

REPORT

The American Bar Association's Commission on Ethics 20/20 has studied how globalization is transforming the practice of law and producing a wide range of new ethical issues. One important change caused by globalization is that clients are increasingly asking their lawyers to handle matters that implicate multiple jurisdictions, both within the United States and abroad. The Commission heard from lawyers who are regularly retained on these matters and learned that they confront a variety of ethics-related choice of law problems that are particularly acute in the conflicts of interest context. This Report describes a proposal that would help to address some of these conflicts-related inconsistencies.

Conflicts-related choice of law issues can arise in many situations, but they are especially difficult to resolve when a lawyer's representation of a client involves a matter that relates to several U.S. or foreign jurisdictions simultaneously. For example, the Commission heard from lawyers who report that, while such matters are pending, lawyers (or their firms) may be asked to handle an unrelated matter adverse to the current client. That matter could be accepted without the consent of the first client, perhaps with a screen, if the conflict rules of one jurisdiction apply, but not if the rules of another jurisdiction do.

Today, in order to determine which jurisdiction's conflict of interest rules apply to the first client, the lawyer may have to determine the jurisdiction where the lawyer's conduct has its "predominant effect." *See* Model Rule 8.5(b)(2) (Choice of Law) (providing that, for any matter not pending before a tribunal, the rules to be applied are "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied"). This determination may be difficult when the lawyer's work affects multiple jurisdictions, as is often (and increasingly) the case.

This lack of clarity does not reflect a flaw in Rule 8.5(b)(2). Choice of law analyses are often fact-intensive, making answers difficult to determine. This unavoidable uncertainty, however, can leave clients, lawyers, and law firms with insufficient guidance about which jurisdiction's conflict rules are applicable in commonly encountered situations.

The Commission is proposing a solution that is commonly used in other contexts where choice of law principles do not – and cannot – yield definitive answers: the use of choice of law agreements. In particular, the Commission's proposal would add new language to Comment [5] of Model Rule 8.5 acknowledging that, subject to limitations, lawyers and clients may specify a particular jurisdiction as within the scope of paragraph (b)(2).

The Commission also will recommend that the Standing Committee on Ethics and Professional Responsibility draft a Formal Opinion that provides greater guidance on how to resolve conflicts-related inconsistencies in the absence of the kinds of agreements anticipated by the proposed new Comment language. The Commission considered a number of methods for offering this guidance within Rule 8.5(b)(2), but ultimately determined that (as in other choice of law contexts) the resolution of conflicts-related inconsistencies requires a fact-based inquiry that is not amenable to Model Rules treatment. The Commission believes that a Formal Opinion could be useful in clarifying the appropriate analysis under Rule 8.5(b)(2) and that such a Formal

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Opinion, in combination with the proposed new Comment language, will enable lawyers, clients, and courts to predict with greater certainty which jurisdiction's conflict rules apply to a particular matter.¹

In developing this proposal, the Commission's Uniformity, Choice of Law, and Conflicts of Interest Working Group included participants from the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Client Protection, the Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. They all made important contributions to the Working Group's understanding of the issues and the development of the Resolutions accompanying this Report. The Commission also released an Issues Paper identifying a wide range of conflicts-related choice of law problems and received considerable helpful input in response, including testimony from lawyers in various practice settings. The final version of the proposal was heavily influenced by this feedback and the very helpful comments submitted in response to earlier drafts of the Commission's proposals.

Proposal to Amend Comment [5] to Rule 8.5

Lawyers and clients can resolve some of the unavoidable uncertainties of Rule 8.5(b)(2) in the same way choice of law issues are resolved in other contexts: through choice of law agreements. The Commission concluded that, although such agreements should be subject to several limitations in light of the distinct nature of the client-lawyer relationship, the agreements may be helpful in many situations. For example, they may be useful in prompting a conversation between lawyer and client as to the rules that would and should apply. They may also be useful to disciplinary authorities who are asked to consider whether a lawyer's determination of the applicable jurisdiction's conflict of interest rule was "reasonable."² Moreover, courts might give the agreements weight when clients who have signed such agreements move to disqualify.³ For this reason, motions to disqualify might be less frequent because the agreements can offer greater clarity regarding the conflict of interest rules that are likely to be applied to the matter covered by the agreement.⁴

These kinds of agreements are analogous to waivers of future conflicts, which are already authorized in Comment [22] of Rule 1.7, and will have a similar effect. Unlike waivers of future conflicts, however, the new agreements will enable the incorporation of a particular jurisdiction's law on conflicts of interest. For example, the agreement might say that "Client and Lawyer anticipate that the predominant effect of the lawyer's conduct will be in Ohio and agree that the

¹ The Commission considered several possible amendments to Rule 1.10, but ultimately concluded that an amendment to that Rule to address this issue was inadvisable.

² MODEL RULE 8.5, cmt. [5] provides that "[s]o long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer *reasonably* believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule." (emphasis added).

³ Cf. *In re Shared Memory Graphics, LLC*, 659 F.3d 1336, 1341 (Fed. Cir. 2011) (honoring a choice of law provision in a joint defense agreement in the context of a motion by one party to the agreement to disqualify the lawyer for another party in a subsequent dispute between the two parties).

⁴ As explained below, the agreements are not – and cannot be – binding as to the rights of third parties, so the agreements would only affect the resolution of a motion to disqualify when the client who is alleging the existence of a conflict signed the agreement.

Ohio Rules of Professional Conduct and law concerning conflicts of interest should govern Lawyer's work on this matter.”

An earlier draft of this proposal had located the authority for these agreements in the black letter of a proposed new Model Rule 1.7(c). Proposed Model Rule 1.7(c) was intended to make clear that, although the proposed agreements would have helped to address inconsistencies among jurisdictions' conflict of interest rules, the agreements were not intended to address other kinds of choice of law problems, such as inconsistencies among jurisdictions with regard to the duty of confidentiality or duties to a tribunal. Moreover, the Rule 1.7 proposal was intended to address the concern that clients may be less likely to understand the material risks of an agreement to select the conflict rules of a particular jurisdiction than when they consent to a specific possible future conflict under Rule 1.7, Comment [22] and that additional safeguards might therefore be necessary.

After getting considerable feedback on the Model Rule 1.7(c) proposal, the Commission decided that a better way to address the issue is to focus on Model Rule 8.5, which is one source of the uncertainty, and make clear that lawyers and clients can specify – subject to limitations – a particular jurisdiction as within the scope of Rule 8.5(b)(2).

Despite the advantages of these agreements, the Commission concluded that they should be subject to several limitations. First, such agreements should only be used in the context of conflicts of interest; they should not be used to specify the rules of a jurisdiction on other issues, such as the duty of confidentiality. The Commission did not want to authorize parties to contract around rules intended to protect adverse parties or tribunals. To ensure the limited use of the agreements, the proposed Comment language begins with the phrase “With respect to conflicts of interest....”

Second, the proposed Comment specifies that the agreement should be “written” and that the client's “informed consent” should be confirmed in the written agreement. By requiring “informed consent” (a term that is defined in Model Rule 1.0(e)), the Commission believes the client will understand the implications of specifying a particular jurisdiction. Moreover, by requiring the agreement to be “written” (a term that is defined in Model Rule 1.0(n)) and the client's informed consent to be confirmed in that written agreement, the Commission believes the lawyer can ensure that there is clear evidence of both the agreement and the consent in the event that a disciplinary or disqualification issue subsequently arises.

Third, the Commission concluded that, unlike choice of law agreements in ordinary contracts, a Rule 8.5(b)(2) agreement raises distinct concerns in light of the nature of the lawyer-client relationship and the deference afforded to the regulatory authority of courts over lawyers. Moreover and more generally, courts are not bound by the Rules of Professional Conduct when deciding disqualification motions.⁵ For these reasons, the proposed Comment makes clear that such agreements may merely be considered (rather than binding) in determining where the predominant effect of the lawyer's work on a matter should be deemed to have occurred.

⁵ See, e.g., MODEL RULE 1.10, cmt. [7] (explaining that, “even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify”).

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Fourth, the Comment requires the agreement to “reasonably specify” the applicable jurisdiction. The phrase “reasonably specify” leaves open the question of how much of a relationship the lawyer's conduct must have to the specified jurisdiction.⁶

The Commission considered other possible restrictions. For example, an early draft of the Commission’s Model Rule 1.7(c) proposal would have required lawyers to advise clients of the advisability of seeking independent counsel before signing the agreement. Such a requirement would have been consistent with Model Rule 1.8(a)(2), which requires lawyers to advise the client of the advisability of seeking independent counsel before the lawyer enters into a business transaction with the client. The Commission concluded, however, that the agreements being proposed are materially different and pose less of a risk. The agreement contemplated by the new Comment is much narrower in scope, is directly related to the lawyer’s representation of the client, and, importantly, is not binding on courts or disciplinary authorities.

Responses to Concerns Raised

One question is whether agreements on choice of law benefit lawyers at the expense of clients. In fact, the current proposal has significant benefits for both parties. Under today’s Model Rules, if a conflict issue arises and the rules of two or more jurisdictions could reasonably apply, a lawyer can simply choose the jurisdiction that favors the lawyer *without ever consulting the client*. As long as that choice is “reasonable,” the lawyer will face no disciplinary consequences, even if the lawyer’s choice is ultimately deemed to be incorrect and even though the client was never consulted.⁷ Thus, an agreement not only provides the lawyer with greater confidence of the jurisdiction whose conflict rules will apply, but it also enables the client to participate in the choice.

With regard to the Commission’s earlier Model Rule 1.7(c) proposal, some commenters suggested that it did not offer any help beyond what is already available through an informed consent to future conflicts under Comment [22]. The Commission believes waivers of future conflicts and the Commission’s proposed approach are not mutually exclusive. Rather, they serve distinct goals, as illustrated by the following three examples. First, the lawyer and client may not wish to enter into an advance consent to a particular conflict. They may wish only to know which jurisdiction’s rules to research if any potential conflict arises. The amendment allows them to designate that jurisdiction. Second, using Comment [22] to Model Rule 1.7, the client may agree in advance that during the representation, the lawyer’s firm may be adverse to the client on a matter that is not “substantially related” to the client’s matter so long as the firm employs a “screen.” Before accepting such a matter, the firm may research governing cases and ethics rules in the potentially applicable jurisdictions, but discover that the law differs in those jurisdictions with regard to the meaning of “substantially related,” the requirements for a “screen,” or whether a screen is permissible at all. One way in which these ambiguities can be

⁶ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). The Commission’s proposal does not address whether a lawyer and client can select the conflict rules of a jurisdiction that is unrelated to the lawyer’s work on the matter under Rule 1.7(b) or through an advance waiver under Rule 1.7, Comment [22]. The Commission’s proposal is only intended to help lawyers and clients define more clearly the meaning of “predominant effect” under Rule 8.5(b)(2).

⁷ See *supra* note 2.

avoided is if the parties have identified the jurisdiction whose rules apply.⁸ Third, even when there is a specific advance consent, designating the applicable jurisdiction in the matter identifies which jurisdiction's conflict rules will apply to all possible conflicts that might arise, not just the conflict that is the subject of the advance consent.

The Commission considered the possibility that the proposal might be interpreted to require a separate agreement for each new matter and that such a requirement would minimize the usefulness of the proposal. In fact, a separate agreement may not be necessary for each individual matter. For example, if a category of matters can be defined such that each matter within that category has the necessary relationship with the selected jurisdiction to satisfy the language in the new Comment, a single agreement for all work on those matters within the category may be permissible. Of course, if a law firm believes the agreements contemplated by the proposed Comment are too burdensome, there is nothing that prevents the firm from using a traditional consent to future conflicts under Model Rule 1.7, Comment [22] or to utilize the agreements contemplated by the proposed Comment for certain matters only.

The Commission also considered the possibility of requiring more disclosures to clients about the effects of entering into the agreement. The Commission concluded, however, that the proposed new Comment language requires the disclosure of adequate information, because a client must give "informed consent" to the agreement. "Informed consent" is a defined term, which means that the lawyer must disclose "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rule 1.0(e). The Commission believes that this "informed consent" requirement will ensure that clients obtain the information that they need.

The Commission was asked by commenters to give clearer guidance to lawyers in the Comment about the content of the anticipated agreements. For example, the Comment could encourage lawyers to define the "matter" to which the agreement applies, explain whether the agreement is intended to apply to all of the lawyers in the same firm as opposed to just the lawyers entering into the agreement, and identify the circumstances, if any, under which either party will be entitled to revoke the agreement and the effect of such a revocation. The Commission concluded that, although lawyers should consider addressing these issues in the agreements, this sort of guidance is too detailed for inclusion in a Comment. More detailed guidance is likely to emerge in ethics opinions and other sources of law.

The Commission agreed with commenters who raised concerns that the agreements should not – and cannot – bind third parties (such as other clients of the firm). For this reason, the new Comment language makes clear that the agreement is only intended to provide guidance in determining a lawyer's reasonable belief under paragraph (b)(2). It does not bind third parties and only helps to determine which jurisdiction's conflict rules might apply in a dispute involving the parties to the agreement. As with waivers of future conflicts under Comment [22] to Rule

⁸ As explained above in note 6, the Commission's proposal does not address whether a lawyer and client can select the conflict rules of a jurisdiction that is unrelated to the lawyer's work on the matter under Rule 1.7(b) or through an advance waiver under Model Rule 1.7, Comment [22]. The Commission's proposal is only intended to help lawyers and clients define more clearly the meaning of "predominant effect" under Model Rule 8.5(b)(2).

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1.7 and consents to conflicts under Rule 1.7(b), the proposed agreements cannot bind third parties.

The Commission considered the possibility that these agreements might result in the application of non-U.S. conflict rules, which are sometimes more permissive than the conflict rules in the U.S. The Commission concluded, however, that this possibility exists today for at least two reasons. First, Model Rule 8.5(b) already has this effect in some circumstances. For example, if the Paris office of a law firm is handling a transactional matter that is heavily centered in France, Model Rule 8.5(b)(2) suggests that the French rules might apply to the firm's representation of that client. Second, Comment [22] to Model Rule 1.7 already permits clients to agree to advance waivers of certain kinds of conflicts of interest. An advance waiver can sometimes have the same effect as an agreement to be governed by the rules of another jurisdiction (such as France), because a waiver can specify that the client is waiving a conflict in a situation that would not be considered a conflict under French law.

Finally, the Commission was not concerned that these agreements are not binding. Whether and when they are binding is a question for tribunals to decide, just as tribunals decide today whether to give effect to consents to conflicts pursuant to Model Rule 1.7(b) and waivers of future conflicts under Comment [22] of that Rule.

Conclusion

Conflicts-related choice of law issues are commonly encountered, but the Rules do not – and cannot – offer clear guidance on how to resolve all of them. The Commission's proposal is intended to provide more predictability to clients and their lawyers by permitting them to specify a particular jurisdiction as within the scope of Rule 8.5(b)(2). For these reasons, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolution.

Respectfully submitted,

ABA Commission on Ethics 20/20

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