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To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Disciplinary Agencies, Individuals, and Entities

From: ABA Commission on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest¹

Date: January 18, 2011

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

I. Introduction

The American Bar Association Commission on Ethics 20/20 is examining a number of legal ethics issues arising from the increasing globalization of law practice. The goal of this paper is to identify ethics-related choice of law problems that have arisen because of this increase in cross-border practice and to elicit comments on possible approaches that the Commission is currently considering. Comments received may be posted to the Commission's website and should be submitted by **March 15, 2011**.

The Commission has taken no positions about the matters addressed in this paper. Rather, the Commission expects to use any comments that it receives to supplement the research that the Commission has completed and to facilitate the development of various reports and proposals that the Commission plans to draft during the next year and a half.

II. Model Rule 8.5: Disciplinary Authority; Choice of Law

Rules of professional conduct vary within the United States and around the world. These variations create problems for lawyers who engage in cross-border practice, especially when they encounter legal ethics issues that could be resolved differently depending on which jurisdiction's rules apply.

Model Rule 8.5 of the Model Rules of Professional Conduct is designed to address this problem. It provides as follows:

¹ Members of the Working Group are: Stephen Gillers (Chair and Commission Member), Hon. Elizabeth B. Lacy (Commission Member), Theodore Schneyer (Commission Member), Doug Ende (National Organization of Bar Counsel), Donald B. Hilliker (ABA Center for Professional Responsibility), Janet Green Marbley (ABA Client Protection Committee), Jim McCauley (ABA Ethics Committee), and John P. Sahl (ABA Standing Committee on Professional Discipline). Andrew M. Perlman serves as Reporter, and Dennis A. Rendleman and John A. Holtaway provide counsel.

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

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

Rule 8.5(a) describes the circumstances under which a lawyer is subject to the disciplinary authority of a jurisdiction, even if the lawyer is licensed in another jurisdiction. Rule 8.5(b) identifies which jurisdiction's rules of professional conduct should be applied to the lawyer's conduct. For example, a lawyer might be subject to the disciplinary authority of New Jersey under Rule 8.5(a) by engaging in law practice there, but Rule 8.5(b) might specify that the New Jersey disciplinary authority should apply the ethics rules of Illinois to determine whether the lawyer should, in fact, be disciplined.

III. Potential Problems and Ambiguities with Model Rule 8.5

Model Rule 8.5 supplies clear answers in some circumstances, but it produces unclear and arguably problematic results in other contexts. These ambiguities and possible problems are reflected in the following fact patterns:

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Fact Pattern #1: Virtual Law Practices. Susan has a solo practice in State X and advertises her will-writing services on her website, which is accessible anywhere in the world. Most of her clients come from State X, but she occasionally writes wills for individuals who live in nearby State Y. (Susan is not licensed to practice in State Y.) When Susan works for a State Y resident, she communicates via telephone and the Internet, but she does not physically enter State Y. The State Y resident comes to State X to execute the will. With regard to Susan's website and her work for State Y residents, does State Y have disciplinary authority over Susan under Model Rule 8.5(a)? If so, which jurisdiction's rules would State Y apply under Rule 8.5(b)? In addition to different

advertising rules, the two jurisdictions may, for example, have different conflict of interest rules and rules for fee agreements.

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Fact Pattern #2: Screening of Laterals in Multistate Law Firms. Firm GHI has offices in States Y and Z. Mike, a lawyer at GHI who practices in State Z, is handling a matter against LITCO in a court in State Z. The firm now wants to hire a lateral, Lucy, to work in GHI's offices in State Y, where Lucy is licensed. Lucy has been representing LITCO at her current firm in a matter substantially related to the matter that Mike is now handling adverse to LITCO. If GHI hires Lucy, LITCO would remain a client of Lucy's former firm, but Lucy's hiring would create a conflict of interest for Mike in his lawsuit against LITCO if Lucy's work for LITCO is imputed to Mike if and when she moves to GHI. State Y allows law firms to screen lateral lawyers to avoid the imputation of this type of conflict (nonconsensual screening), but State Z does not. Can GHI hire Lucy and employ a screen to prevent Lucy's conflict from being imputed to Mike without obtaining LITCO's consent?

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Fact Pattern #3: Conflicts in International Multi-Office Law Firms. Firm JKL has offices in the United States and Country Q. Max in JKL's New York office represents NCO on contract matters. Lia, in JKL's office in Country Q, is asked to undertake an arbitration, litigation, or negotiation against NCO on a matter unrelated to Max's work. Lia's work will be done entirely in Q. Q's rules allow her to do the work. New York's imputation rules treat Max and Lia as one lawyer for conflict purposes, so Lia's clients are imputed to Max. Thus, if Lia were in New York she could not accept the work without informed consent. Can Lia undertake the engagement?

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Fact Pattern #4: Choice of Law Provisions in Engagement Letters. Anticipating the inconsistent conflict rules in the prior two fact patterns, the two firms had specified in their original engagement letters with their clients that the conflict rules in a designated jurisdiction (or in the Model Rules) would govern their relationship. The firms wish only, to the extent allowed, to contract for governing conflict rules, not other rules where there might be inconsistency among jurisdictions, because lack of uniformity in conflict rules is where they run into the most difficult problems. The firms reason that conflict rules are nearly always default rules that can be supplanted by private contract (i.e., informed consent as defined in the rules). Can the firms and the clients bind themselves to such a substitution with the result that the firms can safely conform their conduct to the conflict rules identified in the agreement? Would reliance on such a contractual provision give lawyers a reasonable belief that their conduct complied with applicable rules of professional conduct under Model Rule 8.5(b)(2)?

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Fact Pattern #5: Client Fraud. Ann and Len are representing INCO in a series of negotiations regarding a joint business venture with other parties and that will take place in several jurisdictions, including the two jurisdictions in which Ann and Len are admitted, State A and State L, respectively. Ann and Len learn that INCO is engaged in a substantial fraud in connection with the matter. The potentially defrauded parties to the joint venture are in States Q, R, and S. State A's rule forbids Ann to reveal what she knows. State L's rule requires Len to disclose. The rules of Q, R, and S, where Ann and

Len did much of their work (as authorized under the applicable multijurisdictional practice rules) forbid, permit, and require revelation, respectively. What can (or must) Ann and Len now do with regard to the revelation? Under what circumstances would their reliance on a particular jurisdiction's rules protect them from discipline under Model Rule 8.5(b)(2), which provides that "[a] lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur"?

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Fact Pattern #6: Partnering and Sharing Fees with Non-Lawyers. Law firm ABC has offices in five states, Washington, D.C., and London. Washington, D.C. allows nonlawyer equity partners, and ABC (which has 1,100 lawyers) has two nonlawyer partners, both economists who work with the firm's antitrust lawyers in each of the firm's offices. ABC also has three nonlawyer partners in London who are financial planners and who work with trusts and estates lawyers in London and in the United States on the needs of families with interests around the world. The London financial planners also provide financial advice through the firm to clients who are not law clients of the firm. What is and what should be the rule regarding the ability of the economists and financial planners to share in the income of the firm and the ability of lawyers outside Washington, D.C., to share in the fees generated by the economists and financial planners?

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With regard to these facts patterns, the Commission seeks feedback regarding the following questions:

- Does Rule 8.5(a) make clear (or as clear as possible) which jurisdictions would have disciplinary authority over the lawyers identified in these fact patterns? If not, how should Rule 8.5(a) be changed?
- Does Rule 8.5(b) enable a lawyer *confidently* to resolve the issues in the above fact patterns? If not, how should Rule 8.5(b) be revised to offer clearer guidance? What should be the answers to the above fact patterns?
- The first and fifth fact patterns implicate the second sentence of Model Rule 8.5(b)(2), which states that "[a] lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Should this portion of Model Rule 8.5(b)(2) be retained or modified?
- Should the choice of rule provision vary depending on whether the underlying legal service primarily arises under state or federal law, with a greater emphasis on uniformity when the service arises under federal law?

- In those cases where the current rule offers a clear answer, is that answer correct? If not, how should Rule 8.5(b) be changed?
- How should the Commission address inconsistencies among jurisdictions with regard to their choice of law rules (i.e., some jurisdictions still adhere to the pre-2002 text)?² Should all jurisdictions be urged to adopt the same choice of rule provision, or is this rule, like other rules, a matter best left for each jurisdiction to decide on its own based on its own policies?

IV. Possible Solutions to the Rule 8.5 Issues

The Commission could consider various possible revisions to Model Rule 8.5, including the following:

A. Proposal by the Association of the Bar of the City of New York

The Committee on Professional Responsibility of the Association of the Bar of the City of New York recently issued a report, proposing the following approach in New York. (The redline reflects the Committee’s approach relative to Model Rule 8.5.)

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer’s conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:

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- Deleted:** jurisdiction
- Deleted:** A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.
- Deleted:** jurisdiction
- Deleted:** Choice of Law.
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² Prior to 2002, when the current version of Model Rule 8.5 was adopted, Rule 8.5(b) had offered a more straightforward, bright line approach. That bright line approach is still used in some jurisdictions, including New York. New York Rule 8.5 provides as follows:

- (b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:
- (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
 - (2) For any other conduct:
 - (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
 - (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Thus, choice of law problems are complicated not only because of the increase in cross-border practice and the variations among ethics rules, but because there is a lingering disagreement among states as to the appropriate choice of law rule to apply.

(1) ~~For~~ conduct in connection with a matter pending before a tribunal, the rules ~~to be applied shall be the rules~~ of the jurisdiction in which the ~~court~~ tribunal sits, unless the rules of the tribunal provide otherwise; and

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(2) ~~For~~ any other conduct, the rules ~~to be applied shall be~~ the rules of ~~this~~ state: ~~provided, however, that if a lawyer reasonably believes that the services for which the lawyer or the lawyer's firm has been retained have their predominant effect in another jurisdiction, such lawyer may rely on the rules of professional conduct of such other jurisdiction.~~

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Deleted: jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the

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Association of the Bar of the City of New York Committee on Professional Responsibility, *Report on Conflicts of Interest in Multi-Jurisdictional Practice: Proposed Amendments to New York Rules of Professional Conduct 8.5 (Disciplinary Authority and Choice of Law) and 1.10 (Imputation of Conflicts of Interest)*, pages 1-2 (March 2010), available at <http://www.nycbar.org/pdf/report/uploads/20071895-ReportonConflictsofInterestinMulti-JurisdictionalPractice.pdf>.

Moreover, to address some of the conflicts-related issues identified in the above fact patterns, New York has proposed the adoption of the following Rule 1.10(d):

(d) Notwithstanding the foregoing, no conflict will be imputed hereunder where (i) a conflict arises under these rules from the conduct of lawyers practicing in another jurisdiction in accordance with such jurisdiction's rules of professional conduct, and (ii) such conduct is permitted by the rules of professional conduct of that other jurisdiction.

Id. at 4.

B. Proposal by Professors Laurel Terry and Catherine Rogers

Professors Laurel Terry and Catherine Rogers have submitted a report (attached to this memorandum), which offers an alternative proposal. (The redline is relative to the Model Rule.)

RULE 8.5: Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as

follows:

(1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules specified by or for the tribunal, if any;³

(2) If no ethical rules are specified by or for a tribunal for matters pending before it, the rules to be applied shall be:

i) for conduct in connection with a matter pending before a tribunal, other than an international tribunal, the rules of the jurisdiction in which the tribunal sits, ~~unless the rules of the tribunal provide otherwise~~; or

ii) for conduct in connection with a matter pending before an international tribunal, the rules of this jurisdiction, including Rule 8.5.

As described in the attached memo, this proposal does not suggest any specific amendments to the provisions currently found in Rule 8.5(b)(2).

C. Adoption of the Restatement Approach

The *Restatement (Third) of the Law Governing Lawyers* contains an extended discussion of choice of law considerations and proposes the following approach, which could be reflected in Model Rule 8.5 and its comments:

It is . . . necessary to have a choice-of-law rule to determine which specific provision of two or more arguably applicable and inconsistent lawyer-code provisions should apply. Such a rule should take appropriate account of such elements as the following: 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. That rule should be selected for application which, among rules having a plausible basis for application, is the rule of the jurisdiction with the most significant relationship to the charged offense

³ This proposed language for 8.5(b)(1) differs textually from the current ABA Model Rule 8.5(b)(1) and the City Bar's proposal, but its purpose and effect are the same. All three rules specify that the advocate's first step is to consult the tribunal's own rules. The proposed changes to paragraph (b)(1) are necessary to accommodate the substantive changes proposed for paragraph (b)(2).

conduct. See [Restatement Second, Conflict of Laws § 6](#). Somewhat contrary to that approach, the 1983 ABA Model Rules of Professional Conduct were amended in 1993 (Rule 8.5), adding a rule that attempted to provide more rigid, per se rules—an approach that has not recommended itself to most jurisdictions (see Reporter's Note).

No more specific formula than that stated here can adequately deal with all relevant conflict considerations, and each issue of conflict must be addressed on its specific facts. However, as a presumptive preference, a lawyer in nonlitigation work is subject to the lawyer code of the single state in which the lawyer is admitted or, if admitted in more than one state, in the state in which the lawyer maintains his or her principal place of law practice. If the lawyer's act occurs in the course of representing a client in a litigated matter, the presumptive preference is for the lawyer-code rules enforced by the tribunal in which the proceeding is pending. Either presumptive preference can be displaced by a sufficient demonstration that the interests of another jurisdiction are, on the particular facts, more involved than those of the presumptive jurisdiction.

Restatement (Third) of the Law Governing Lawyers, §5, cmt. h.

III. Conclusion

Lawyers need clearer guidance when they engage in cross-border practice and encounter rules of professional conduct that impose conflicting obligation. For this reason, the Commission seeks input into whether amendments to Model Rule 8.5 or other action would be advisable and specifically requests feedback on whether any of the above approaches (or any other alternatives not described here) would be more effective than the current version of Model Rule 8.5. The Commission also seeks feedback on whether it should consider any amendments to Model Rule 1.10 in order to clarify how conflicts of interest should be resolved when the conflict implicates more than one jurisdiction.

Any responses or comments on related issues should be directed by **March 15, 2011**, to:

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Comments received may be posted to the Commission's website.

Sample Bibliography

The Commission has had the benefit of reviewing numerous materials, a select number of which are included in this sample bibliography. The Working Group and Commission welcome recommendations for additional resources that address the issues in this paper.

Representative Ethics Opinions

Arizona:

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MEMORANDUM

FROM: Laurel S. Terry
Catherine A. Rogers

DATE: October 1, 2010 (updated Dec. 1, 2010 by adding footnote 2)

RE: Proposed Revisions to Model Rule 8.5

On June 24, 2010, we circulated a proposal to add to the ABA Model Rules of Professional Conduct a new Model Rule 8.6. The purpose of the new rule, if adopted, would be to govern choice-of-law issues for legal activities that occur outside the United States or before an international tribunal that sits or is seated in the United States. We have now received comments and feedback on our June 24th draft and have had the opportunity to review the *Report on Conflicts of Interest in Multi-Jurisdictional Practice: Proposed Amendments to New York Rules of Professional Conduct 8.5 (Disciplinary Authority and Choice of Law) and 1.10 (Imputation of Conflicts of Interest)* prepared by the Professional Responsibility Committee of the New York City Bar Association which was released on June 29, 2010. In light of this feedback, we have revised our proposed rule, a copy of which is attached.

The current draft seeks to simplify proposed changes by incorporating them into Rule 8.5 instead of being proposed as a stand-alone Rule 8.6. Thus, the blackletter in the attached draft now provides a unitary rule for both domestic and transnational practice. Should the Commission prefer, the same concepts could be included in a separate Rule 8.6 that would apply to U.S. lawyers engaged in transnational practice.

This proposal is limited to the most problematic applications of the current version of Model Rule 8.5(b)(1), which mandates application of the ethical rules of the foreign jurisdiction in which an international tribunal sits when such tribunal does not have its own ethical rules. The problems arise with international tribunals because, unlike U.S. state and federal courts, many international tribunals have not adopted rules of conduct for lawyers appearing before them. As a result, the first clause in paragraph (b)(1) usually applies and subjects U.S.-licensed lawyers to the rules of the jurisdiction where the tribunal “sits.” While this formulation makes sense in the domestic situation, where state and federal lawsuits are subject to venue rules, the approach of paragraph (b)(1) is inapposite to the context of international disputes.

In disputes before international tribunals, clients, their counsel, and the underlying dispute are often wholly and intentionally unrelated to the place where the tribunal physically sits. As a result, in obliging counsel to follow the rules of professional conduct of the jurisdiction where an international tribunal sits, Rule 8.5(b)(1) effectively requires that U.S. attorneys abide by rules that are completely unrelated to the proceedings in which they are appearing. To illustrate, because the Iran-U.S. Claims Tribunal sits in the Hague and does not have its own ethical rules, under paragraph (b)(1) a U.S. attorney

would be bound by Dutch ethical rules, even though Dutch law and Dutch procedure have no relationship with, or even relevance to, proceedings before the Tribunal and regardless of whether the Dutch rules (or sources interpreting them) are available in an official English translation. Moreover, because few, if any, foreign jurisdictions have a choice of law rule equivalent to Rule 8.5(b)(1), U.S.-licensed lawyers are likely to be the only lawyers appearing before the Iran-U.S. Claims Tribunal who would be subject to Dutch rules. For more detailed discussion of the problems with the current version of Rule 8.5, see Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PENN. INT'L L. REV. 1035 (2009); see also CHALLENGES OF TRANSNATIONAL LEGAL PRACTICE: ADVOCACY AND ETHICS, Panel 30 in the *Proceedings of the 103rd Annual Meeting of the American Society of International Law* (2010) (forthcoming).

The solution found in the attached proposal is straightforward. If an international tribunal has adopted rules of conduct for counsel appearing before it, Rule 8.5(b)(1) would require a U.S.-licensed lawyer to comply with those rules. But if the tribunal has not adopted rules of conduct for counsel, the fallback provision would be Rule 8.5, not the rules of the jurisdiction in which the international tribunal “sits.”

In streamlining the blackletter, the current proposal shifts into the Comments much of detailed guidance that had been included in the blackletter of our June 24th draft. The draft makes clear that very different considerations apply in transnational settings, but proposes that those considerations be treated as background guidance rather than blackletter mandates.

Because this proposal is limited in scope to those provisions that pertain to advocates, namely the provisions of paragraph (b)(1) of the current Model Rule 8.5 and paragraphs (b)(1)&(b)(2) of the proposed revisions below, the proposed revisions do not address the provisions in paragraph (b)((2) of the Model Rule, now paragraph (b)(3) of the proposal. We are aware that the New York City Bar has proposed changes to the provisions in paragraph (b)(2) of the current version of the Model Rule and we are generally supportive of those proposed changes.

We welcome any and all comments and suggestions. Please send them to Laurel Terry at LTerry@psu.edu and Catherine Rogers at CAR36@psu.edu.

APPENDIX A – Redline Version

RULE 8.5: Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules specified by or for the tribunal, if any;¹

(2) If no ethical rules are specified by or for a tribunal for matters pending before it, the rules to be applied shall be:

i) for conduct in connection with a matter pending before a tribunal, other than an international tribunal, the rules of the jurisdiction in which the tribunal sits, ~~unless the rules of the tribunal provide otherwise;~~ or

ii) for conduct in connection with a matter pending before an international tribunal, the rules of this jurisdiction, including Rule 8.5.

(3) [As described in the attached memo, this proposal does not suggest any specific amendments to the provisions currently found in Rule 8.5(b)(2).]

¹ This proposed language for 8.5(b)(1) differs textually from the current ABA Model Rule 8.5(b)(1) and the City Bar’s proposal, but its purpose and effect are the same. All three rules specify that the advocate’s first step is to consult the tribunal’s own rules. The proposed changes to paragraph (b)(1) are necessary to accommodate the substantive changes proposed for paragraph (b)(2).

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement,. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject ~~only~~ to the rules adopted by or prescribed for that tribunal. The applicable rules might consist of pre-established ethical rules that apply to all matters pending before that tribunal or rules or rulings regarding conduct that are imposed for a specific matter. ~~of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise.~~ [The remainder of comment 4 focuses on Rule 8.5(b)(2), which this proposal does not address].

[5] Many international tribunals do not have pre-established ethical rules. The absence of such rules creates problems because participants from different systems may have different perceptions about what constitutes ethical conduct and their abiding by different ethical rules can undermine the fairness and perceived legitimacy of the proceedings. Accordingly, international tribunals sometimes address lawyer conduct issues through procedural orders or rulings, either at the beginning of the proceedings or in response to specific issues that arise during the proceedings. Particularly in international arbitral tribunals, parties often enter into agreements and tribunals issue rulings regarding the procedures to be followed. Those agreements and rulings sometimes have implications regarding the conduct of counsel, and related issues of legal ethics. Consistent with their obligations under Rule 3.4(c), a lawyer should make every effort to comply with such agreements and rulings to the extent possible consistent with these rules. To the extent that compliance is not possible, a lawyer should provide the tribunal and opposing counsel timely notice of the lawyer's intent not to comply and cite to the conflicting rule that is determined to apply under paragraph (b)(2)(ii).

[6] Paragraph (b)(2) provides two distinct choice-of-law rules that apply to those situations in which a tribunal does not have any rules governing the conduct of lawyers appearing before it. For domestic tribunals, paragraph (b)(2)(i) provides that the governing rules are the ethical rules, including the choice of law provisions, of the jurisdiction in which the domestic tribunal sits. Paragraph (b)(2)(ii) provides that, if an international tribunal does not have any preestablished rules and has not adopted rules for a specific matter, then a lawyer who is licensed in this jurisdiction and who is appearing before an international tribunal shall use the rules of this jurisdiction.

[7] The choice-of-law rule for domestic tribunals in paragraph (b)(2)(i) selects the rules of the jurisdiction where the tribunal sits. In such contexts, there is necessarily some relationship between the dispute and the jurisdiction in which the tribunal is located, even when the tribunal is an arbitral tribunal instead of a court. The same is not true with respect to international tribunals. The place where an international tribunal sits or has its seat often bears little or no relationship either to the dispute, the proceedings or the parties. Indeed, in the international context, the jurisdiction in which the international tribunal sits or has its seat is often selected for travel convenience or precisely because it bears no relationship to the dispute. Accordingly, if an international tribunal does not have any general rules governing counsel conduct and has not adopted any rules specific to the matter at hand, then the rules of this jurisdiction apply rather than the rules of the jurisdiction in which the international tribunal has its seat.

[8] The term "international tribunal" includes foreign and international tribunals seated abroad, as well as tribunals, other than U.S. state and federal

courts, that are seated in the United States but are constituted to resolve a dispute that involves property located abroad, performance or enforcement of obligations abroad, or has some other reasonable relation with one or more foreign states. Rule 8.5(b)(2)(ii) thus applies to international arbitral proceedings that physically occur in the United States, such as an ICSID arbitral tribunal, because these proceedings have more in common with international tribunals seated abroad than with other domestic tribunals in which all lawyers are licensed in a U.S. jurisdiction.²

[9] It may be the case that a lawyer appearing before an international tribunal is licensed in more than one U.S. jurisdiction. In that situation, the provisions of paragraph (b)(2)(ii) do not fully resolve the choice-of-law issue since that lawyer may be directed under that paragraph to abide by ethical of rules that are different from those that another jurisdiction directs the lawyer to follow. In that instance, the lawyer should, consistent with the approach found in paragraph (b)(3), apply the rules of the other jurisdiction if the lawyer if the lawyer reasonably believes that the lawyer’s representation in that case has a predominant effect in the other U.S. jurisdiction. This approach may be appropriate, for example, if the clients are located in another U.S. jurisdiction or if the lawyer’s primary office or principal locus for preparing the case is the other U.S. jurisdiction.

Choice-of-Law in Parallel Proceedings

[10] Large complex international cases often involve multiple proceedings that occur in different venues. In many instances, these parallel proceedings involve a combination of national courts, arbitral tribunals and other international tribunals. Generally, lawyers will be able to abide by all the ethical rules of the multiple tribunals, even if the rules of one tribunal are more restrictive than those of another. For example, in a case pending in a U.S. court, a lawyer may wish to depose abroad a witness who resides in a country that does not permit private depositions, and instead requires that any deposition be administered by a local judge. A lawyer can comply with both U.S. ethical obligations and the foreign prohibition by pursuing the judicial procedure in the local foreign court, or by arranging to depose the witness in a jurisdiction where the foreign prohibition does not apply. If a lawyer cannot comply with the rules of both tribunals, the rules of the tribunal that are most directly related to the relevant conduct apply. One forum is likely to have a more direct link to the conduct in question, for example if the activities physically occur in that forum. In the event that a lawyer

² In the Oct. 1, 2010 draft, this sentence stated “Rule 8.5(b)(2)(ii) thus applies to international arbitral proceedings that physically occur in the United States, such as an ICSID arbitral tribunal, because these proceedings have more in common with international tribunals seated abroad than with other domestic tribunals in which all lawyers are licensed in a U.S. jurisdiction.” The updated draft, dated Dec. 1, 2010, deletes the words “in which all lawyers are licensed” because some U.S. jurisdictions authorize *pro hac vice* appearances by lawyers who are licensed in a foreign jurisdiction but not a U.S. jurisdiction. See http://www.abanet.org/cpr/mjp/prohac_admin_comp.pdf.

cannot comply with the rules that would otherwise apply to proceedings before a particular tribunal, the lawyer shall provide timely notice, both to the tribunal and to opposing counsel, of the lawyer's intention not to comply with the otherwise applicable rule, and cite to the conflicting rule that is determined to apply under paragraph (b)(2)(ii).

[insert as [11] and [12] comments related to proposed Rule 8.5(b)(3)]

[713] The choice of law provision in Rule 8.5(b)(3) applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Issues Related to Enforcement

[614] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules. In the domestic context, U.S. disciplinary authorities have procedures for communicating regarding lawyer conduct issues. For example, many jurisdictions have adopted rules that address reciprocal discipline and cooperation issues such as those found in ABA Model Rule of Disciplinary Enforcement 22. U.S. jurisdictions also share information through the National Lawyer Regulatory Data Bank.

In the international context, there are no formal rules or procedures to facilitate reciprocal discipline and cooperation. However, decisions regarding discipline for conduct that occurs in another country or involves violation of foreign or international ethical rules may be aided by information from the foreign jurisdiction or international or foreign tribunal. In determining whether to impose discipline, this jurisdiction may seek appropriate guidance from the foreign jurisdiction or foreign or international tribunal regarding the interpretation of and the policies underlying its rule, and whether discipline would be imposed by that jurisdiction for the conduct at issue. Moreover, this jurisdiction may take under consideration any factual findings or assessments of a lawyer's conduct rendered by a foreign or international tribunal, whether or not such tribunal imposed sanctions directly on the lawyer.

[15] The ethical rules of some foreign jurisdictions or international tribunals may require conduct that would be considered offensive to the public policy of this jurisdiction. For example, an order by a foreign tribunal that would require a lawyer to violate directly a non-derogable order of a court in this jurisdiction would almost invariably be a violation of the public policy of this jurisdiction. In determining whether discipline is appropriate for conduct that

occurred outside the United States and is subject to the rules of a foreign jurisdiction or international tribunal, this jurisdiction may consider whether the imposition of discipline would result in grave injustice, be contrary to the reasonable and good faith expectations of the lawyer regarding the applicable rules, or be offensive to the public policy of this jurisdiction. This allowance for exceptions based on grave injustice, unfair surprise or violation of public policy is consistent with the approach found in ABA Model Rule of Disciplinary Enforcement 22(D)(3), which contains a similar public policy exception in the context of reciprocal discipline between individual U.S. jurisdictions.

APPENDIX B – Clean Version

RULE 8.5: Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules specified by or for the tribunal, if any;

(2) If no ethical rules are specified by or for a tribunal for matters pending before it, the rules to be applied shall be:

i) for conduct in connection with a matter pending before a tribunal, other than an international tribunal, the rules of the jurisdiction in which the tribunal sits,;
or

ii) for conduct in connection with a matter pending before an international tribunal, the rules of this jurisdiction, including Rule 8.5.

(3) [As described in the attached memo, this proposal does not suggest any specific amendments to the provisions currently found in Rule 8.5(b)(2).]

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement,. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject ~~only~~ to the rules adopted by or prescribed for that tribunal. The applicable rules might consist of pre-established ethical rules that apply to all matters pending before that tribunal or rules or rulings regarding conduct that are imposed for a specific matter.

[5] Many international tribunals do not have pre-established ethical rules. The absence of such rules creates problems because participants from different systems may have different perceptions about what constitutes ethical conduct and their abiding by different ethical rules can undermine the fairness and perceived legitimacy of the proceedings. Accordingly, international tribunals sometimes address lawyer conduct issues through procedural orders or rulings, either at the beginning of the proceedings or in response to specific issues that arise during the proceedings. Particularly in international arbitral tribunals, parties often enter into agreements and tribunals issue rulings regarding the procedures to be followed. Those agreements and rulings sometimes have implications regarding the conduct of counsel, and related issues of legal ethics. Consistent with their obligations under Rule 3.4(c), a lawyer should make every effort to comply with such agreements and rulings to the extent possible consistent with these rules. To the extent that compliance is not possible, a lawyer should provide the tribunal and opposing counsel timely notice of the lawyer's intent not to comply and cite to the conflicting rule that is determined to apply under paragraph (b)(2)(ii).

[6] Paragraph (b)(2) provides two distinct choice-of-law rules that apply to those situations in which a tribunal does not have any rules governing the conduct of lawyers appearing before it. For domestic tribunals, paragraph (b)(2)(i) provides that the governing rules are the ethical rules, including the choice of law provisions, of the jurisdiction in which the domestic tribunal sits. Paragraph b(2)(ii) provides that, if an international tribunal does not have any preestablished rules and has not adopted rules for a specific matter, then a lawyer who is licensed in this jurisdiction and who is appearing before an international tribunal shall use the rules of this jurisdiction.

[7] The choice-of-law rule for domestic tribunals in paragraph b(2)(i) selects the rules of the jurisdiction where the tribunal sits. In such contexts, there is necessarily some relationship between the dispute and the jurisdiction in which the tribunal is located, even when the tribunal is an arbitral tribunal instead of a court. The same is not true with respect to international tribunals. The place where an international tribunal sits or has its seat often bears little or no relationship either to the dispute, the proceedings or the parties. Indeed, in the international context, the jurisdiction in which the international tribunal sits or has its seat is often selected for travel convenience or precisely because it bears no relationship to the dispute. Accordingly, if an international tribunal does not have any general rules governing counsel conduct and has not adopted any rules specific to the matter at hand, then the rules of this jurisdiction apply rather than the rules of the jurisdiction in which the international tribunal has its seat.

[8] The term "international tribunal" includes foreign and international tribunals seated abroad, as well as tribunals, other than U.S. state and federal courts, that are seated in the United States but are constituted to resolve a dispute that involves property located abroad, performance or enforcement of obligations

abroad, or has some other reasonable relation with one or more foreign states. Rule 8.5(b)(2)(ii) thus applies to international arbitral proceedings that physically occur in the United States, such as an ICSID arbitral tribunal, because these proceedings have more in common with international tribunals seated abroad than with other domestic tribunals in a U.S. jurisdiction.

[9] It may be the case that a lawyer appearing before an international tribunal is licensed in more than one U.S. jurisdiction. In that situation, the provisions of paragraph (b)(2)(ii) do not fully resolve the choice-of-law issue since that lawyer may be directed under that paragraph to abide by ethical of rules that are different from those that another jurisdiction directs the lawyer to follow. In that instance, the lawyer should, consistent with the approach found in paragraph (b)(3), apply the rules of the other jurisdiction if the lawyer if the lawyer reasonably believes that the lawyer's representation in that case has a predominant effect in the other U.S. jurisdiction. This approach may be appropriate, for example, if the clients are located in another U.S. jurisdiction or if the lawyer's primary office or principal locus for preparing the case is the other U.S. jurisdiction.

Choice-of-Law in Parallel Proceedings

[10] Large complex international cases often involve multiple proceedings that occur in different venues. In many instances, these parallel proceedings involve a combination of national courts, arbitral tribunals and other international tribunals. Generally, lawyers will be able to abide by all the ethical rules of the multiple tribunals, even if the rules of one tribunal are more restrictive than those of another. For example, in a case pending in a U.S. court, a lawyer may wish to depose abroad a witness who resides in a country that does not permit private depositions, and instead requires that any deposition be administered by a local judge. A lawyer can comply with both U.S. ethical obligations and the foreign prohibition by pursuing the judicial procedure in the local foreign court, or by arranging to depose the witness in a jurisdiction where the foreign prohibition does not apply. If a lawyer cannot comply with the rules of both tribunals, the rules of the tribunal that are most directly related to the relevant conduct apply. One forum is likely to have a more direct link to the conduct in question, for example if the activities physically occur in that forum. In the event that a lawyer cannot comply with the rules that would otherwise apply to proceedings before a particular tribunal, the lawyer shall provide timely notice, both to the tribunal and to opposing counsel, of the lawyer's intention not to comply with the otherwise applicable rule, and cite to the conflicting rule that is determined to apply under paragraph (b)(2)(ii).

[insert as paragraphs [11] and [12] comments related to proposed Rule 8.5(b)(3)]

[13] The choice of law provision in Rule 8.5(b)(3) applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Issues Related to Enforcement

[14] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules. In the domestic context, U.S. disciplinary authorities have procedures for communicating regarding lawyer conduct issues. For example, many jurisdictions have adopted rules that address reciprocal discipline and cooperation issues such as those found in ABA Model Rule of Disciplinary Enforcement 22. U.S. jurisdictions also share information through the National Lawyer Regulatory Data Bank.

In the international context, there are no formal rules or procedures to facilitate reciprocal discipline and cooperation. However, decisions regarding discipline for conduct that occurs in another country or involves violation of foreign or international ethical rules may be aided by information from the foreign jurisdiction or international or foreign tribunal. In determining whether to impose discipline, this jurisdiction may seek appropriate guidance from the foreign jurisdiction or foreign or international tribunal regarding the interpretation of and the policies underlying its rule, and whether discipline would be imposed by that jurisdiction for the conduct at issue. Moreover, this jurisdiction may take under consideration any factual findings or assessments of a lawyer's conduct rendered by a foreign or international tribunal, whether or not such tribunal imposed sanctions directly on the lawyer.

[15] The ethical rules of some foreign jurisdictions or international tribunals may require conduct that would be considered offensive to the public policy of this jurisdiction. For example, an order by a foreign tribunal that would require a lawyer to violate directly a non-derogable order of a court in this jurisdiction would almost invariably be a violation of the public policy of this jurisdiction. In determining whether discipline is appropriate for conduct that occurred outside the United States and is subject to the rules of a foreign jurisdiction or international tribunal, this jurisdiction may consider whether the imposition of discipline would result in grave injustice, be contrary to the reasonable and good faith expectations of the lawyer regarding the applicable rules, or be offensive to the public policy of this jurisdiction. This allowance for exceptions based on grave injustice, unfair surprise or violation of public policy is consistent with the approach found in ABA Model Rule of Disciplinary Enforcement 22(D)(3), which contains a similar public policy exception in the context of reciprocal discipline between individual U.S. jurisdictions.