swath of REO properties from a particular bank or servicer (at a discount) and the properties spanned several states, we cannot definitively answer where the predominant effect of our counsel "occurs" if the client is based in our home state and we engage (truly engage) local counsel in each of the other states/jurisdictions. In many respects, our counsel occurs where the client "is" or "goes" (which is sometimes out of our control). Most often, the client (and its office and operation) remains in our home state/jurisdiction.

The paper raises 2 chief issues based on our group's discussion. The first is the UPL issue that arises out of cross border practices.

In response to this paper's first issue, we believe the Commission should be asked whether the ABA wants to revise Rule 8.5 to reduce or even halt cross-border practices entirely or find a way re-draft Rule 8.5 to better describe a safe harbor for well meaning attorneys in 1 jurisdiction who have a client that wants to transact in several jurisdictions. We vote for the latter.

As an example, the ABA could craft an addendum to 8.5 to provide a safe-harbor for well meaning attorneys whose clients push the borders. In this regard, please note we've specifically excluded attorney advertising in another jurisdiction (a separate issue entirely that we did not discuss nor address here). Instead, we are referring to a solution for the hypothetical above - with the multi-state transaction client. We envisioned a modified Rule 8.5 that provides a safe-harbor for a lawyer licensed in 1 jurisdiction who (1) follows the adopted rules in his/her home state/jurisdiction, and (2) familiarizes him/herself and follows, reasonably, the adopted rules in each transaction state/jurisdiction, and (3) engages local counsel in each transaction state. As an alternative or a supplement, Rule 8.5 could add a quasi-pro-hac-vice process (similar to litigation practices).

The second issue is whether the actions of the attorney who crosses the border are subject to the disciplinary authority of the cross-border state, and, if so, which state's ethics rules will apply. We think the proposed/revised rule has taken the best possible approach, i.e. that the attorney's conduct can be subject to discipline in the cross-border state. With respect to which state's rules will apply, we believe that each state is going to apply its own rules and that the attorney may be subject to discipline in both his/her home state/jurisdiction as well as the cross-border state/jurisdiction. However, we think that the ABA should support a position that the cross-border state should take into account (as a factor) the attorney's reasonable belief as to whether a UPL violation occurred (provided such a reasonable belief existed).

The more difficult question involves attorneys (a) crossing the border and performing work with an impact in the non-home state, or (b) performing work that is intended to have legal consequences primarily in the jurisdiction that is not the home attorney’s state. Of the two approaches suggested that are relevant to 8.5(b)(2) – the New York proposal and the Restatement – the New York proposal is closest to the existing rule, with the primary difference being that it is more clearly written. Both the existing rule and the New York proposal focus on the lawyer’s “reasonable” belief about the predominant effect of the lawyer’s conduct. After reviewing the presumption and factors described in the Restatement approach, it does not seem that a significant change from the existing rule to something like the Restatement’s approach would materially improve the rule. Both approaches permit consideration of numerous different circumstances that may be material to what rule applies. Because the facts to which the rule may be applicable can vary significantly, an effort to be more specific may not improve the rule and could leave a hole where the rule should be applied. This rule, like every other statute, regulation, and rule, is difficult to apply in some circumstances and may be open to varied interpretation. But, that sort of flexibility is necessary and desirable.

Please do not hesitate to contact us with any question or concern. As a minor editorialization, I would like to add that preparing comments to this paper was very difficult. Both due to the breadth of the issues raised in applying and modifying Rule 8.5, and also in reaching a consensus among the participants in my working group respecting the comments.

If you have any questions or concerns regarding this memorandum, please do not hesitate to contact me.

Respectfully submitted,

Adam J. Sigman

Task Force on International
Trade in Legal Services
AMERICAN BAR ASSOCIATION
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Defending Liberty
Pursuing Justice

October 3, 2011

Ms. Jamie Gorelick and Mr. Michael Traynor
Co-Chairs
ABA Commission on Ethics 20/20

Via email: ethics2020@americanbar.org

Dear Ms. Gorelick and Mr. Traynor:

The ABA Task Force on International Trade in Legal Services (ITILS) is writing to request that the ABA Commission on Ethics 20/20 reconsider its position related to Rule 8.5(b)(1)'s choice of law "fallback provision" in situations involving international and foreign tribunals, including international arbitral tribunals. ITILS believes that it is appropriate for this issue to receive a more thorough airing than it is has to date and that there is more interest in this issue than the public response might suggest.1

ITILS has not yet taken an official position on the 8.5(b)(1) international tribunal fallback provision, but hopes to do so in the future. In the meantime, we understand that because of the schedule of the Commission's in-person meetings, it might be useful for ITILS to provide some preliminary feedback on this issue. Accordingly, we are writing to advise the Commission that based on discussion of this issue at our August 7 and September 22, 2011 meetings, there is significant (albeit not uniform) support within ITILS for modifying the "fallback provision" in Rule 8.5(b)(1) as it applies to U.S.-licensed lawyers appearing before foreign and international tribunals. The current fallback rule – the status quo – states that U.S. lawyers who appear before a foreign or international tribunal must comply with the ethics rules of the [foreign] jurisdiction in which the tribunal sits unless the tribunal's rules specify otherwise. Those individuals who have signed the attached page are among those who believe that the status quo in Rule 8.5(b)(1) is problematic in the international setting and should be changed. Because ITILS has not yet formed an official position on this issue, we are signing this letter in our individual capacities.

One of the rationales for the Commission's preliminary determination to leave Rule 8.5(b)(1) untouched was the Commission's view that the ABA should work with others to encourage international tribunals to develop rules that would apply to all advocates appearing before them.

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1 To date, the Commission has received two comments in support of changing the "fallback" provision of Rule 8.5(b)(1) and one comment in opposition to this idea. In October 2010, Professors Terry and Rogers presented a proposal for change to the Commission. The Commission referenced this proposal in its January 18, 2011 "Issues Paper: Choice of Law in Cross-Border Practice" and requested comments. The Commission received one comment in support of this proposal from Gary Born and one comment in opposition to this proposal. (The comment in opposition was jointly submitted by from Brian Toohey and Anne Marie Morris.) These Comments are available at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rule_8_5_comments.authcheckdam.pdf

ITILS and the undersigned individuals wholeheartedly agree that this is an appropriate and worthwhile goal. We will support those efforts. We also agree that if these efforts are successful, the problems addressed in this letter will disappear because U.S.-licensed lawyers will not need to use the "fallback" choice of law provision found in Rule 8.5(b)(1).

Although such efforts may ultimately be successful, until they are, the ***status quo of the current rule*** puts U.S. lawyers in a problematic situation. We think it is unacceptable to ask U.S. lawyers to wait years and perhaps decades for a resolution of this untenable situation. (The current situation dates from 2003, when the MJP Commission modified Comment 7 to Rule 8.5 to make it applicable to U.S. lawyers engaged in transnational practice. Prior to 2003, Rule 8.5(b)(1) did not apply to such lawyers.) ITILS urges the Commission to reconsider this issue and the undersigned urge the Commission to revise the fallback provision in Rule 8.5(b)(1) as applied to international tribunals. This action does not preclude the Commission from encouraging other ABA entities to work with international partners to ensure that international tribunals adopt rules for lawyers appearing before them.

The undersigned believe that a limited change to Rule 8.5(b)(1)'s fallback provision would bring the rule in line with the expectations of U.S. lawyers who practice before international and foreign tribunals. In our experience, most U.S. lawyers who appear before international tribunals do not routinely research and attempt to comply with the ethics rules of the foreign jurisdiction in which the international tribunal sits. In many cases, the foreign ethics rules and law of lawyering may not be available in English and may not have anything at all to do with the dispute. Indeed the tribunal's location might have been selected precisely because it has *no connection* to the dispute. (The international situation is different than the domestic situation in which venue rules require some connection between the dispute and the jurisdiction in which the tribunal sits.)

In addition to bringing the rule in line with the expectations of U.S. lawyers, we believe that changing the fallback provision would be fair and appropriate. We are unaware of any other foreign jurisdiction that has a choice of law rule that is comparable to Rule 8.5(b)(1). Thus, having the current fallback rule does not ensure that all advocates appearing before an international tribunal use the same rules. Nor is such a rule necessary in order to protect the interests of the foreign or international tribunal or the foreign jurisdiction in which it sits. The change we recommend would still require a U.S. lawyer to follow rules of conduct explicitly set forth by a tribunal, the entity creating that tribunal, or the foreign jurisdiction in which the tribunal sits. These entities have the power to exercise control over U.S. licensed lawyers. We simply ask that where these entities have chosen ***not*** to exercise that power – which is a common situation – the fallback provision in the ABA Model Rules of Conduct should specify that U.S. lawyers are subject to U.S. rules of conduct not foreign rules.

Some may suggest that the status quo in Rule 8.5(b)(1) is acceptable because lawyers practicing before international tribunals have not been subject to discipline for failure to comply with foreign ethics rules. We suggest that the lack of discipline cases is not an appropriate measure of whether the status quo is acceptable. The mere existence of the rule means that responsible and conscientious lawyers will undertake efforts to comply with it. If the rule is burdensome and expensive to comply with, then some or all of these costs may be passed on to clients. Thus, if

the Commission agrees that the current fallback rule is unnecessary and inappropriate in the international tribunal setting, the lack of discipline cases is not a sufficient justification for leaving the status quo as is.

We understand that the Commission may be hesitant to adopt the Terry-Rogers' request to change the black letter of Rule 8.5(b)(1). The undersigned write in support of the ***concept*** of changing the current fallback provision and are not wedded to any particular language. We recognize that the Commission might find it sufficient to change Comment [7] to Rule 8.5 along the lines indicated on the enclosed document.

Sincerely yours,

Glenn P. Hendrix
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American Bar Association
Commission on Ethics 20/20
Comments on Issue Paper Regarding Choice of Law in Cross-Border Practice

Submitted by:

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Dated: March 15, 2011

Attorneys' Liability Assurance Society, Inc., A Risk Retention Group (ALAS) submits the following comments on the Commission's Issue Paper Regarding Choice of Law in Cross-Border Practice (Issue Paper).

I. Introduction

Founded in 1987, ALAS is a mutual insurance company that insures 233 major law firms, including over 58,000 lawyers in 49 states, the District of Columbia, and 26 foreign countries, and is the leading provider of professional liability insurance for large law firms in the United States. Lawyers from ALAS were actively involved in the American Law Institute's development of the *Restatement Third, The Law Governing Lawyers* and in the American Bar Association's 2002 revision of the Model Rules of Professional Conduct, and they are involved with other professional and bar associations that have defined the ethical and professional duties of lawyers. Among other services, ALAS provides its insured lawyers with extensive loss prevention advice. ALAS also actively monitors the defense of professional liability claims asserted against its insured firms and lawyers. By virtue of the services it renders, ALAS has a unique understanding of problems confronting law firms today.

As the Issue Paper notes, professional conduct rules vary both within the United States and internationally. And, as the Fact Patterns included in the Issue Paper demonstrate, Model Rule 8.5 may not adequately inform lawyers on which set of professional conduct rules apply in engagements that involve multiple jurisdictions. Accordingly, ALAS submits the following observations regarding the three possible revisions to Model Rule 8.5 discussed in the Issue Paper.

II. Proposal by the Association of the Bar of the City of New York Committee on Professional Responsibility.

The Association of the Bar of the City of New York Committee on Professional Responsibility (ABCNY Committee) issued an extensive Report on Conflicts of Interest in Multi-Jurisdictional Practice in March 2010. In that Report, the ABCNY Committee proposed changes to New York Rules of Professional Conduct 8.5 and 1.10. ALAS currently takes no position on the precise formulations of these proposed changes, but notes that the ABCNY Committee's approach presents a sensible solution to many of the quandaries lawyers and law firms face when trying to determine which set of sometimes conflicting professional conduct rules apply in cross-border representations. In particular, the ABCNY Committee's approach to imputation in Rule 1.10 may clarify the application of Rule 8.5 in many circumstances.

ALAS also notes that it may be prudent for the Commission to consider harmonizing any proposed change to Rule 1.10 designed to deal specifically with cross-border practice issues with broader efforts to address conflicts of interest. *See, e.g.*, Creamer, "Expanding Screening Further," The Professional Lawyer, Volume 20, Issue 3 (2010) (advocating proposed changes to Model Rule 1.10 designed to address conflicts of interest in general that were first published over 10 years ago by the Section of Business Law's Ad Hoc Committee on Ethics 2000). This would be consistent with the Commission's charge, as stated in Section C of its Preliminary Issues Outline, to examine the conflicts of interest rules in light of law firm growth and the globalization of the legal practice, including studying "the utility and ongoing feasibility of imputed disqualification rules such as Model Rule 1.10."

III. Proposal by Professors Laurel Terry and Catherine Rogers.

ALAS does not have sufficient information regarding the issues raised by Professors Terry and Rogers regarding international tribunals to make any substantive comment on their proposed revisions to Model Rule 8.5.

IV. Adoption of the Restatement Approach.

ALAS does not believe that the Commission should consider revising Rule 8.5 or its comments to reflect the choice of law approach taken by the *Restatement Third of the Law Governing Lawyers.* The factors outlined in Section 5, cmt. *h* of the *Restatement* may be relevant to a theoretical choice of law analysis, but they do not resolve the ambiguities demonstrated by the Fact Patterns in the Issue Paper.

V. Designating the Governing Professional Conduct Rules by Contract.

Clients and lawyers should be able to agree that a designated jurisdiction's professional conduct rules regarding conflicts of interest will govern their relationship. *See* Fact Pattern #4 of

the Issue Paper. Such an agreement contained in the lawyer's engagement letter (or similar communication) could eliminate much of the choice of law uncertainty for clients and lawyers pertaining to cross-border representations. The extent of the information and explanation that a lawyer should communicate to the client on this issue may depend on a number of factors. At a minimum, however, a client should be able to freely contract for a specific jurisdiction's conflict of interest rules when the client is experienced in legal matters generally, an experienced user of the legal services involved, or independently represented, as by in-house counsel.

VI. Conclusion

ALAS respectfully submits the foregoing for the Commission's consideration.

Dear Sirs/Mesdames:

I am writing in connection with 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. In particular, I am writing to strongly endorse the proposed amendment submitted by Professors Laurel Terry and Catherine Rogers to revise the "fallback provision" in Model Rule 8.5(b)(1) so that, when an international tribunal does not have an ethical code of its own, U.S. ethical rules apply instead of the rules of the jurisdiction where the tribunal sits.

In my view, the proposed revision to Rule 8.5(b)(1) is a matter of very substantial importance to U.S. lawyers engaged in international practice, in particular international commercial and investment arbitration. I make this observation on the basis of extensive personal experience in international arbitration and other forms of international dispute resolution. That experience includes having participated in some 550 international arbitrations as counsel, almost all seated outside the United States, and having sat as arbitrator in some 125 international arbitrations. I have also written extensively on international arbitration, including on ethical issues arising in international arbitral proceedings. My biographic information can be found at: http://www.wilmerhale.com/gary_born/.

Based on my experience, I strongly believe that Rule 8.5's current default rule -- which is to apply the ethical rules of the jurisdiction in which an international arbitral tribunal sits -- is badly flawed and not reflective of the expectations of participants, including particularly U.S. lawyers. Indeed, U.S. lawyers very frequently participate in arbitral (and mediation/conciliation) proceedings abroad without any idea of what local ethical rules require (and, often, no realistic ability to determine the content of these rules). Rather, the expectation of all participants in international arbitral proceedings is that a lawyer's own home country's ethical rules will govern his or her conduct in those proceedings. This approach also comports with the expectations of clients who engage U.S.-qualified lawyers.

For these reasons, I strongly urge the Commission to modify the fallback provision in Model Rule 8.5 consistent with the amendments proposed by Professors Terry and Rogers.

Gary Born

Gary B. Born | Wilmer Cutler Pickering Hale and Dorr LLP

Mark A. Dubois

Interesting problem, not easily solved as different states have different choice of laws regimes. As with some of the other things you have been working on, the problem is that when you try to create a single rule for conduct crossing state and national borders, you inevitably get very complex very quickly. Perhaps the simplest solution would be: "(b) For any other conduct, the applicable law to be applied shall be in accordance with the choice of laws jurisprudence of this state."

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March 14, 2011

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Re: Issues Paper: Choice of Law in Cross-Border Practice

I would like to respond to the Commission's request for feedback regarding the first fact pattern listed in the issues paper entitled "Virtual Law Practices" and whether a portion of 8.5(b)(2) should be retained or modified. I will speak from my experience as a solo practitioner who has operated a completely web-based virtual law office pertaining to North Carolina law for going on six years now. I will also speak from my experience as the co-founder of a software as a service application that provides other attorneys from solos to smaller firms with the ability to deliver unbundled legal services online. In this role and as a practitioner myself, I have worked with many attorneys who are engaged in different forms of virtual law practice where the first fact pattern is a regular occurrence.

Several of the other fact patterns mentioned in this issues paper also may relate to virtual law practice, both those operated by solos and by larger, multijurisdictional firms. I am in the process of writing a more detailed paper regarding the implications of virtual law firms that are cross-border and involve international law. This more complex form of virtual law practice does need to be addressed in the comments to 8.5 and runs into some of the same issues that are brought up by Professors Terry and Rogers in their excellent analysis and proposal that follows the Commission's paper. The use of the virtual law firm in outsourcing legal services overseas and working with non-lawyers in the use of the technology to deliver the legal services are obvious issues that are hinted at in almost all of the fact patterns. However, these issues involve the confidentiality and security of client data, which should be addressed separately outside of Rule 8.5. Maybe a note to this effect about the issues related to multijurisdictional virtual firms could be integrated into the comments for 8.5 along with Professors Terry and Rogers' proposed international tribune comments.

I will limit myself in this response to the specific request for feedback on the first fact pattern. I do not believe that any modification to the second sentence of Model Rule 8.5(b)(2) is necessary. Some clarification of the process of setting up a virtual law office and then how the legal services are delivered online may be useful. A virtual law office provides legal services pertaining only to the laws of the state(s) in which the attorney is licensed to practice law. When setting up a virtual law office, the attorney creates a website like any other law firm would; the only difference is the addition of the secure client portal where the prospective client and existing clients will register for assistance. The virtual law office website states throughout where the attorney is licensed to practice

law. The terms and conditions or disclaimers custom on these sites explains again where the attorney is licensed to practice law. This is no different than a traditional law firm website. When the prospective client registers to request legal services from the attorney, he or she must scroll through a clickwrap agreement and accept it before proceeding. A clickwrap agreement is the common method of clicking on a button on a website to accept the terms or user agreement associated with the use of that site or the online software application. You may be familiar with clickwrap agreements from registering for online banking or signing up for profiles on social media sites such as Facebook or LinkedIn, or have encountered it before purchasing items online with a credit card. The clickwrap on the virtual law office website yet again reminds the prospective client of the jurisdiction of the attorney. For further reassurance, the attorney may have the online client sign a traditional or digital engagement agreement that provides notice of which state's laws will apply should there be any dispute.

In addition, some client portals have jurisdiction checks so that in order to register, the prospective client must provide their address. For example, with the software application that I use, if a prospective client is not physically located in the state where I am licensed, a red flag notice in the form of a reminder box is shown to the prospective client online, reminding them that I am only licensed to practice law in North Carolina. On my end, I am also provided with a red flag notice that this prospective client may have an out of state legal matter that I cannot handle.

With all of these safe-guards in place online, it is difficult to perceive how an attorney with a virtual law office would have any confusion about where the predominant effect of his or her conduct would occur. The answer would be: whichever state's laws were required to create and make enforceable the legal matter needed for that client.

To provide a real-world example, some of my clients may be located in my neighboring state of South Carolina, but I would only provide legal services to those clients if the legal matter they needed assistance with pertained to North Carolina law. I have worked with clients in northern states who own retirement property here in North Carolina and who needed assistance with a North Carolina real estate matter. I have worked with families who currently live in other states but who are moving to North Carolina and want their estate planning updated to conform to North Carolina laws so that it will be effective and ready for them when they move here. There are many other situations in which my clients are not physically located in the state where I am licensed to practice, but need my assistance nonetheless on a NC-law related legal matter. The second sentence of 8.5(b)(2) asks where the lawyer "reasonably believes the predominate effect" of his or her conduct will occur. There is no question that the predominant effect would be in the state to which the legal matter's law pertains. In the case of my virtual law office, it would be in North Carolina.

Completely virtual law offices, such as the one in the first fact pattern, primarily deliver unbundled or limited scope legal services. Other virtual law firms provide the same full-service representation as a traditional law firm but handle most of their business transactions online through the virtual law office. Some of these traditional firms with a virtual law office integrated into their structure may also provide limited scope representation online, as well as full-service representation that combines in-person

with online communication. Most often these are transactional services and do not involve litigation. If the virtual law office serves clients in multiple jurisdictions because the attorney is licensed in multiple jurisdictions, then the rules that apply to the lawyer's conduct will be those of the state whose laws apply to the client's legal matter. If discipline is necessary, then that state's laws would be the source of disciplinary authority.

For example, if in the first fact pattern the Will that lawyer Susan create for her client was pertaining to the laws of State Y where she is not licensed, she should reasonably expect that the effect of that legal work would occur in State Y. Therefore, she should be subject to the laws of State Y. This ignores the fact that she is committing unauthorized practice of law in another jurisdiction. However, if she provides a Will that pertains to the laws of State X, where she is licensed to practice, because the mere fact that her client is physically located in State Y does not mean that Susan should be subject to the laws of State Y.

International law firms have been using technology such as web conferencing tools and client extranets for years now to work with clients overseas without meeting them in person. The virtual law office operated by a solo or small firm is no different in that respect. As long as the virtual practitioner takes the appropriate steps to make sure that she is selecting the proper law to be applied to the client's legal matter, does not engage in UPL and checks for conflicts of interest in compliance with the rules of the jurisdictions in which she is licensed, the activities of a virtual practitioner should not be treated any differently than those of a traditional, brick & mortar law office practitioner.

A client's presence in a different geographic location than his or her attorney does not mean that state's ethics rules should come into play for the attorney handling a project that is unrelated to that state's laws. In the first fact pattern, Susan's website, as with all attorney websites, has the potential to be viewed by anyone anywhere in the world. State Y shouldn't have disciplinary authority over Susan because her website may be viewed by prospective clients in their state. By having a website, she is not "offering to provide" legal services in State Y under Rule 8.5(a). It should state clearly on her site under which state's laws she is "offering to provide" legal services.

State bars that wish to retain more antiquated control over their members will create residency requirements and bona fide office rules, as in the case of the New Jersey Joint Opinion regarding virtual law offices. See for example, a recent law review article I wrote entitled "Practicing Law Without an Office Address: How the Bona Fide Office Requirement Affects Virtual Law Practice." *University of Dayton Law Review*, Volume 36:1 (2011). (http://virtuallawpractice.org/2011/02/practicing-law-without-an-office-address-law-review-article-published/)

The issue becomes more complex with a multijurisdictional virtual law firm where the solo or small firm with a virtual law office is licensed and serving online clients in more than one state. For this type of practice, the virtual practitioner must be careful to conform with the rules of multiple state bars when the attorney "provides or offers to provide any legal services" in those jurisdictions. For example, when creating

the virtual law office website, the attorney licensed in three different states would need to make sure that the site was approved by each state bar as required and that the strictest requirements of the three state bar rules was adhered to before delivering unbundled legal services online. Again, if an ethics issue arises, the state law that would apply would be the law of the state where the attorney's actions had an impact. For example, if the attorney is physically located in State X, but licensed and providing online legal services in States X, Y and Z and fails to comply with an ethics rule in State Y in the course of providing services under State Y law, that attorney is subject to the discipline and laws of State Y.

I would be happy to contribute to any further discussion on the issues presented in this paper as they relate to the use of technology to deliver legal services online.

Respectfully,

Stephanie L. Kimbro, M.A., J.D.

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.

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[1] *See* http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/20111801.authcheckdam.pdf.

[2] *See* Comments on Choice of Law in Cross-Border Practice Issues Paper, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rule_8_5_comments.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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[4] Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT'L L. 1035, 1042 (2009) (footnotes omitted).

[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/lst3/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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[6] From the Nuremburg trials in 1945 up through June of this year, the total number of cases handled by all major international criminal tribunals totals an estimated 183 cases. By contrast, looking only at one year—2009—and only at two of many international arbitration institutions—the International Center for Dispute Resolution (ICDR) and the International Chamber of Commerce (ICC)—the total number of new international arbitration cases filed under the auspices of those institutions was over 1600 cases. *See* ICC, Facts and Figures on International Arbitration – 2009 Statistical Report, *available at* http://www.iccwbo.org/court/arbitration/index.html?id=34704; AAA-ACDR, 1 ICDR INT'L ARB. REP. 1, *available at* http://www.adr.org/sp.asp?id=38670&printable=true; ICTR, http://www.unictr.org/Home/tabid/36/Default.aspx; UN ICTY, http://www.icty.org/; SCSL, http://www.sc-sl.org/HOME/tabid/53/Default.aspx; ECCC, http://www.eccc.gov.kh/en; Special Tribunal for Lebanon, http://www.stl-tsl.org/action/home; Nuremburg Trials Project, http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=overview; Web Genocide Documentation Center, http://www.ess.uwe.ac.uk/genocide/war_criminals.htm.

[7] *See* Michael I. Kaplan, *Solving the Pitfalls of Impartiality when Arbitrating in China: How the Lessons of the Soviet Union and Iran Can Provide Solutions to Western Parties Arbitrating in China*, 110 PENN ST. L. REV. 769, 801 (2006) (attributing the success of the Tribunal to The Hague's "chronicled history of neutrality").

[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.[10] 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.[11]

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[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.[12] 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[13] 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.[14] As Professor Rogers has explained:

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[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").

[13] Shane Spelliscy, Note, *The Proliferation of Transnational Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143, 143-76, 164-8 (2001); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31-SUM N.Y.U. J. INT'L L. & POL. 709, 709-52 (1999).

[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.[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.[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.[17] It is true that U.S. conflict-of-interest rules are considered stricter than those of many foreign jurisdictions.[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

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[15] *See* Rogers, *supra* note 4, at 1053.

[16] One member of the drafting committee suggested that dissimilar treatment of lawyers who engage in the same conduct in the same state may give rise to due process and equal protection problems. *See* Report of the Standing Comm. on Ethics and Professional Responsibility in Support of Amended Rule 8.5 (1993) Report of the Standing Comm. on Ethics and Professional Responsibility in Support of Amended Rule 8.5, at 11 (1993) (statement of Ralph G. Elliot, dubitante), *cited in* Susanna Felleman, *Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct*, 95 COLUM. L. REV. 1500, 1515 n.143 (1995).

[17] *See, e.g.*, Akzo Nobel Chems. Ltd. v. Commission (E.C.J.), Introductory Note by Laurel S. Terry, 50 I.L.M. 1 (2011).

[18] Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 63 (2005).

sits rather than because of a substantive connection with one of the parties or the dispute.[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.[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.

[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.

[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*
http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/RulesofProfessionalConductasamended041511.pdf

MEMORANDUM

To: ABA Commission on Ethics 20/20

From: Brian Toohey and Anne Marie Morris[*]

Date: March 14, 2011

Re: Proposed Amendment to ABA Model Rule 8.5(b)(1)

Recommendation

We are not convinced that the proposed amendment to ABA Model Rule 8.5 ("MR 8.5"), submitted to the Commission by Professors Laurel Terry and Catherine Rogers,[1] is in the best interest of either US or foreign attorneys. Although the revision appears at first glimpse to offer a cleaner and simpler fallback provision when an international tribunal has no ethics rules of its own, it provides no practical guidance for our global practitioners and makes already muddied waters even murkier. We recommend additional study by the Commission before the amendments are put forward.

Background to MR 8.5 and the Proposed Revision

The problem of which jurisdiction's ethical principles should apply in a transnational setting is not unique to US attorneys practicing abroad. The international legal community is scratching its head over how to determine or regulate attorney conduct. As Johnny Veeder cogently puts it: "To the Q: What are the professional rules applicable to an Indian lawyer in a Hong Kong arbitration between a Bahrainin claimant and a Japanese defendant represented by NY lawyers, the answer is no more obvious than it would be in London, Paris, Geneva and Stockholm. There is no clear answer."[2] In the words of Professor Rogers, "International arbitration dwells in an ethical no-man's land…Where ethical regulations should be, there is only an abyss."[3] The general consensus is that national codes of ethics will never get on the same page concerning how international practitioners should be regulated, and, consequently, the solution is to be found in action from either the international community or the tribunals

[*] Brian Toohey is Chair of the Multijurisdictional Practice Subcommittee of the Ethics and Professionalism Committee, ABA Section of Litigation, and Of Counsel to Jones Day. Anne Marie Morris is a Jones Day Associate.

[1] Laurel S. Terry & Catherine A. Rogers, *Memorandum: Proposed Revisions to Model Rule 8.5*, dated October 1, 2010 (updated December 1, 2010).

[2] Johnny Veeder, 2001 Goff Lecture.

[3] Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2001-2002).

themselves in crafting an ethical framework.[4] As even Professor Rogers is quick to admit, MR 8.5(b)(1), even if revised, is only a stopgap solution - an imperfect attempt at providing some guidance for US attorneys until international tribunals enact codes of ethics and/or the international community finds an alternative resolution.[5]

MR 8.5(b) outlines which ethical principles apply when a matter is before an international tribunal. US lawyers are potentially subject to ethical rules of multiple jurisdictions, which impose differing and sometimes conflicting obligations. MR 8.5(b) "seeks to resolve such potential conflicts"[6] and provide a straightforward determination of which set of rules applies in a given situation. Indisputedly, a clear and workable choice-of-law rule would be helpful, both for attorneys and for the tribunals enforcing the rules. Originally, MR 8.5(b) applied only to matters before "courts" and was crafted primarily for the national setting. US lawyers began servicing more clients abroad and, as alternative-dispute resolution processes came into vogue,[7] the rule was explicitly expanded to lawyers "engaged in transnational practice"[8] and to proceedings in non-court tribunals, such as "binding arbitration."[9] In other words, MR 8.5(b) is not just a national rule attempting to be applied to the international setting. It has been explicitly re-crafted to try to meet the challenges and complexities of fast-paced globalization.[10]

If an international tribunal has its own code of ethics, MR 8.5(b)(1) kicks in nicely, instructing US attorneys to follow that tribunal's code. When that international tribunal does not have its own set of rules, however, MR 8.5(b)(1) falls short in providing clear and helpful choice-of-law guidance to US attorneys. The current version provides that where a tribunal does not have its own code of ethics, a US attorney should follow the rules of the jurisdiction where the tribunal "sits." This provision has several glaring shortcomings. First, the international tribunal may be physically located in a jurisdiction that intentionally has no bearing on the disputed matter, having been selected by the parties as a neutral setting. Consequently, the ethical rules of the physical seat of the tribunal may not have any natural relation to the proceedings.[11] Also, "large complex international cases often involve multiple proceedings that occur in different venues,"[12] making it difficult to determine where a tribunal "sits." Further,

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[4] The fact that global arbitration practitioners function under different national legal frameworks "does not mean that international practitioners are pirates sailing under no national flag; it means only that on the high seas, navigators need more than a coastal chart." Johnny Veeder, 2001 Goff Lecture.

[5] "Ultimately….international tribunals must develop their own ethical rules. It seems inevitable that conscripting national ethical rules into service be accepted in the short run as a temporary, second best solution." Rogers, *Lawyers Without Borders*, *supra* note 2, at 1051.

[6] MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 3 (2002)

[7] Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PENN. INT'L L. REV. 1035, 1042 (2009).

[8] MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 7 (2002)

[9] Rogers, *Lawyers Without Borders*, *supra* note 7.

[10] Professor Catherine Rogers, one of the authors of the recent proposal to revise 8.5(b)(1), takes a different view: "International practice was added [to MR 8.5] as something of an afterthought…" *Id.* at 1039.

[11] For example, the Iran-US Claims Tribunal or the International Court of Justice. *See Id*.

[12] Terry & Rogers, *Memorandum: Proposed Revisions to Model Rule 8.5*, *supra* note 1, at A-4.

even if the tribunal physically "sits" in only one jurisdiction, "sits" can be interpreted to mean something other than the tribunal's physical location. As Professor Rogers points out, the International Tribunal for the Law of the Sea has its "seat" in Germany, but "may sit and exercise its functions elsewhere whenever it considers this desirable."[13] Finally, and most significantly, MR 8.5(b)(1) potentially obligates US attorneys to conform to a set of ethical rules markedly different from those applicable to non-US opposing counsel. If opposing counsel are not similarly required to follow the ethical rules of the jurisdiction where the tribunal sits, the two sides will be subject to different ethical obligations, potentially placing the party with the more stringent regulations at a disadvantage. As Jan Paulsson notes, "in cases where counsel come from three different countries where standards are quite inconsistent on a given point, does the client whose lawyer is subject to the lowest standard have an unfair advantage?"[14] For example, an article by Cyrus Benson reports that UK rules allow a lawyer to communicate with the employees of an adverse corporate party which is already represented by counsel, under US rules contact with certain employees is prohibited, under German rules it is generally not allowed, and under Mexican law it is typically allowed.[15] Another example is that US attorneys may prepare a witness to testify, but this is strictly forbidden under UK ethical rules.[16] Benson adds, this "list goes on…."[17]

Professors Terry and Rogers propose revising MR 8.5(b) to try to resolve some of these shortcomings.[18] They propose that where a tribunal does not have its own set of rules of conduct, the fallback choice-of-law should be the rules of the US attorney's home licensing jurisdiction, rather than the rules of the jurisdiction where the tribunal sits. Although we agree that the current version of MR 8.5 is imperfect in providing clear guidance for our global practitioners, we do not believe this proposal is successful in improving the rule, and in fact, believe it will exacerbate the rule's shortcomings.

Analysis

The current version of MR 8.5(b)(1) recognizes that its national guidance is only a temporary solution and that US attorneys need something more than just their home ethics rules as guidance for ethical behavior abroad. Instead of directing attorneys all the way back to their home licensing jurisdiction to find a set of obligations disconnected from the proceeding at hand, it instructs US attorneys to abide by the ethical obligations most closely connected to the proceeding, usually the local ethical norms where the tribunal sits. In some cases, a close

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[13] Rogers, *Lawyers Without Borders*, *supra* note 7, at 1050.

[14] Doak Bishop, Keynote Address: *Ethics in International Arbitration*, ICAA Congress Rio, May 26, 2010, quoting Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 AM. REV. INT'L ARB. 214 (1992).

[15] *See* Cyrus Benson, *Can Professional Ethics Wait: The Need for Transparency in International Arbitration*, 3 DISP. RESOL. INT'L 78, 83 (Mar. 2009).

[16] *Id.*

[17] *Id.* at 85.

[18] Terry & Rogers, *Memorandum: Proposed Revisions to Model Rule 8.5*, *supra* note 1.

connection between the ethical rules and the proceedings will be present. For example, some international criminal tribunals are seated in the country where the purported criminal activity took place.[19] Even in cases where the connection is more attenuated,[20] the fallback choice-of-law to the rules of the jurisdiction where the tribunal sits provides at least some tangible connection between and context for the proceeding and ethical obligations. Furthermore, the 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. Additionally, local counsel is often required and engaged when a foreign attorney appears before an international tribunal.[21] One commentator has also suggested that "When analyzing how norms of attorney conduct are established in international tribunals, all roads lead back to the judges."[22] If this assessment is accurate, there is even greater reason to direct US attorneys to follow the local ethical norms of where the judge and tribunal sit. As compared to applying home licensing rules of US attorneys, 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.

In contrast, Terry and Roger's proposed revision to MR 8.5(b)(1) falls back on the lawyer's home jurisdiction code of ethics, seeming to ignore the need for much more than national codes to guide international practitioners' behavior as they attempt to navigate the unchartered international arena. The proposal also entirely separates the attorney's ethical obligations from the particular context of an international proceeding. It asks the US attorney to apply a set of rules, drafted within the context of the licensing state's particularities, to a proceeding that may bear little relation to that original context. The proposal offers no guidance for melding these two realities.

Although the proposal provides a bright line fall back provision, it comes at the price of hamstringing US attorneys into a highly particularized set of home licensing rules that leave little flexibility to adapt to the particularities of the international setting. The current version of MR 8.5(b)(1) is not ideal in this respect either but the proposed revision only exacerbates this shortcoming. Additionally, the ambiguity of the current version of MR 8.5(b)(1), whether intentional or not, provides much needed flexibility for attorneys to use their judgment concerning what is meant by where the tribunal "sits" in a given context. As Professor Rogers notes, the ability to discern regulatory distinctions and make difficult choices between conflicting rules is an essential skill of an international practitioner.[23]

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[19] Examples are the Special Courts in Sierra Leone, Cambodia, and East Timor.

[20] For example, when parties specifically choose a location that does not have any direct bearing on the proceeding, in order to provide a neutral setting.

[21] "…[There] is the necessity, in many instances, of having local counsel for purposes of an international arbitration proceeding." STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 183 (2002).

[22] Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. ENVTL. AFF. L. REV. 139, 171 (2007).

[23] "One of the defining features of global advocates is that they routinely engage in regulatory arbitrage. This process requires them to evaluate the inter-relative effects of particular rules in determining which ones can or should apply to a particular situation. This is a unique and valuable skill." Rogers, *Lawyers Without Borders*, *supra* note 7, at 1059.

Importantly, the proposed revision may well increase the likelihood of an uneven playing field whenever a US attorney appears before an international tribunal. The current default to the jurisdiction where the tribunal sits provides greater room for finding a common ethical standard, particularly when local counsel is engaged on both sides. Non-US attorneys will more likely abide by the rules of the jurisdiction where the tribunal sits, than by US rules.

Conclusion

"…[T]he lack of ethical guidance continues to breed (or at least permit) procedural unfairness in various cases, attack[s] the integrity of the system and invite[s] deterioration in standards of professional conduct."[24] Undoubtedly, the world of international legal ethics needs attention.[25] The consensus is that the solution lies in an international code of ethics, rather than in national ethical codes. In our opinion, the proposed revision to MR 8.5 moves us away from this ultimate goal of an international solution, sacrificing the end goal for a temporary façade of a bright line choice-of-law. The proposal focuses on the national code as a black-and-white default, giving the appearance of providing clear ethical guidance. But in reality it asks US attorneys to apply a highly developed and particularized set of regulations, drafted in the context of US litigation, to an entirely different environment. We believe that this proposal is impracticable, risks the further tilting of the playing field, and could hamstring US attorneys from effectively representing clients abroad.[26]

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[24] Benson, *Can Professional Ethics Wait: The Need for Transparency in International Arbitration*, *supra* note 15, at 79.

[25] The costs of not having a workable ethical framework extend beyond any one proceeding. "…[E]thical violations could have serious consequences for parties and tribunals and threaten the public's confidence in arbitration as a viable dispute resolution system. For example, such violations could 'result in unnecessary motions, longer hearings, duplication of effort and wasted time.' Unethical behavior, moreover, could 'slow the dispute resolution process and increase the cost of arbitration.' The reputation of arbitration as a fair process certainly would be adversely affected if attorneys felt free to engage in unethical conduct, either because the arbitration process is flexible and for the most part private, or because attorneys in arbitration are unlikely to see the same arbitrators more than once." Steven Bennett, *Who Is Responsible For Ethical Behavior By Counsel In Arbitration?*, 63:2 DISPUTE RES. J. 38, 39 (2008), *citing* Pat Sadler, *One Lawyer's Proposal For A Code Of Professionalism In Securities Arbitration*, 1264 PLI/Corp 67, 77 (2001).

[26] Common-law ethical codes are typically much more detailed than civil-law codes, and common-law systems include duties to not only the client but also to the tribunal (*see* Benson, *Can Professional Ethics Wait: The Need for Transparency in International Arbitration*, *supra* note 15, at 82). This suggests that common-law countries, such as the US, will more likely be the disadvantaged party in the uneven playing field created by international practitioners functioning under different national ethical codes.