

Choice of Law in Lawyer Discipline: Excursions into the Dismal Swamp

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Introduction

WILLIAM L. PROSSER, opinionated maven of the law of torts in an earlier generation, probably represented widespread professional sentiments about the subject of choice of law—a field that, then and now, consists largely of judge-made law. Several years ago, he colorfully wrote: “The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”¹ When advising lay clients about legal issues subject to the vagaries of choice-of-law doctrine, most lawyers are able to rise with professional good grace above their frustration with the field’s uncertainties. When dealing with legal issues affecting themselves, however, lawyers—as with their clients and gored oxen generally—have been far less tolerant of uncertainty. That has led the American Bar Association (ABA) and a number of states to attempt to resolve at least some of the uncertain applications of choice-of-law rules in the limited field of lawyer discipline. The ABA has done so by replacing the common law rules of choice of law with rules it touts as being significantly clearer and more predictable.

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1. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). As was then common professional parlance, Professor Prosser referred to the subject as “conflict of laws.” *Id.* The field for the last several decades has also been “choice of law,” the term used here. Prosser wrote at a time when U.S. courts were still deploying a system of choice of law that is now followed by only a minority of jurisdictions. Replacement systems, such as the one promulgated by the ABA in its Model Rules of Professional Conduct, have been subject to similar criticisms, which are the central topics of this article.

This Article assesses the state of choice of law as applied to lawyers who are subject to disciplinary enforcement proceedings. This Article begins by reviewing the current state of judicial decisions, both in the specific realm of lawyer discipline and in the several other settings in which lawyer rights and responsibilities have been litigated. This Article then traces the development of relevant choice-of-law rules in the various ABA lawyer codes and, to the extent they are different, in the states. In the process, this Article assesses whether those rules have significantly improved on what judges have independently developed through the common law process. As will be seen, this Article joins the several other scholars who previously asserted doubt that the attempts to codify choice-of-law rules as applied to lawyer discipline have achieved a notable advance. This Article concludes with some remarks addressed to the specific topic of the symposium that generated these thoughts: interstate lawyer advertising.

I. Lawyer Codes² and Choice-of-Law Issues in General³

As with much else of legal importance, most of the law governing lawyers is state law, which states craft through the enactment of lawyer codes to suit their own needs and interests. As a result and as with other legal areas in which the applicable law varies from one jurisdiction to another, the laws governing lawyer discipline can vary significantly across the United States. One way of dealing with resulting questions about which of the disparate rules to apply is to ignore the clear potential for a clash between such rules, similar to the practice of whistling past graveyards. For example, the International Code of Ethics of the International Bar Association, which was in effect for a

2. Throughout this article, “lawyer codes” refers to the laws governing lawyers’ professional conduct.

3. See generally Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT’L L. 1035 (2009) (explaining the failings of rule 8.5 of the Model Rules of Professional Conduct to address the problems created by the increasingly global nature of the practice of law); Nancy J. Moore, *Choice of Law for Professional Responsibility Issues in Aggregate Litigation*, 14 ROGER WILLIAMS U. L. REV. 73 (2009) (describing the choice-of-law uncertainties created by rule 8.5 in both two party and aggregate litigations); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73 (1997) (arguing that solutions to the uncertainty associated with choice-of-law issues should take principles of federalism into account); Comm. on Counsel Responsibility, *Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States*, 45 BUS. LAW. 1229 (1990) (describing the ethical pitfalls of multijurisdictional practice before the ABA’s revisions to rule 8.5).

half century until 2011,⁴ could have been read (admittedly rather unfairly) to adopt such an approach in its first rule:

A lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted. He shall also observe all ethical standards which apply to lawyers of the country where he is working.⁵

On one possible reading, that rule seems to require a lawyer confronted with two conflicting professional regulations to obey both. An American lawyer could function with a choice-of-law rule mandating compliance with all applicable ethical standards in some instances, but hardly in all.⁶ In some European countries, professional regulations mandate that lawyers must not, without the prior consent of opposing counsel, reveal to their own clients such things as copies of correspondence between their own lawyer and opposing counsel.⁷ That rule of intra-lawyer confidentiality is perhaps best understood as a rule providing extraordinary lawyer independence from client control. A lawyer admitted in the United States facing such a rule would obviously confront the lawyer code rule in every state requiring lawyers to keep clients reasonably informed about important developments in the course of a representation.⁸ Obviously, the same lawyer could not comply with those sharply conflicting requirements.

Resolving choice-of-law issues will be similarly critical for a lawyer confronting conflicting lawyer codes if the facts are such that a disciplinary body could find that each of the jurisdictions has a legitimate claim to apply its own rule. That is, the lawyer would need to pursue a

4. In 2011, the IBA promulgated new ethical standards. *IBA Publishes New Code of Conduct for the Global Legal Profession*, INT'L BAR ASS'N (July 21, 2011), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bc99fd2c-d253-4bfe-a3b9-c13f196d9e60>. In its first paragraph, the 2011 standards attempt to obviate the need to conduct a choice-of-law analysis by disclaiming any legal effect for the document: "These International Principles are not intended to replace or limit a lawyer's obligations under applicable laws or rules of professional conduct. Nor are they to be used as criteria for imposing liability, sanctions, or disciplinary measures of any kind." INT'L BAR ASS'N, INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION 5 (May 28, 2011), available at www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C.

5. INT'L CODE OF ETHICS r. 1 (1988).

6. In fairness, it is likely that the IBA was using "shall" in its precatory or descriptive sense, and not as a command—in short, purposefully ignoring the obvious problem of choice of law with the expectation that a lawyer reading it would be able to recognize the gorilla lurking in the room.

7. John Toulmin Q.C., *A Worldwide Common Code of Professional Ethics?*, 15 *FORDHAM INT'L L.J.* 673, 684 (1992).

8. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.4(a) (2002) (broadly requiring lawyers to provide information to clients).

choice-of-law inquiry in any instance other than one of “false conflict,” as choice-of-law verbiage puts it.⁹ A false conflict is present whenever a claim for applying the rules outlining the responsibilities of lawyers of a particular jurisdiction would be fanciful or otherwise unreasonable.¹⁰ For example, it would be fanciful to claim that, in a matter involving a lawyer’s conduct allegedly harmful to a client, the lawyer code rules of a distant jurisdiction in which the client was born should be applied. While the law of the jurisdiction of birth may be relevant to some issues (such as citizenship or residence), no reasonable lawyer would argue that such law should have any bearing on the lawyer-discipline rules applying to a client’s interactions with a lawyer that are localized in another jurisdiction.

When a lawyer is confronted with a “true conflict” between conflicting professional rules, the standard advice, and surely the safest course, is that the lawyer should conform, if possible, to the strictest standard of those that might be applicable.¹¹ But that advice will not be well received in several contexts. First, and most obviously, it will resolve only some situations and leaves unanswered the critical question of choice when it is not possible for the lawyer to conform to both lawyer codes because they require inconsistent conduct. For example, one jurisdiction might compel a lawyer to disclose a client’s intention to commit a crime, while another interested jurisdiction compels the lawyer to remain silent.¹² Second, even in instances in which a lawyer could comply with the stricter rule, the lawyer may have sympathetic reasons for wishing to follow another professional rule, such as when the lawyer desires to serve compelling and otherwise legitimate needs of a client. Third, in many situations, a lawyer might be impelled by interests that do not carry particular sympathetic value, but may, nonetheless, be personally motivating. This would be true of a lawyer’s

9. LUTHER L. MCDUGAL III ET AL., *AMERICAN CONFLICTS LAW* § 85 (5th ed. 2001).

10. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 8(3) (1971) (stating, in effect, that a false conflict exists when the forum state has no significant connection to the specific issue in question or when the litigants and the courts of all interested states in the matter would agree that the local lawyer code is most applicable to that issue); see also *id.* cmt. 1. See, e.g., *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 813 (3d Cir. 1994) (“Faced with the possibility that either Pennsylvania or Wisconsin law applies to this diversity case, a choice of law question looms on the horizon. Before a choice of law question arises, however, there must actually be a conflict between the potentially applicable bodies of law.”).

11. See, e.g., Milton Gwirtzman, *The International Lawyer: Extra-Territorial Application of Professional Responsibility Standards*, in *Lawyers’ Ethics: Contemporary Dilemmas*, in *LEGAL ETHICS* 251, 252 (Allan Gerson ed., 1980).

12. Jonathan M. Weiss, *The Need for Federal Solutions to Interstate and International Ethics Conflicts: A Case Study in Confidentiality*, 11 *J. INT’L BUS. & L.* 1, 18 (2012).

desire to take the course of action that would result in a significantly higher fee, such as entering into a more lucrative contingent-fee arrangement with a client than is allowed under another applicable set of lawyer codes.¹³

In such instances of genuine and inescapable conflict between arguably applicable rules, lawyers will need to forecast how, at a later point, courts or other tribunals, such as disciplinary hearing bodies, will choose which of the contending rules to apply. Affected lawyers can forecast that choice only by referring to choice-of-law rules and concepts that are embedded either in lawyer codes or in other prescriptive texts (such as a statute) or, absent such a regulatory guide, that may be found in generally applicable rules found in the common law. The exercise of deriving a reasonably predictive choice-of-law rule can be a daunting prospect. Those who have taught or written in the field of conflicts of law often agree with the sentiments of the late Professor Prosser,¹⁴ many judges, and other lawyers that choice of law is a field that seems to be subject to neither coherent principle nor the sure rudder of clear rules.¹⁵

Nonetheless, and notwithstanding the difficulty of choice, choice is inescapably necessary in many instances, and at least some clear, if general, guideposts are discernible. In making a choice, courts should avoid extravagant and chauvinistic attempts to apply local lawyer code rules and other local law in disregard of the compelling relevance of the law of other jurisdictions.¹⁶ In the context of lawyer discipline,

13. See, e.g., *Elder v. Metro. Freight Carriers, Inc.*, 543 F.2d 513, 518 (3d Cir. 1976) (holding that a New York lawyer admitted *pro hac vice* in a action in federal court in New Jersey involving a wrongful death claim arising from New Jersey is bound by New Jersey limits on contingent fees, rather than the more permissive New York rule). See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (providing examples of similar cases).

14. See *supra* text accompanying note 1.

15. E.g., Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 949 (1994); Moulton, *supra* note 3, at 74–75 n.1. Professor Moulton concludes his analysis of federal versus state regulation of lawyers with the common conclusion that the states should continue to regulate lawyers, but he then offers the interesting (but politically implausible) hope that Congress would enact a nationally uniform rule of choice of law to govern lawyer discipline cases, although without describing the content of such a uniform rule. *Id.* at 155–70. See also Weiss, *supra* note 12, at 36–40 (providing a similar argument for a congressional solution).

16. Some decisions involving choice-of-law issues may be open to criticism on that score. Compare, e.g., *Norris v. Kunes*, 305 S.E.2d 426, 426 (Ga. Ct. App. 1983) (holding that contingent fee contract made in Georgia to obtain award from Maine workers' compensation agency for injuries incurred there was valid under Georgia law despite Maine law prohibiting a lawyer from receiving a greater fee than what the agency might allow), and *Sisk v. Transylvania Cmty. Hosp., Inc.*, 695 S.E.2d 429, 436 (N.C. 2010) (criticizing interme-

tribunals should not hold lawyers to unusual powers of clairvoyance in attempting in good faith to determine in advance how a court might resolve an open-ended choice-of-law issue.¹⁷

The prospect of articulating a choice-of-law approach possessing significantly more certainty than the common law approach has captivated the ABA in recent decades.¹⁸ The ABA has attempted to achieve this end by enacting various versions of Model Rule (“MR”) 8.5. That quest is obviously driven by the belief of many lawyers that such an articulated rule would significantly improve on the indeterminate nature of common law choice-of-law rules. But, a jurisdiction considering such a candidate rule afresh should first subject it to several stress tests.

For the first and most obvious test, the rule should indeed hold out the clear likelihood of improving significantly on common law rules. A sensible requirement for a dramatic displacement of otherwise applicable choice-of-law rules should be an insistence that the proponent demonstrate that the common law rules have produced rather clearly erroneous results in a significant number of actual cases. In fact, however, to this day very few decisions apply choice-of-law concepts of any sort in lawyer discipline decisions, and most of the few that exist seem straightforward.

Scholarly writing on the topic also rarely cites actual decided cases involving controversial choice-of-law results in lawyer discipline. The otherwise comprehensive ABA/BNA Lawyers’ Manual on Professional Conduct similarly indicates that choice-of-law decisions of any kind on the topic of lawyer discipline are rare. Its only discussion of either MR 8.5(b) or choice of law in lawyer discipline generally is tucked into a discussion of multijurisdictional practice.¹⁹ The choice-of-law discussion referred to consists of nothing more than a brief description of a single, unremarkable Wisconsin decision.²⁰

diat appellate court for focusing too much attention on lawyer code choice-of-law rule and too little on the trial court’s independent authority to discipline lawyers), *with, e.g., In re Discipline of Hoffman*, 379 N.W.2d 514, 515 (Minn. 1986) (applying Alaska law to claims originating in Alaska for purpose of determining whether fee charged to a Minnesota resident working on Alaska Pipeline was lawful in lawyer-discipline matter litigated in Minnesota).

17. That consideration has most recently led the ABA to insert into its post-2002 version of rule 8.5(b)(2) a safe harbor provision for certain choice-of-law situations. *See infra* Part V.A.

18. *See infra* Part II.A.–B.

19. ABA/BNA Lawyers’ Manual on Professional Conduct § 21:2133 (2014).

20. *In re Disciplinary Proceedings Against Marks*, 665 N.W.2d 836 (Wis. 2003). *See infra* text accompanying note 59.

The paucity of decisions is hardly surprising. Very few disciplinary proceedings involve important multijurisdictional elements, requiring the choice of an applicable professional standard. In large part, that situation can be explained by the near universal arrangement by the states, requiring local admission of any lawyer practicing there. The state then uses the fact of local admission as the basis for regulatory power over each locally admitted lawyer, and the state applies its own lawyer code to the lawyer's conduct wherever it occurred.

If a pressing need for a palliating choice-of-law rule of some sort could be shown, several additional tests should be applied to any proposed cure.

Second, any rule proposed to replace the common law should operate so that adversary lawyers opposing each other in litigation or negotiations with significant interstate or international features are subject to the same set of disciplinary rules. Failing that, the client of one of the lawyers is likely to be disadvantaged compared to the other.

Third, and relating to the foregoing consideration, the substitute choice rule should not provide opportunities for lawyers to get around it, such as by selecting a forum with lawyer code rules favoring the lawyer for the litigant with the power to choose the forum, and derivatively favoring that client.

Fourth, the ultimate choice-of-law rule should apply across the array of its probable application in ways that advance the substantive interests of the jurisdiction most relevantly concerned with the outcome of the choice question.

Fifth and finally, the rule should work.

Applying those tests to the ABA's current efforts to frame a choice-of-law rule, one must conclude that the ABA has so far made no real progress toward producing a choice-of-law rule that improves on the common law.²¹ To the contrary, the ABA should have left the choice-of-law process where it started—with the common law. In fact, as will be seen, the ABA implicitly endorsed the superiority of the common law, choice-of-law approach at a critical point in its own most recent choice rule. Overall, the ABA's attempt to rescue American lawyers from unjustly applied choice-of-law rules appears to have been both unnecessary in the first place and futile as drafted.

21. *Accord, e.g.,* Weiss, *supra* note 12, at 23 (“An examination of the original rule 8.5, the amendments thereto, and state variation in implementation will prove that Model Rule 8.5 has failed to provide clear guidelines to lawyers with respect to which state's ethics laws should govern a particular transaction or representation.”).

II. Disciplinary Choice of Law: ABA Model Rule 8.5 Evolves

A. The Original Version of MR 8.5

As originally adopted by the ABA in 1983, MR 8.5 took the cautious, and probably wiser, course of not attempting to grapple legislatively with choice-of-law issues for lawyer discipline. The original rule provided simply that a lawyer admitted to practice in the local jurisdiction “is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.”²² The rule was correctly read as a rule of regulatory jurisdiction and not as a choice-of-law rule. That is, it simply declares that a lawyer admitted in a particular jurisdiction is subject to the disciplinary authority of that jurisdiction for conduct of the lawyer no matter where the conduct occurred. But the rule itself said nothing about how to resolve possible choice-of-law conflicts. The comment to the original MR 8.5 acknowledged that choice-of-law problems might arise in lawyer discipline cases, but it offered no rule or guide other than by referring generally to “principles of conflict of laws” for their resolution.²³ Those “principles,” of course, could at that time refer only to the open-textured and sometimes elusive common law rules of choice of law.

Shortly after the adoption of the Model Rules, scholars expressed the need for clarity in choice of law in lawyer discipline because of the significant number of jurisdictions with different lawyer codes—some jurisdictions adopted the new (as of 1983) Model Rules, while many others retained the older 1969 ABA Model Code of Professional Responsibility.²⁴ The current, near-universal adoption by states of lawyer codes more or less based on the ABA Model Rules, perhaps removed concern about the wide disparity between the “new” 1983 Model Rules and the earlier 1969 Model Code. But that concern hardly disappeared. The reason for this continuing concern is that no state has adopted the ABA Model rules intact and no rival model has supplanted the ABA rules. Several important jurisdictions with large lawyer populations—including California with roughly one-eighth of the nation’s lawyers²⁵—adopted lawyer codes that vary significantly from

22. MODEL RULES OF PROF’L CONDUCT r. 8.5 (1983).

23. *Id.* cmt. (“If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.”).

24. *E.g.*, Duncan T. O’Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678, 678–81 (1986).

25. AM. BAR ASS’N, NATIONAL LAWYER POPULATION BY STATE (2013), available at <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/>

the ABA model.²⁶ Nowhere is that truer than with respect to lawyer-advertising rules, a topic whose choice-of-law implications this Article examines at a later point.²⁷ Moreover, in recent decades, large law firms have grown like mushrooms after a rain, and one prominent source of that expansion has been the strategy of many mid-sized and large firms of opening or acquiring offices in several out-of-jurisdiction places that are heavily stocked with additional lawyers. It is not uncommon for larger firms to have hundreds, even thousands, of lawyers, in different offices in jurisdictions with dramatically differing lawyer codes, with each lawyer admitted to practice in the jurisdiction in which the lawyer's office is situated. A combination of these attorneys could be working for the same client.²⁸

B. The ABA's III-Starred 1993 Amendment to MR 8.5

Prior to 1993, very few courts decided choice-of-law issues in lawyer discipline cases, and the few reported decisions did not suggest particular difficulty or controversy. Nonetheless, the ABA in 1993 attempted a more "certain" choice-of-law rule for lawyer discipline, purportedly to allay professional confusion about choice-of-law issues and to provide guidance to lawyers faced with potentially differing professional rules. The 1993 amendment followed an earlier report of an ABA group that forecast increasing litigation on those questions due to the increasingly multistate nature of law practice and a perception that the states differed greatly in their rules on important ethical issues.²⁹ The 1993 amendment seems to have sprung most immediately from the professional reaction to ABA Formal Opinion 91-360 (1991), in which the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee") briefly opined on the choice-of-law issues involved in determining whether a lawyer admitted else-

2013_natl_lawyer_by_state.authcheckdam.pdf (showing that in 2013, 163,163 out of 1,268,011 lawyers in the United States, or roughly 13%, resided in California).

26. The extent of those variations are well known to any scholar of legal ethics and apparent to even a casual researcher who has, for example, consulted the ABA/BNA Lawyers' Manual on Professional Conduct to determine whether a particular ABA Model Rule has been copied intact or with variations among the states.

27. See *infra* Part VI.

28. Despite other modernizing changes, the bar in every state requires that a lawyer practicing in the jurisdiction must be admitted to the bar of the jurisdiction. Many states have liberalized, to varying degrees, the historical strictures on multi-jurisdictional practice by individual lawyers. See generally ABA/BNA Lawyers' Manual on Professional Conduct § 21:2101-107 (2009) (discussing the revised MR 5.5 on multi-jurisdictional practice and how various states have interpreted or adopted it).

29. See Comm. on Counsel Responsibility, *supra* note 3, at 1229-30.

where could form a partnership in the District of Columbia under the District's unique rule allowing non-lawyers to be members of lawyer partnerships in limited instances.³⁰ In its opinion, the committee denigrated common law approaches to choice of law as lacking sufficiently clear standards of conduct.³¹ Two years later, the same ABA Ethics Committee cosponsored what became the 1993 version of MR 8.5.

The ABA House of Delegates voted unanimously to adopt the proposed amendment to MR 8.5, suggesting that delegates either considered the recommended rule brilliant, believed it to be of little practical importance, or did not understand it. Perhaps most delegates, recalling their law school befuddlement about conflict of law, felt insufficiently comfortable with the matter to speak out in opposition.

The basic approach of the 1993 amendment was to divide all choice-of-law issues in lawyer codes into two categories. The first involved alleged lawyer misconduct in connection with litigation in which the lawyer was a member³² of the bar of the court before which the matter was pending. For such lawyers, all lawyer-discipline issues were to be controlled by the lawyer code of that court's jurisdiction. The second category consisted of any alleged misconduct that did not occur in connection with pending litigation, and which was to be regulated by the lawyer code of the jurisdiction in which the lawyer was admitted to practice. If the lawyer was admitted in only one jurisdiction, the lawyer code of that jurisdiction applied to all the lawyer's conduct not relating to pending litigation, wherever it occurred. If the lawyer was admitted in multiple jurisdictions, the applicable rules were those of the jurisdiction in which the lawyer "principally practice[d]."³³ However, if such a lawyer's non-litigation conduct had its "predominant effect" in another jurisdiction in which the lawyer was admitted, that jurisdiction's lawyer code would apply.³⁴

The 1993 version of MR 8.5 was deceptively clear, but difficult to apply sensibly. Among other difficulties, basing choice of law on where a lawyer was admitted to practice threatened to produce extremely artificial outcomes. The rule's reliance on a lawyer's jurisdic-

30. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-360 (1991).

31. *Id.*

32. The 1993 rule applied to lawyer-membership either generally—as where a lawyer admitted in both New York and California was involved in California litigation—or where the lawyer was admitted only for the purpose of the specific litigation, which lawyers sometimes refer to as *pro hac vice* admission. See BLACK'S LAW DICTIONARY 1405 (10th ed. 2014).

33. MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(2)(ii) (1993).

34. *Id.*

tion of admission manifested the then dominant approach of the ABA and the states to relegate the adjudication of lawyer discipline exclusively to the place of a lawyer's admission.³⁵ Thus, a lawyer admitted only in Oregon, but who extensively solicited potential clients in California, would be subject to discipline only in Oregon and not in California. Exclusive reliance on the jurisdiction-of-admission approach to lawyer discipline is slowly receding, as exemplified in recent amendments to the ABA's own Model Rules.³⁶

The scholarly reaction to the ABA's 1993 proposal was deafeningly critical,³⁷ and only a handful of jurisdictions adopted it.³⁸ Nevertheless, as next discussed, the ABA later incorporated significant aspects of its 1993 model into its 2002 rule.

C. The ABA's 2002 Amended MR 8.5(b)

Believing that further effort would produce a better product, the ABA Commission on Multijurisdictional Practice ("MJPC") developed a revised MR 8.5 on choice of law—a topic closely connected with the commission's attention to the ethical problems of lawyers practicing in multiple jurisdictions. The MJPC worked somewhat in tandem with and somewhat independently of the ABA Ethics 2000 Commission, which was engaged in an extensive revision of every part of the ABA Model Rules other than Rule 8.5. The ABA House of Delegates ultimately accepted the MJPC's recommendation in August 2002 and adopted a new MR 8.5 with a revised approach to choice of law, although one that was still indebted to the discarded 1993 revision. Many more jurisdictions have adopted the 2002 model of Rule 8.5 than was true of the ABA's 1993 effort, although a few have not.³⁹ In the years following 2002, the ABA has left MR 8.5 alone, perhaps per-

35. See Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015, 1015 (2002).

36. MODEL RULES OF PROF'L CONDUCT r. 8.5(a) (2002). As amended in 2002, MR 8.5 explains that a jurisdiction has authority to discipline a lawyer not admitted in that jurisdiction "if the lawyer provides or offers to provide any legal services in th[at] jurisdiction." *Id.* The new rule would plainly apply to an out-of-state lawyer soliciting or advertising for clients within the jurisdiction.

37. *E.g.*, Moulton, *supra* note 3, at 157; Gregory B. Adams, *Reflections on the Reaction to Proposed Rule 8.5: Consensus of Failure*, 36 S. TEX. L. REV. 1101, 1101–02 (1995); Kathleen Clark, *Is Discipline Different? An Essay on Choice of Law and Lawyer Conduct*, 36 S. TEX. L. REV. 1069, 1070 (1995); Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, An Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 758 (1995).

38. See MODEL RULES OF PROF'L CONDUCT ANN. 603 (6th ed. 2007).

39. See AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MODEL RULE 8.5 (Oct. 6, 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_8_5.authcheckdam.pdf (indicating that as of October 2014,

ceiving widespread adoption as an indication that the reformulated rule successfully resolved most choice-of-law puzzles. It is widely perceived, however, not to have succeeded.

As with the ABA's otherwise discarded 1993 model, its 2002 version of MR 8.5 recommended an all-encompassing approach, providing rules purporting to deal comprehensively with all choice-of-law issues that might arise in lawyer discipline.⁴⁰ It did so mainly by attempting to express clear rules in broad areas of law practice, but then incorporating by reference choice-of-law notions that could only be found in the common law. Again, the basic approach reflects a surface simplicity of broadly stated rules that apparently abandon choice-of-law concepts developed through the common law process. In the end, however, the new rule retreats back to those concepts for several purposes.

In one respect, the ABA clearly intended the 2002 version of its MR 8.5(b) to sweep more broadly than the 1993 version of that rule.⁴¹ The earlier version disclaimed application to international practice.⁴² But Comment 7 of the 2002 version of MR 8.5 explicitly affirms its global reach, stating that its "choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaty or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise."⁴³

The new MR 8.5(b), although applying comprehensively to all alleged lawyer misconduct, specifies that each of its subparts is to apply only "[i]n any exercise of the disciplinary authority of this jurisdiction."⁴⁴ Thus, a lawyer's conduct—for example, communicating with a prospective client in another jurisdiction—might be subject to the lawyer code of one jurisdiction for purposes of professional discipline, but also subject possibly to another jurisdiction's law regarding attorney-client privilege, whether a client-lawyer relationship arose out of the exchange, and whether the lawyer committed malpractice in counseling the prospective client. As to all such non-disciplinary legal issues, the general common law of choice of law will determine which

twenty-five jurisdictions had adopted a rule identical to MR 8.5, while twenty-one had adopted a rule similar to it).

40. See MODEL RULES OF PROF'L CONDUCT r. 8.5 (2002).

41. See *id.* cmt. 6.

42. MODEL RULES OF PROF'L CONDUCT r. 8.5 cmt. (1993) ("The choice of law provision is not intended to apply to transnational practice.").

43. MODEL RULES OF PROF'L CONDUCT r. 8.5 cmt. 6 (2002).

44. *Id.* r. 8.5(b).

jurisdiction's law applies.⁴⁵ Further, MR 8.5(b) does not apply in other litigation in which lawyer codes may otherwise play a large part, such as litigation between lawyers over the validity of fee-splitting agreements.⁴⁶

Even in lawyer-discipline proceedings, the MR 8.5 choice-of-law rules are to be used for the purpose of ascertaining "the rules of professional conduct to be applied."⁴⁷ It follows that issues such as the choice of sanctions for a lawyer's conduct occurring or primarily impacting another jurisdiction are not subject to MR 8.5(b). Jurisdictions can then generally expect to apply their own rules on lawyer sanctions.⁴⁸

The 2002 version of MR 8.5(b) is broadly similar to its 1993 predecessor in that it divides all issues into two categories. The first, set out in MR 8.5(b)(1), consists of a lawyer's "conduct in connection with a matter pending before a tribunal," for which "the rules of the jurisdiction in which the tribunal sits" apply "unless the rules of the tribunal provide otherwise."⁴⁹ The second category, defined in MR 8.5(b)(2),

45. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. e (2000) ("In general, traditional choice-of-law principles, such as those set out in the Restatement Second of Conflict of Laws, have governed questions of choice of law in nondisciplinary litigation involving lawyers."). See also *id.* § 5 cmt. h (urging that jurisdictions adopt less rigid and more workable choice-of-law rules in lawyer-discipline cases); RESTATEMENT (SECOND) CONFLICT OF LAWS § 139 cmt. c, illus. 1 (1971) (stating that the evidence law of the state having the most significant relationship with a communications should generally control whether the communication is privileged).

46. See *Macurdy v. Sikov & Love, P.A.*, 894 F.2d 818 (6th Cir. 1990) (applying common law choice-of-law principles from the Restatement to determine which state's law applied in resolving a fee-splitting dispute). In limited circumstances, other law may also displace otherwise applicable lawyer code rules. *E.g.*, *Arnold, White & Durkee, P.C. v. Gotcha Covered, Inc.*, 714 A.2d 360, 365–66 (N.J. Super. Ct. App. Div. 1998) (holding that the constitutional requirement of full faith and credit controlled the question of the enforceability of a Texas judgment in New Jersey, and that otherwise-applicable choice-of-law concepts were displaced due to the constitutional imperative).

47. MODEL RULES OF PROF'L CONDUCT r. 8.5(b) (2002). Even that limitation may be debatable in some contexts. For example, in *In re Gil*, a lawyer's allegedly criminal act of larceny had connections with three jurisdictions. 656 A.2d 303, 304–05 (D.C. 1995). In two of them, larceny did not require proof that the accused intended to deprive the victim of property permanently; the third jurisdiction did require such proof. In construing whether the alleged misconduct constituted a "criminal act," the court followed a highest-common-denominator approach looking to the law of any jurisdiction that might have prosecuted the lawyer to determine if the lawyer had committed larceny. See *id.* at 305.

48. This author found no post-2002 decisions addressing the issue of sanctions. However, several pre-2002 decisions exist. See, e.g., *In re Dugan*, 636 N.Y.S.2d 342, 343 (N.Y. App. Div. 1996) (stating that the state where a lawyer lived and practiced law at the time of the misconduct has the greatest interest in determining the appropriate sanction for misconduct committed in another state).

49. MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(1) (2002).

consists of “any other conduct” of a lawyer, for which “the rules of the jurisdiction in which the lawyer’s conduct occurred” apply, unless “the predominant effect of the conduct is in a different jurisdiction,” in which case “the rules of that jurisdiction shall be applied to the conduct.”⁵⁰

Note that, among many other differences from the 1993 rule, the 2002 version does not link the choice of law in either category to jurisdictions in which a lawyer is admitted to practice.⁵¹ Instead, the choice potentially extends to any jurisdiction in which the lawyer’s conduct occurred or had its predominant effect—whether or not the lawyer was ever admitted in that jurisdiction. In that respect, the 2002 rule takes a major departure from the prior rule.

A final sentence in MR 8.5(b)(2) then adds a safe harbor rule, providing 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.”⁵² Note that the safe harbor apparently applies only to “other conduct” subject to subsection (b)(2) and not to conduct governed by (b)(1). Thus, a lawyer’s reasonable belief about the predominant effect of the lawyer’s litigation-related conduct is irrelevant for choice-of-law purposes. Why is a lawyer’s uncertainty about choice of law more excusable when it doesn’t involve litigation? The distinction is unexplained and appears to be inexplicable on policy grounds.

Most of the comments to MR 8.5 address the new rule MR 8.5(b), but they provide little additional guidance about the rule’s operation. Implicitly recognizing that two or more disciplinary tribunals might make independent assessments of the choice-of-law issue and perhaps acknowledging the difficulty of formulating workable choice-of-law rules, Comment 3 nonetheless expresses the hope that all the relevant jurisdictions will arrive at the same choice-of-law determination and apply only the same set of substantive rules to a lawyer’s conduct,⁵³ and that MR 8.5 will “mak[e] 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.”⁵⁴

50. *Id.* r. 8.5(b)(2).

51. *Compare id.* r. 8.5, with MODEL RULES OF PROF’L CONDUCT r. 8.5 (1993).

52. MODEL RULES OF PROF’L CONDUCT r. 8.5(b)(2) (2002).

53. *See id.* r. 8.5 cmt. 3 (“Accordingly [the rule] takes the approach of . . . providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct.”).

54. *Id.*

Comment 6 urges straightforward and predictable choice-of-law determinations with even greater fervor in the hopes of protecting lawyers. There, the ABA takes the position that when two disciplinary tribunals in different jurisdictions deal with the same choice-of-law issue about the same lawyer's conduct, they should both come to the same conclusion and "should take all appropriate steps" (whatever those might be) to assure consistency.⁵⁵ Further, the two tribunals "in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules."⁵⁶ However, in many instances only one jurisdiction will formally proceed against the lawyer, because the lawyer complied with the rules of conduct of the other jurisdiction. Under such circumstances the rule of the other jurisdiction is not "inconsistent."⁵⁷ In any event, it has been and likely will continue to be rare for multiple jurisdictions to proceed concurrently against the same lawyer for the same offense.

Of course, such occasions do arise after a lawyer is disciplined in one jurisdiction and is then proceeded against in another jurisdiction for reciprocal discipline.⁵⁸ But most jurisdictions now embrace the concept of reciprocal discipline and apply various forms of watered-down claim preclusion as to another jurisdiction's disciplinary findings and sanctions, which will often bar the lawyer from attacking the first jurisdiction's determinations. As a result, choice-of-law issues as to the offense simply do not arise. Comment 6 is primarily a cry from the hearts of lawyers hoping against reality that they will not be required to grapple occasionally with the inherent uncertainty of conflicting jurisdictional rules to which amended MR 8.5(b) provides only an indeterminate answer.

In jurisdictions that have adopted MR 8.5(b), very few decisions discuss these issues extensively. Nor do they apply MR 8.5(b) in controversial circumstances. Despite the rule's defects, the few relevant

55. *Id.* r. 8.5 cmt. 6.

56. *Id.*

57. *Id.*

58. *E.g.*, CAL. BUS. & PROF. CODE §§ 6049.1–49.2 (West 1985) (“[A] final order made by any court of record or any body authorized . . . to conduct disciplinary proceedings against attorneys, of the United States or of any state . . . determining that a member of the State Bar committed professional misconduct in such other jurisdiction shall be conclusive evidence that the member is culpable of professional misconduct in this state”); *Florida Bar v. Abrams*, 402 So.2d 1150, 1151 (Fla. 1981) (applying reciprocal discipline based in part on discipline proceeding in Appellate Division of High Court for the Trust Territory of the Pacific Islands); *In re Anshell*, 385 N.Y.S.2d 771, 771–72 (N.Y. App. Div. 1976) (disciplining an attorney based in part on findings of the Law Society of Alberta, Canada).

decisions to date generally interpret the rule sensibly. In the process, courts have occasionally had to remind local disciplinary agencies that applying lawyer-conduct rules of other jurisdictions is appropriate.⁵⁹ As with choice-of-law issues in other areas of the law, courts in lawyer discipline cases have not hesitated to find that the lawyer code of State A will govern some issues, but the lawyer code of State B will govern others.⁶⁰ In that regard, when State A adjudicates a claim of misconduct for which State A's rules specify using the lawyer code of State B, courts have appropriately held that State A does not thereby also incorporate the other jurisdiction's rules on non-conduct procedural matters, such as the standard of appellate review applicable in a disciplinary proceeding.⁶¹

It is also noteworthy that a few decisions apply state rules based on MR 8.5(b) in non-disciplinary contexts, such as in ruling on disqualification motions, sanctions motions, and fee disputes.⁶² In the few relevant decisions to date, there is no indication that the court has used the MR 8.5(b) choice in a way that distorts the result that would otherwise arise under the jurisdiction's common law jurisprudence regarding choice of law.

Given this background, this Article will analyze more closely the two parts of MR 8.5(b). That examination will further demonstrate the ways in which the rule fails in its attempt to provide more straightforward rules or greater certainty in choice of law.

59. *E.g.*, *In re Disciplinary Proceedings Against Marks*, 665 N.W.2d 836, 845–46 (Wis. 2003) (explaining that in line with MR 8.5, Wisconsin's disciplinary authority could proceed against a lawyer who violated the Michigan Rules of Professional Conduct).

60. *E.g.*, *In re Disciplinary Action Against Overboe*, 745 N.W.2d 852, 861–62 (Minn. 2008) (applying Minnesota's version of MR 8.5(b) and its predominant-effect test, the court applied North Dakota law to charges that a lawyer made deceptive use of a trust account and commingled funds, but then applied Minnesota law to charges that the lawyer lied to Minnesota disciplinary authorities about those events and failed to cooperate with their investigation).

61. *E.g.*, *In re Disciplinary Action Against Overboe*, 763 N.W.2d 776, 779–82 (N.D. 2009) (finding that the lawyer involved in the Minnesota *Overboe* decision, *supra*, was subject to reciprocal discipline, rejecting his argument that the Minnesota finding that he had violated a North Dakota lawyer code should not provide the basis for such discipline because Minnesota applied its less-searching clearly erroneous standard to review the hearing referee's findings rather than North Dakota's standard of *de novo* review).

62. *See generally* Mark J. Fucile, *Important Choices: Choice of Law Under Model Rule 8.5(b)*, 19 J. PROF. LAW 20, 20–21 (2009).

III. MR 8.5(b)(1)—Conduct in Connection with a Matter Pending Before a Tribunal

The first important area of lawyer conduct in the 2002 version of MR 8.5(b) is conduct occurring “in connection with a matter pending before a tribunal”⁶³ The rule simply provides that a disciplinary tribunal assess such conduct under “the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.”⁶⁴ To date, very few decisions have interpreted the rule. In one of the few decisions, the Wisconsin Supreme Court applied Wisconsin’s version of a choice-of-law rule to a lawyer admitted in both Wisconsin and Michigan, and applied Michigan’s disciplinary rule (which was the same as Wisconsin’s) in holding that a lawyer who filed a frivolous lawsuit in a Michigan court committed a disciplinary offense.⁶⁵ The absence of significant judicial critiques of MR 8.5 thus far is the result of how rarely the circumstances arise in which the rule applies. If that remains the case going forward, it would seem that the rule is benign because it is largely inapplicable. If and when it becomes more frequently applied, several possible questions of interpretation are likely to arise.

One of these issues is that MR 8.5(b)(1) may create a problem of indeterminacy in terms of choice of law. Comment 3 to MR 8.5 states, “Paragraph (b)(1) provides that as to a lawyers conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only

63. MODEL RULES OF PROF’L CONDUCT r. 8.5(b) (2002).

64. *E.g.*, *In re Ponds*, 876 A.2d 636, 636–37 (D.C. 2005) (quoting D.C. RULES OF PROF’L CONDUCT r. 8.5(b)(1)) (disciplining lawyer for violation of Maryland rule of conduct in disclosing confidential client information in moving for permission to withdraw in a criminal case in Maryland).

65. *In re Disciplinary Proceedings Against Marks*, 665 N.W.2d 836, 846 (Wis. 2003). The specific wording of Wisconsin and Michigan’s lawyer codes addressing what constitutes a meritorious claim differs significantly, but each prohibits a lawyer from litigating a frivolous lawsuit. WIS. RULES OF PROF’L CONDUCT FOR ATTORNEYS 20:3.1 (2015) (“In representing a client, a lawyer shall not: . . . knowingly advance a claim or defense that is unwarranted”); MICH. RULES OF PROF’L CONDUCT r. 3.1 (West 2011) (“A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous.”). Thus, *In re Marks* might have been a situation of false conflict, and there would therefore have been no need for the court to make a choice of law between the two jurisdictions. The court seems, however, to have seized on the refusal of the Wisconsin disciplinary hearing officer to apply Michigan’s rule as the occasion to emphasize that disciplinary authorities were to apply the state’s version of the choice-of-law rule as then set out in its lawyer code. *See In re Marks*, 665 N.W.2d at 846. The court left open the possibility that a better solution would be for the Wisconsin disciplinary authority to refer the matter to its Michigan counterpart for an arguably more sure-footed application of Michigan’s own lawyer code rule. *Id.*

to the rules, of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice-of-law rule, provides otherwise.”⁶⁶ Students of choice of law will readily recognize this as the familiar issue of *renvoi*,⁶⁷ under which, essentially, a court resorting to the law of another jurisdiction will also apply the other jurisdiction’s choice-of-law rules. In situations where Rule 8.5(b) applies, the rationale for *renvoi* is compelling. For example, if State A was to determine whether a lawyer committed a disciplinary offense in litigation pending in State B, it would not be sensible for State A to refer solely to the lawyer codes of State B, where State B—were it to discipline the lawyer under its choice-of-law rules—would apply different lawyer codes of another jurisdiction—including, possibly, State A. Obviously, that would occur only if State B has a choice of law for disciplinary purposes that differs significantly from MR 8.5, as is true in several states. The *renvoi* problem will persist so long as that difference continues.

The Restatement (Second) of Conflict of Laws seems to adopt the opposite position.⁶⁸ It states that, subject to an important exception, a reference by a forum’s choice-of-law rules to “the law” of another jurisdiction generally should be taken as a reference to only what the Restatement calls the “local law” of the other jurisdiction.⁶⁹ In the present context, that would include only the other jurisdiction’s lawyer code rules, and not its rules dealing with choice of law. However, section 8(2) of the Restatement states the exception in terms that apply here: “When the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state, the forum will apply the choice-of-law rules of the other state, subject to consideration of practicability and feasibility.”⁷⁰

66. MODEL RULES OF PROF’L CONDUCT r. 8.5 cmt. 3 (2002).

67. See *Renvoi*, BLACK’S LAW DICTIONARY 1490 (10th ed. 2014). See generally Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821 (2005) (discussing what kind of problem *renvoi* is, why it occurs, and what it shows about choice-of-law issues generally).

Because of the doctrine of *renvoi*, drafters of choice-of-law clauses in private contracts typically make the point explicitly if the clause is not to include a reference to the other jurisdiction’s choice-of-law rules.

68. RESTATEMENT (SECOND) CONFLICT OF LAWS § 8(1) (1971).

69. *Id.* As noted in § 8, comment c, if choice-of-law rules called for applying the entire law of the other jurisdiction, that could logically lead to a kind of infinite regress: “If, in this context, ‘law’ were to be interested as meaning the entire law of the forum, the court would be referred to its own choice of law rules and would be back at the place where it began.” *Id.* cmt. c.

70. *Id.* § 8(2). Comment j explains that the reference in § 8(2) to “considerations of practicability and feasibility” refers primarily to situations in which the choice-of-law rules

That is also an alleged goal of MR 8.5. The comments to MR 8.5 leave no doubt that the primary objective of the revised rule is to assure that “any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct.”⁷¹ That can obviously be achieved only if both jurisdictions apply the same rule—that is, the jurisdiction in which the disciplinary tribunal facing the choice-of-law question sits and the other jurisdiction (where the lawyer’s conduct occurred, where the underlying litigation was pending, or where the predominant effect of the lawyer’s conduct is appropriately sited). While one would expect most jurisdictions to recognize that point and apply *renvoi* in all such situations arising under MR 8.5, it would have been preferable for the ABA to have explicitly addressed it in either MR 8.5 or its comments.

Two key points about the choice of law contemplated by MR 8.5(b)(1) for misconduct occurring while litigation was pending are discussed further below. First, its use of the rules of the forum for such conduct is conclusive, not merely presumptive, even if the predominant effect of the lawyer’s conduct was clearly centered in a different jurisdiction. The tribunal’s rules govern regardless of the strength of the claims of other jurisdictions even if the circumstances are such that their lawyer codes should apply instead. Similarly, no good faith safe harbor is recognized for conduct while litigation was pending, as is recognized for other conduct under MR 8.5(b)(2).⁷² Therefore, the rules of the tribunal where litigation is pending will inexorably apply under MR 8.5(b)(1), notwithstanding the reasonableness of a lawyer’s good faith claim that the lawyer code of another jurisdiction applied at the time he or she committed the conduct in question.

Second, however, MR 8.5(b)(1)’s aforementioned *renvoi* problem reduces the rule’s intended certainty.⁷³ As discussed above, the rules of the forum where litigation is pending direct a disciplinary body to follow the forum’s choice-of-law rules, if they are reasonably ascertainable. That would include the forum’s equivalent, if any, to

of the jurisdiction referred to are too undeveloped to permit the forum to determine those rules with a reasonable degree of confidence. *Id.* cmt. j.

71. MODEL RULES OF PROF’L CONDUCT r. 8.5 cmt. 3 (2002); *id.* cmt. 6 (“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 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.”).

72. *See infra* Part V.

73. *See supra* notes 66–67 and accompanying text.

MR 8.5, or even the applicable common law, choice-of-law rules.⁷⁴ In certain states, those rules might resemble the “predominant-effect” approach of MR 8.5(b)(2),⁷⁵ which under certain circumstances would include a reference to the law of another state. With the back-and-forth of renvoi, only very astute or very well advised lawyers will be able to achieve the certainty sought by MR 8.5. Certainty here, as elsewhere, may be a much more illusive objective than the ABA and states adopting MR 8.5 believe or hope.

MR 8.5(b)(1) bristles with two other specifically textual questions of interpretation. First, when does a “matter pending before a tribunal” begin and end? The gerund “pending” speaks to the present, suggesting that the rule does not attach until a matter formally commences, and continues to attach until entry of final judgment.⁷⁶ The pending language requires diligence by lawyers to determine the precise event—whether it be filing a complaint, effecting service of process, or obtaining a case number—that causes a matter to “pend.” Once the commencing event is determined, however, courts can be expected to draw the line at the act of commencement itself.

How to interpret the pending clause of MR 8.5(b)(1) is debatable. The rule does not explicitly cover the potentially contentious lawyerly conduct that occurs after a final judgment is entered in a case. At least one decision, however, suggests that a lawyer’s conduct occurring either before or after a matter was pending may still be subject to the law of the forum so long as it is importantly related to the proceeding.⁷⁷ Again, MR 8.5(b)(1) and its comments give little gui-

74. The common law would apply if the forum jurisdiction lacked a lawyer code corresponding to MR 8.5(b).

75. See *infra* note 89 and accompanying text.

76. New York’s rules, for example, confusingly appear to have it both ways, as there is no mention of “pending” in its version of MR 8.5. N.Y. RULES OF PROF’L CONDUCT r. 8.5(b)(1) (2009) (“For conduct in connection with a proceeding in a court . . .”). This means that legal work preliminary to filing a lawsuit, along with work connected to post-judgment enforcement would be covered by the place-of-litigation lawyer code. But comment 4 to the New York rule appears to have imported the “pending” qualification. *Id.* cmt. 4 (“Paragraph (b)(1) provides that as to a lawyer’s conduct relating to a proceeding *pending* before a court . . .”) (emphasis added). The lapse in the comment could be a drafting error, perhaps caused by failing to delete the word in the comment (which simply copies the wording of the corresponding ABA comment) after deleting it in the rule itself. To the extent that the additional word “pending” in the comment could be read to create a more onerous rule, a New York court would presumably refuse to apply it under the overarching rule that a comment cannot expand the duties stated in a rule. See N.Y. RULES OF PROF’L CONDUCT scope 13 (2009).

77. *E.g.*, *Apple Corps Ltd. v. Int’l Collectors Soc’y*, 15 F. Supp. 2d 456, 472–73 (D.N.J. 1998) (applying the 1993 version of MR 8.5(b)(1) to conduct occurring after litigation had terminated upon entry of a consent decree).

dance.⁷⁸ On the other hand, a court applying MR 8.5(b)(2) carefully will presumably apply the forum's law in circumstances in which the lawyer's post-judgment conduct either occurs in the forum or has its "predominant effect" there.⁷⁹

The "pending" concept might invite lawyers to strategically time conduct so that it occurs either prior to or after commencing litigation. Clever lawyers might be tempted to determine, for example, whether a particular investigative step would be permissible under the forum rules selected by MR 8.5(b)(1), or instead, only under the rule of another jurisdiction where the investigation would be permissible under the law if conducted prior to litigation under MR 8.5(b)(2). Depending on the answer, the lawyer would (1) delay taking the step, causing the lawsuit to "pend," or (2) proceed promptly with litigation. As another example, a lawyer might be tempted to file an appeal before a final judgment is entered to keep intact the "pending" status of the litigation while the lawyer conducts activities not permissible except under the tribunal-jurisdiction's rules.

MR 8.5(b)(1) invites additional maneuvering by lawyers to achieve substantive or procedural advantage in litigation. For example, a lawyer for a plaintiff will usually have the upper hand in selecting the jurisdiction in which to commence litigation.⁸⁰ A plaintiff's lawyer is accordingly in a position to select a jurisdiction based on the permissiveness of its lawyer code. The same opportunity to manipulate lawyer codes would not exist either in a sensibly applied common law regime of choice of law, or if MR 8.5(b)(1) were to include a "predominant effect" exception as does MR 8.5(b)(2).

A second interpretive question under MR 8.5(b)(1) is the meaning of the limitation that the conduct of the lawyer occurred "in connection with" pending litigation. Suppose, for example, that a lawyer enters into a contingent-fee agreement with a client at the lawyer's office in State A, which is both the client's home state and the place where the lawyer is admitted, lives, and conducts a law practice. The

78. See MODEL RULES OF PROF'L CONDUCT r. 8.5 cmt. 4 (2002) ("As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.")

79. See *id.* r. 8.5(b)(2).

80. The unusual case is when a defending party is empowered to frustrate a plaintiff's attempted choice of jurisdiction, such as filing a preemptive declaratory judgment action.

lawyer then takes the steps necessary to commence the lawsuit in State B, and it is “pending” there. Then imagine that the lawyer, entirely in State A, induces the client to amend their contract orally to increase the lawyer’s fee. Assume that the amendment would violate the lawyer code of State A, but not State B. In a subsequent disciplinary action in State A, should the tribunal treat the lawyer’s conduct as conduct “in connection with” the State B litigation? Ample argument could be advanced for either outcome, if based on the words of MR 8.5 alone. However, arguments for applying the lawyer code of State A have far more persuasive force if based on the interests of State A as compared with the minimal interest of State B.

MR 8.5(b)(1) clearly applies to courts, but does “pending before a tribunal” include additional decisional bodies? The definitions of MR 1.0(m) fully warrant an affirmative answer.⁸¹ Its first sentence defines the term “tribunal” to include “an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.”⁸² MR 1.0(m) goes on to define the phrase “acting in an adjudicative capacity” as denoting an institutional setting in which “a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.”⁸³ Whatever value such an expansive definition of tribunal might have for other purposes, applying the same definition for MR 8.5(b)(1) is puzzling. To begin, while the definition seems to fit comfortably with respect to arbitration before a governmental body, applying the same rule to private-agreement arbitration seems particularly inapt. When, as is commonly the case, arbitration stems from a private contract between the arbitrating parties, the arbitral body is a private organization without rules of lawyer conduct. Moreover, the specific jurisdiction where the arbitration occurs is chosen by the parties usually for their convenience and little else. Most often, it will otherwise have little to do with the dispute or the parties, other than offering a conveniently accessible airport and other accommodations for visitors required to travel. Furthermore, as applied to international arbitration, MR 8.5(b) will often impose rules on American lawyers that are quite different from those regulating their adversaries.⁸⁴ Presumably

81. MODEL RULES OF PROF’L CONDUCT r. 1.0(m) (2002).

82. *Id.*

83. *Id.*

84. See Rogers, *supra* note 3, at 1036 (“Rule [8.5] is a failed experiment as applied to international advocacy and it must be reconsidered.”). Because a significant number of American jurisdictions have refused to adopt the 2002 ABA choice-of-law rule, it will also

in light of such considerations, some states have refused to follow the 2002 ABA model with respect to choice of law in private-party arbitration.⁸⁵

Another puzzle is why MR 8.5(b)(1) adopts the MR 1.0(m) definition of tribunal as applied to a legislative body that operates in an “adjudicative capacity.” Legislative hearings offer only truncated or no opportunities for “parties” to present evidence and legal argument. Only rarely would a reasonable observer conclude that “neutral official” aptly describes the legislator or legislators presiding at a legislative hearing. Even more clearly, it is extremely rare for a legislative body to render a “binding legal judgment directly affecting a party’s interests in a particular matter” as Rule 1.0(m) requires.⁸⁶ Most legislative hearings result in nonbinding reports or recommendations—not binding judgments. The inclusion of “adjudicative capacity” in the definition of tribunal seems pointless and merely creates confusion.

In sum, MR 8.5(b)(1) hardly delivers the straightforward rules, certain in their application, as seemingly promised by Comment 3 to the rule.⁸⁷ One defending the rule might respond that any attempt to legislate a choice-of-law rule will inevitably result in some indeterminate applications, arbitrary line drawing, and lack of certainty. To be sure, many criticisms presented in this Article appear to be directed at sloppy drafting. Moreover, the inevitable costs of a more skillfully drafted rule do not present reasons for adopting the rule, but rather present cautionary warnings not to adopt it unless it clearly provides demonstrably fewer uncertain or unfortunate outcomes than the alternative—the common law concepts of choice of law. In each of its parts and overall, MR 8.5(b) fails any fair-minded assessment as to whether it provides such improvement.

create many situations in which lawyers opposing each other in arbitrated matters in the United States might operate under significantly different lawyer code rules. *See supra* note 39.

85. *E.g.*, MASS. RULES OF PROF’L CONDUCT r. 8.5(b)(1) (limiting application of the Massachusetts choice-of-law rule to conduct stemming from a matter pending before a “governmental tribunal”) (emphasis added).

86. MODEL RULES OF PROF’L CONDUCT r. 1.0(m) (2002).

87. *Id.* cmt. 3 (“Paragraph (b) seeks to resolve such potential [choice-of-law] 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).”).

IV. MR 8.5(b)(2)—Conduct Other than Litigation

Matters are little better under the second part of the 2002 version of ABA MR 8.5(b), dealing with non-litigation conduct. Under MR 8.5(b)(2), any conduct other than conduct relating to pending litigation is subject to the rules of lawyer conduct in the jurisdiction where “the lawyer’s conduct occurred.”⁸⁸ But MR 8.5(b)(2) is somewhat more nuanced than MR 8.5(b)(1) in that it goes on to provide that the lawyer codes of a jurisdiction other than the place-of-conduct jurisdiction will be applied “if the predominant effect of the conduct is in a different jurisdiction.”⁸⁹ Finally, the lawyer gets a disciplinary free pass in every instance if the lawyer can prove that “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.”⁹⁰

As is notorious to lawyers concerned about multijurisdictional practice issues, however, the first aspect of MR 8.5(b)(2) can be problematic because it can be difficult to determine—confidently and in advance—the location where a lawyer’s conduct occurs. Imagine, as was the case in *Lawyer Disciplinary Bd. v. Allen*,⁹¹ a lawyer sitting in an office in the District of Columbia, personally soliciting clients in West Virginia by telephone. The West Virginia Supreme Court determined the lawyer violated the West Virginia Rules of Professional Conduct despite the fact that he was engaged in conduct occurring outside West Virginia.⁹² But, obviously, the lawyer’s conduct occurred in two places. It is equally plausible to conclude that the solicitation occurred in Washington D.C., in West Virginia, or in both jurisdictions at the same time. Furthermore, because in-person solicitation is a lawyer code violation in West Virginia, but arguably not in the Washington D.C.,⁹³ is the conduct unlawful if prosecuted in one jurisdiction but not in the other? A further provision in MR 8.5(b)(2), which is next considered in the Article, renders some versions of that question moot.

88. *Id.* r. 8.5(b)(2) (“[F]or 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.”).

89. *Id.*

90. *Id.* (“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.”).

91. 479 S.E.2d 317, 320 (W. Va. 1996).

92. *Id.* at 356–58.

93. *See infra* note 146.

At first glance, it might appear that the choice-of-law rule of MR 8.5(b)(2) could be subject to manipulation by a lawyer who deliberately chooses to act in a certain way in a particular jurisdiction because that jurisdiction's more relaxed lawyer code does not prohibit that conduct. For example, a lawyer practicing in a jurisdiction that outlaws unconsented recording of conversations might arrange to meet a witness in a distant jurisdiction allowing such recording. This was the case in *In re Crossen*,⁹⁴ in which an attorney was disbarred for secretly recording a sham job interview with a judge's law clerk in Halifax, Nova Scotia, in an attempt to incriminate the judge who formerly employed the clerk. But MR 8.5(b)(2) alters that choice-of-law destination if "the predominant effect of the [lawyer's] conduct is in a different jurisdiction"⁹⁵ The predominant effect of taping the judicial clerk, who was a state resident and who clerked for a state judge, would be found to have occurred in that state—regardless of where the interview occurred. Thus, MR 8.5(b)(2)'s place-of-conduct test is merely provisional, and demonstrates that the superior regulatory interests of another jurisdiction will displace it.

With respect to conduct involving litigation, a comment to MR 8.5 makes it clear that, while lawyer conduct occurring in the midst of pending litigation is to be regulated by the forum state's rules under MR 8.5(b)(1), lawyer conduct occurring in connection with a proceeding commencing at a later date is subject to different choice rules of MR 8.5(b)(2).⁹⁶ However, as noted in the discussion above, rules of the jurisdiction in which the tribunal sits may include choice-of-law rules of the state where the conduct occurred; in some jurisdictions those rules operate on the same "predominant-effect" principle as MR 8.5(b)(2) itself, but more clearly are based on common law principles rather than on the jurisdiction's lawyer code rules.⁹⁷ At the end of the search for which rules govern which conduct, MR 8.5(b)(1) and (b)(2) might therefore converge in some instances. As a result, the question of choice of law under either prong of MR 8.5(b) will be decided under a predominant-effect test. To that extent, one can overstate the significance of the apparently wide divergence in ap-

94. See *In re Crossen*, 880 N.E.2d 352 (Mass. 2008).

95. MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(2).

96. *Id.* r. 8.5 cmt. 4 ("As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct.").

97. See *supra* Part III.

proach of the two subparts of MR 8.5(b). In that same vein, one can also overstate the extent to which MR 8.5(b) has effectively freed lawyers of the indeterminacy of traditional, common law, choice-of-law rules.

But what does MR 8.5(b)(2) intend in referring to the predominant effect of a lawyer's questioned conduct? Remarkably, there is nothing in MR 8.5(b)(2) or its comments offering any guidance on that question.⁹⁸ This author has been unable to unearth any decision attempting to construe the term since the ABA first drafted the language in 2002. Nonetheless, given the context of MR 8.5(b)(2) in dealing with choice-of-law issues, courts are very likely to conclude that the test is modeled on the arguably similar governmental-interest/most-significant-relationship test set out in the Second Restatement of Conflict of Laws.⁹⁹ That is not an entirely bad thing, to the limited extent that it provides familiar guidance to courts that have already adopted the Restatement approach, which formulates choice-of-law rules and principles for other types of legal issues. For the minority of jurisdictions whose choice-of-law jurisprudence predates the Restatement, it will be necessary either to invent a new wheel, or to become students of the Restatement approach, which is much more likely.

V. MR 8.5(b)(2)—The Reasonable Belief Safe Harbor

A. In General

The search for certainty and clarity in choice of law is one of many modern equivalents of the medieval quest for the philosopher's stone—which, according to myth, turned base metal into gold. Certainty and clarity in choice of law is excitedly discussed and eagerly sought after, but exist only in believers' imaginations. The last sentence of MR 8.5(b)(2) pursues that course in offering a safe haven for lawyers who make their own reasonable assessment of choice-of-law

98. The last sentence of comment 3 to MR 8.5 contains a vague reference to what the objective of the "predominant effect" language could be. MODEL RULES OF PROF'L CONDUCT r. 8.5 cmt. 3 (2002) ("[Paragraph b] takes the approach of . . . making the determination of which set of rules . . . consistent with recognition of appropriate regulatory interests of relevant jurisdictions.").

99. See generally RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971) (setting out the Restatement's seven factor governmental-interest test for resolving all choice-of-law issues, which requires a balancing of the interests of the forum state against the interests of other interested states).

issues at the time of acting¹⁰⁰—although, as discussed below, MR 8.5(b)(2) applies only when the lawyer’s conduct does not involve pending litigation.¹⁰¹ Creating a safe harbor implies that the certainty provided in the rest of the rule might be illusory or, at least, significantly incomplete, although the safe harbor itself offers yet another promise of a more certain outcome if the lawyer makes a reasonable prediction about how a court will ultimately decide the choice-of-law issue.

The safe harbor provision, in effect, reduces many disciplinary choice-of-law issues involving non-litigation conduct, if the lawyer had a good faith belief about the very choice-of-law question posed. In effect, the provision turns away from the ABA’s promise of objective application of clear choice-of-law rules and embraces a subjective inquiry into an individual lawyer’s state of mind regarding a highly indeterminate question. There is no requirement in the language of the rule itself for written or other corroborative evidence. Moreover, most lawyers on most occasions would likely concede, if pressed, that the question of choice of law barely crossed their minds at the time of committing the conduct in question. Thus, the rule tempts lawyers to be less than candid if accused of a disciplinary violation. The inquiry, however, is not entirely a matter of subjectivity and thus susceptible of proof only through the lawyer’s self-reported and, very likely, self-serving description of an earlier mindset. Instead, disciplinary tribunals are to conduct the inquiry objectively. As indicated in the MR 1.0(i) definition of “reasonably believes”—the term that MR 8.5(b)(2) deliberately employs—the inquiry is divided into two separate factual issues: (1) what, in fact, “the lawyer . . . believe[d]” at the time of acting;¹⁰² and (2) whether “the circumstances are such that the [lawyer’s actual] belief is reasonable.”¹⁰³

Comment 3 to MR 8.5 defends the reasonable-belief safe harbor rule on the ground that lawyers will often have to act in the face of uncertainty, and that lawyers who act reasonably in such stressful situations should be free of the threat of discipline.¹⁰⁴ All lawyers should

100. MODEL RULES OF PROF’L CONDUCT r. 8.5(b)(2) (2002) (“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.”).

101. See *infra* Part V.B.

102. MODEL RULES OF PROF’L CONDUCT r. 8.5(b)(2) (2002).

103. *Id.* r. 1.0(i) (“‘Reasonable belief’ or ‘reasonably believes’ when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”).

104. *Id.* r. 8.5 cmt. 3.

be so fortunate, but, of course, they are not, especially when faced with the uncertain, possible application of conflicting criminal laws and onerous civil rules. Determining choice of law based solely on the actor's reasonable expectations is unknown in choice-of-law jurisprudence in the United States. A key provision of the Second Restatement of Conflict of Laws does include "the protection of justified expectations" of actors in its list of "factors relevant to the choice of the applicable rule of law."¹⁰⁵ But that is only one of seven factors,¹⁰⁶ and it is hardly dominant among them, much less the only and conclusive factor as is the case with the safe harbor provision in MR 8.5(b)(2).¹⁰⁷

Despite the appearance of favoring lawyers, the safe harbor protection offered by MR 8.5(b)(2) might prove to be illusory. At a minimum, a close reading of the rule shows that it requires a lawyer to demonstrate the following: (1) the existence, at the time the lawyer acted, of a rule different from the one that would otherwise apply under MR 8.5(b)(2); and (2) a convincing basis for the lawyer to have reasonably concluded, at the time the lawyer acted, that the alternative rule solely applied.¹⁰⁸ At the very least, and assuming that the safe harbor rule is applied as written, a lawyer invoking it will face strong headwinds. Presumably, the drafters of the rule acted reasonably in setting out the preferred and normally applicable choice-of-law rule in MR 8.5(b)(2)—which, by hypothesis, differs from the lawyer's claimed "reasonable" conclusion. A lawyer who is both reasonably cautious and reasonably well informed about the choice-of-law process will take only small comfort from its purported protection.

Under what circumstances are lawyers able to demonstrate such a reasonable belief?¹⁰⁹ When applicable, the safe harbor exists only for

105. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6(2)(d) (1971).

106. *Id.* ("[T]he factors relevant to the choice of the applicable rule of law include[:] ([1]) the needs of the interstate and international systems[:] ([2]) the relevant policies of the forum[:] ([3]) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue[:] ([4]) the protection of justified expectations[:] ([5]) the basic policies underlying the particular field of law[:] ([6]) certainty, predictability and uniformity of result[:] and ([7]) ease in the determination and application of the law to be applied.").

107. MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(2) (2002).

108. *Id.*

109. Neither the Rule nor its comments provide additional guidance on what constitutes a "reasonable belief." The only directly relevant comment in r. 8.5 is comment 5, which does no more than closely paraphrase the language in the Rule. *Id.* r. 8.5 cmt. 5 ("So 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."). The general definition of "reasonable belief" in MR 1.0(i)

the uncommonly reflective lawyer—one who can later authenticate that, prior to and at the time of acting, the lawyer actually thought about the choice-of-law issue, and then actually formed a reasonable belief that the conflicting lawyer code rules would be resolved in a certain way. Again, the lawyer's conclusion must be a belief that other reasonable lawyers would also reach. Presumably, the reasonable lawyer would not be self-interested in a particular resolution of the choice question. The two-fold test also counsels the reflective lawyer to spell out—preferably in a contemporaneous writing—the lawyer's actual belief and the steps by which the lawyer arrived at it. To buttress that defense further, the careful and reflective lawyer will also seek a second opinion from a well-credentialed lawyer to reprocess the question and attest in writing to the reasonableness of the lawyer's claimed belief.

A lawyer will, of course, have only imperfect control over whether the safe harbor is indeed available. In any application of the safe harbor rule, a tribunal will ultimately assess the lawyer's claimed belief by comparing it against what the court determines is a possible range of reasonable ways of deciding in what jurisdiction the predominant effect of the lawyer's later conduct transpired. Administering the test fairly will require a somewhat high degree of judicial integrity, for the deciding officer must avoid the temptation to conclude that the choice of law that the tribunal thinks is the correct resolution is the only "reasonable" resolution.

To what extent, if any, should a choice-of-law clause in a client-lawyer agreement bear on a tribunal's determination whether the agreed-to choice is a reasonable one?¹¹⁰ Comment 5 to MR 8.5, in explaining the "reasonable belief," safe harbor standard, states that "in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's in-

does note that the concept requires two showings—both that the lawyer in fact believed the matter in question and that the lawyer's belief was reasonable. *Supra* note 103.

110. See generally J. Mark Little, Note, *The Choice of Rules Clause: A Solution to the Choice of Law Problem in Ethics Proceedings*, 88 TEX. L. REV. 855 (2010) (concluding, contrary to this Article's conclusion and that of other scholars, that private client-lawyer agreements should routinely be given effect in disciplinary proceedings despite the fact that such choice-of-law clauses were virtually unknown at the time the ABA amended MR 8.5 in 2002).

formed consent confirmed in the agreement.”¹¹¹ The Comment is puzzling in at least two respects.

First, it conditions a finding of reasonableness on a finding that the client gave informed consent to the clause, and that the consent was included in the same writing in which they agreed to the choice.¹¹² The client’s consent would seem to have no bearing on the issue of reasonableness, except perhaps in the rare situation in which the client is coincidentally a well-informed and reasonable lawyer.

Second, and more broadly, such a client-lawyer agreement is binding only between the contracting parties. A disciplinary agency, not being a party to the agreement, is not and should not be precluded from urging a different choice. More broadly, it seems an abuse of authority for a governmental body, such as a disciplinary court or other body, to delegate to self-interested private parties the power to displace, through their private agreements a selection of law with important public objectives beyond protecting the interests of the client.¹¹³ No jurisdiction should yield application of its own lawyer code rules to the private agreement of a lawyer and client, particularly when the lawyer will have an intensely personal interest in avoiding discipline through a strategic choice of law. The lawyer may have persuaded the client to agree with the lawyer about a matter (the lawyer’s possible discipline) that will often be of no concern or interest to the client.

111. MODEL RULES OF PROF’L CONDUCT r. 8.5 cmt. 5 (2002).

112. Note that, under r. 8.5(b)(2), the client must agree that, for purposes of a future prosecution of the contracting lawyer for professional discipline, the “predominant effect” jurisdiction favored by the lawyer is a reasonable choice. The usual choice-of-law clause in a client-lawyer retention agreement has an entirely different purpose—that of choosing the law to govern the legal relationship between client and lawyer, not between the lawyer and a disciplinary system. The two types of clauses have entirely different purposes and focuses. Only the former should qualify as a safe harbor.

113. See Arvid E. Roach II, *The Virtues of Clarity: The ABA’s New Choice of Law Rule for Legal Ethics*, 36 S. TEX. L. REV. 907, 928 (1995). See also Fred C. Zacharias, *A Nouveau Realist’s View of Interjurisdictional Practice Rules*, 36 S. TEX. L. REV. 1037, 1044–46 (1995) (presenting several arguments against lawyers having the ability to select the lawyer code applicable to them); but cf. Daly, *supra* note 37, at 793–95 (1995) (suggesting that client and lawyer should be able, within limits, to specify which state’s lawyer code will control their relationship—apparently for purposes of lawyer discipline as well as private litigation).

A similar issue arose when the ABA’s 20/20 Commission considered a quite limited proposal of a choice-of-law provision to apply (only, apparently) to questions of conflicts of interest. See Joan C. Rogers, *Model Rules: Ethics 20/20 Commission Airs Proposals on Conflicts-Checking, Choice of Law Pacts*, 27 LAW. MANUAL PROF’L CONDUCT 575 (Sept. 14, 2011). It would have given conclusive effect to some lawyer-client agreements choosing which jurisdiction’s conflict rules should apply. *Id.* The Commission ultimately decided not to continue study of the proposal.

B. Why Not a Safe Harbor or a “Predominant Effect” Alternative for Conduct Related to Pending Litigation?

The bifurcation between MR 8.5(b)(1)’s treatment of lawyer’s conduct while litigation is pending and MR 8.5(b)(2)’s treatment of the same lawyer’s “other conduct,” carries with it two important distinctions. First, that the safe harbor recognized in MR 8.5(b)(2) applies only to a lawyer’s “other conduct” and is not recognized in MR 8.5(b)(1), which deals with conduct in connection with pending litigation. While the distinction is not defended or even mentioned in the comments to the rule, it plainly appears from the text that the sharp differentiation was deliberate and not an oversight.¹¹⁴ Second, in making a choice of law for a lawyer’s non-litigation conduct under MR 8.5(b)(2), the tribunal is provided the choice of the law of either the place where the lawyer’s conduct occurred or, if different, the law of the place where the predominant effect of the lawyer’s conduct occurred. But, a lawyer’s conduct in connection with pending litigation is, under MR 8.5(b)(1), subject only to the rules of the jurisdiction in which the tribunal sits. The two distinctions raise separate issues.

1. The Absence of a Safe Harbor for Pending Litigation Conduct

The reasons for the ABA’s refusal in 2002 to acknowledge a safe harbor defense for a lawyer’s conduct in pending litigation are by no means apparent. Perhaps for that reason among others, not all jurisdictions that have otherwise adopted a version of MR 8.5(b)(2) have adopted the exception for non-litigation conduct.¹¹⁵ Perhaps the thought was that a lawyer involved in pending litigation was not relegated to privately determining the choice-of-law issue applicable to the lawyer’s contemplated conduct because the lawyer could simply apply to the tribunal where the litigation was pending for guidance. But, this is unrealistic. It is highly unlikely that a lawyer would wish to go to the trouble, expense, and publicity of a motion dealing with uncertain choice-of-law issues concerning the ethics of the lawyer’s prospective conduct. It is also unlikely that many courts would be interested in becoming involved in *ex parte* proceedings involving hypothetical ethical issues arising out of conduct that has not yet occurred.

A more subtle reason for the differentiation might be that the ABA drafters entertained the unstated belief that something like a

114. MODEL RULES OF PROF’L CONDUCT r. 8.5(b)(1)–(2) (2002).

115. *See, e.g.*, N.Y. RULES OF PROF’L CONDUCT r. 8.5(b)(2) (2009).

predominant-effect choice of law might be available under the law in, at least, many forums, and that the drafters assumed that such a choice of law would be available as one of the forum's "rules of the jurisdiction."¹¹⁶ But it hardly seems consistent with the drafters' overriding objective of providing greater certainty to leave such an important issue to the vagaries of state-by-state variations in accepting predominant-effect jurisprudence. Acknowledging the likelihood of such variations also assumes that the ABA's own choice-of-law proposal would be ignored in a significant number of jurisdictions.

2. The Absence of a "Predominant-Effect" Optional Choice of Law for Pending-Litigation Conduct

Even more mysterious is the absence from MR 8.5(b)(1) of the ability of a disciplinary tribunal to decide that the law of a jurisdiction other than that of the forum should be selected for a lawyer's conduct during pending litigation. Surely there are imaginable, real-life settings in which such an alternative would be highly desirable. Assume, for example, that a fee dispute over a post-inception, fee-altering agreement arises between lawyer and client in the immediate aftermath of settling a lawsuit such as described above.¹¹⁷ If the lawyer code of the forum would uphold the alteration, but the law of the client and lawyer's residence would not uphold it, the predominant effect of the lawyer's conduct in entering into the alteration clearly is in the latter jurisdiction and not in the forum. Applying forum law to resolve the fee dispute would be as insensible in such pending-litigation situations as it would be in other-conduct situations.

VI. Choice of Law and Lawyer Advertising

Given the contemporary state of lawyer advertising and its regulation, choice-of-law issues can, at least theoretically, play a pivotal role due to the marked disparity in the ways in which different jurisdictions regulate. This author discovered the chaotic variety of lawyer-advertising rules relatively early in the process by which the states adopted the ABA Model Rules. While preparing the appendices to *Modern Legal Ethics*,¹¹⁸ I naturally wanted to include the entire text of the then newly minted 1983 ABA Model Rules. The ABA had, however, impressed their copyright on the text of the rules and insisted on

116. MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(1) (2002).

117. *See supra* Part III.

118. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* (1986).

a hefty royalty for anyone wishing to reprint them. Irritated that the ABA would put its fiscal interests above the public interest in academic publicizing of its purported “model,” I searched for a state that had already adopted the ABA’s 1983 “model” intact, but without copyrighting the resulting text. All states, however, had departed from the ABA model in many respects. At the time, Idaho came closest to conformity, with the text of most of its rules copied from the ABA. On lawyer advertising, however, Idaho departed in several important ways from the ABA model.¹¹⁹ In the ensuing years, each state insisted on following its own muse in lawyer-advertising rules, with the result that those rules differ in many important respects both from the ABA’s model advertising rules and from each other’s authoritative texts. Most legal ethics scholars would agree that variation from the ABA “model”¹²⁰ and from possible models in other states is more pronounced in the lawyer-advertising rules than in any other comparable group of rules. That makes choice-of-law considerations particularly important for lawyers who advertise in a manner that is arguably multistate.

Additionally, a great deal of contemporary lawyer advertising has inescapable multistate impacts. Today, lawyers have moved from relying exclusively on traditional local advertisements in newspapers, in telephone directories, and on billboards and joined almost all other significant segments of the advertising world in relying extensively on Internet advertising. Notoriously, anything appearing on the Internet can be accessed globally, and certainly can be accessed in every jurisdiction in the United States. What jurisdiction or jurisdictions, then, should regulate a specific instance of Internet advertising by a lawyer?

In one group of cases, the choice of law will be straightforward, resulting in application of the lawyer code of the jurisdiction in which the lawyer is admitted and practices, despite the interstate nature of the advertising. In *In re Anonymous*, for example, the Indiana Supreme Court dealt with a situation in which an Indiana lawyer advertised his services on a website of the American Association of Motorcycle Injury Lawyers (“AAMIL”).¹²¹ He did so without identifying his office address, as required by Indiana’s lawyer advertising rules, which in this

119. Idaho’s current lawyer-advertising rules remain significantly different from those of the corresponding ABA Model Rules. Compare IDAHO RULES OF PROF’L CONDUCT r. 7.1–7.6 (2014), with MODEL RULES OF PROF’L CONDUCT r. 7.1–7.6 (2002).

120. MODEL RULES OF PROF’L CONDUCT r. 7.1–7.6 (2002).

121. *In re Anonymous*, 6 N.E.3d 903, 904 (Ind. 2014).

respect are similar to those in many states.¹²² Without discussing possible choice-of-law issues and despite the interstate nature of the lawyer's advertising, the court applied Indiana's advertising rule.¹²³ The facts were such that any court would have been hard-pressed to apply any other rule. The respondent apparently made the well-considered decision not to argue a hopeless point regarding choice of law. Among other compelling facts, AAMIL's website apparently recognized the respondent as its only Indiana-affiliated lawyer.¹²⁴ Therefore, AAMIL's website would link an inquiring prospective client from Indiana exclusively with the respondent. In other words, the website seems to have been designed to benefit the respondent with respect to Indiana clients. It should surprise no reasonably competent lawyer to foresee that such targeted solicitation activities in a particular jurisdiction would likely lead to application of the jurisdiction's own lawyer code rules.¹²⁵

Somewhat more challenging choice-of-law issues are presented when the lawyer who advertises on the Internet maintains an office in-state, but practices primarily in an out-of-state office; the advertising or practice is not overtly focused on prospective clients in a particular jurisdiction. Even there, however, the facts might indicate that the lawyer derives significant legal business from a particular jurisdiction.

Although decided on other grounds, the facts of a recent Washington appellate decision, *Gorden v. Lloyd Ward & Assocs., P.C.*,¹²⁶ involving non-discipline issues are illustrative. *Lloyd Ward* involved a Texas debt adjustment service provider, which advertised its services on the Internet.¹²⁷ As a result a significant number of Washington resident debtors responded online and signed retainer agreements that a Texas law firm drafted.¹²⁸ Among other onerous terms the re-

122. *Id.* at 904–05.

123. *Id.* at 905–07.

124. *Id.* at 904.

125. The concept of “targeted” advertising may come into general use in the regulation of interstate media advertising by individual states. Florida, one of the most restrictive jurisdictions, revised its rule on lawyer advertising in mid-2013. FLA. RULES OF PROF'L CONDUCT r. 4-7.11–4-7.23 (2013). Florida's new advertising rules apply “to lawyers, whether or not admitted to practice in Florida or other jurisdictions, who advertise that the lawyer provides legal services in Florida or who target advertisements for legal employment at Florida residents.” *Id.* r. 4-7.11(b). The first comment under the rule elaborates the ways in which the state's extensive advertising rules apply or do not apply to lawyer advertising on “websites.” *Id.* r. 4-7.11(b) cmt.

126. 323 P.3d 1074 (Wash. Ct. App. 2014).

127. *Id.* at 1076–77.

128. *Id.* The opinion does not indicate the number of Washington clients, but the action had been brought as a class action suggesting a large number of clients.

tention agreements provided the following: (1) the representation was to be governed by Texas law—explicitly stating that the reference to Texas law excluded its choice-of-law rules; (2) venue and jurisdiction in any dispute between the law firm and its debtor client was to be solely in Dallas; and (3) any dispute over the firm’s fees was to be decided only by arbitration before a fee-dispute committee of the Dallas bar association.¹²⁹ In ruling on the validity of the arbitration clause, the court did not hesitate to apply Washington case law and, in doing so, invoked provisions of the Washington Rules of Professional Conduct, requiring the lawyer to provide a reasonable and fair disclosure to a client of the terms of the fee agreement.¹³⁰ The court applied the Washington rules, in part, because the court rejected the Texas defendants’ arguments that the Washington courts lacked personal jurisdiction over them.¹³¹ The court found that there were ample facts supporting the conclusion that the defendants purposefully engaged in a course of transacting business within Washington with multiple persons known to be Washington residents, even if those transactions were, in one perspective, initiated by Washington residents who responded to the defendant’s Internet advertising.¹³² If the issue had been raised, doubtless, the court would have held that the “predominant effect” of the lawyer’s questioned conduct was its impact on Washington clients.

Those, however, are the relatively easy cases—situations in which a lawyer, who is reasonably well informed about choice of law, could confidently assess that there was a high likelihood that a tribunal would apply the law of the jurisdiction where the lawyer’s advertising had its intended impact. More difficult will be cases where, unlike *In re Anonymous*, the lawyer’s Internet advertising is non-specific as to prospective clients and, unlike *Lloyd Ward*, where advertising generates a less significant quantity of clients from a particular state. Compounding the choice question are such features as the peculiarity of the alleged offense of an advertising rule in the local jurisdiction. For example, rules in Texas require that all advertising must note the name of at least one lawyer responsible for its content,¹³³ that any presentation state at its outset and its conclusion that it is advertis-

129. *Id.* at 1077. Among other problems with those terms, the court noted the harshness of requiring a client indisputably burdened with debt to travel to a distant state to litigate a dispute with their lawyer. *Id.* at 1080.

130. *Id.* at 1079–80.

131. *Id.* at 1080–82.

132. *Id.*

133. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF’L CONDUCT r. 7.04(b)(1) (2005).

ing,¹³⁴ and that the advertising lawyer or firm must keep a copy of the communication for four years.¹³⁵ Applying such a rule to an out-of-state lawyer advertising on the Internet through communications not targeted at Texas residents would pointlessly burden all lawyers wishing to advertise on the Internet.

Despite the presence of lawyer advertising on the Internet and the state-by-state fascination with enforcing stringent, anti-advertising rules, no lawyer has yet been disciplined in a published decision that applies choice-of-law concepts in anything but a conventional way. Negative ramifications for lawyers have not yet been realized for several reasons. For one, absent the direct targeting of residents of a specific state, lawyer advertising generated in one state that happens to reach residents outside that state's borders will unlikely result in a disciplinary proceeding anywhere except in the state where the lawyer's office is located.

As with tax audits or many other areas where the law as applied can differ significantly from the law on the books, lawyer disquiet over choice-of-law rules as they might apply to their advertising or other professional conduct can be considerably tempered by the realities of lawyer disciplinary enforcement. Most states' lawyer-disciplinary agencies are under-staffed and over-worked and consequently must allocate their scarce resources wisely.¹³⁶ In the process of making the necessary choices about which disciplinary matters to pursue and which to ignore, disciplinary agencies can be expected—typically, but not invariably—to refuse to expend scarce resources on choice-of-law matters having little practical, local significance. It will not suffice, for example, that the lawyer in question happens to be admitted to practice in the jurisdiction, if the impact of the lawyer's conduct occurred elsewhere, its claimed victims have no connection to the jurisdiction, and the conduct was not so serious or notorious as to cause alarm to the public or other lawyers in the jurisdiction.¹³⁷ Similarly, if a lawyer admitted elsewhere committed misconduct under the state's lawyer

134. *Id.* r. 7.05(c)(5)(i).

135. *Id.* r. 7.05(e).

136. ABA COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT 69 (1992).

137. Potentially, many other considerations might also bear on a state agency's willingness to prosecute. For example, if the out-of-state lawyer's conduct—no matter how otherwise unconnected to the jurisdiction—results in a felony conviction, the ease of prosecuting the lawyer (requiring little more than proof of the conviction) would likely lead to a discipline prosecution.

code, but not under the rules of the jurisdiction where the lawyer regularly practices, or where her conduct occurred and had its impact, it will not arouse sufficient prosecutorial interest that the out-of-state lawyer's offensive communication reached an impermissible person or two in the jurisdiction.¹³⁸ Finally, many disciplinary enforcement offices will presumably respond favorably to reasons by an out-of-state lawyer why an unpredictable choice-of-law basis for a disciplinary charge would be fundamentally unfair.¹³⁹

Another factor that at one time curtailed prosecution of out-of-state lawyers is receding in relevance. Traditionally, a lawyer could be brought before any state's lawyer-discipline agency only if the lawyer was locally admitted.¹⁴⁰ In lawyer-discipline's version of capital punishment—disbarment—the connection between local admission and discipline is graphic. In a jurisdiction still wedded to the state-of-admission model, it would be unthinkable for a local agency to discipline a lawyer admitted only in another state—no matter how offensive the out-of-state lawyer's Internet or otherwise interstate advertising might be and no matter how specifically targeted the advertisements were directed towards in-state, prospective clients. The unthinkable, however, is now becoming mainstream.

Over recent decades, several states have expanded the jurisdictional authority of their agencies and authorized proceedings against out-of-state lawyers in limited cases. The desirability of doing so was coupled directly with the ABA's efforts to change its rules concerning multijurisdictional practice—ultimately resulting in the promulgation of its much revised MR 5.5(b) in 2002 on the recommendation of the ABA's Commission on Multijurisdictional Practice.¹⁴¹ The new rule expands on the permissible forms of multijurisdictional law practice. Persuading states to open their borders to lawyers admitted elsewhere obviously required a counter-balancing rule that expanded the adopting states' authority to discipline out-of-state lawyers. The ABA accomplished that at the same time as the amendment to MR 5.5(b) by amending MR 8.5(a), which defines the scope of the jurisdiction's disciplinary authority. Under the amendment, admission to local practice remained one basis for discipline, but it was no longer exclusive. In addition, disciplinary authority was extended to “[a] lawyer not ad-

138. For example, the jurisdiction's anti-contact rule might sweep more broadly than the rule in the lawyer's home jurisdiction. See *supra* notes 91–94 and accompanying text.

139. See *supra* Part V.A.

140. See *supra* Part II.A.

141. MODEL RULES OF PROF'L CONDUCT r. 5.5(b) (2002).

mitted in this jurisdiction . . . if the lawyer provides or offers to provide any legal services in this jurisdiction.”¹⁴²

VII. Reducing the Occasions for Choice of Law in Lawyer Advertising and Elsewhere

For lawyers who remain concerned about uncertain or otherwise unfair application of the lawyer codes of other jurisdictions, one can imagine three ways of reducing the present level of uncertainty with respect to interstate lawyer advertising. One approach is that of the ABA’s 2002 amendments to MR 8.5, which tried to increase certainty by simplifying the choice rules.¹⁴³ But, as this Article demonstrates, it is highly debatable whether the ABA and states following its lead have done or can do much beyond replacing one set of choice-of-law uncertainties with others that are similarly indeterminate. Moreover, and as with much else in its model, the ABA “Model” Rule 8.5 has simply failed as a model. It has been adopted as proposed in less than half the states, with the rest taking more or less significantly variant approaches, or refusing to adopt it or a variant version at all.¹⁴⁴

A second theoretical way of achieving certainty is for lawyers to take the self-help step of stopping all Internet advertising, as well as other advertising that might cross state lines, perhaps other than messages with the bland and uncommunicative content of tombstones. But that is a bad idea for reasons of both lawyer self-interest in generating additional legal business, and, far more importantly, it impairs the public interest in facilitating information about access to the legal system.¹⁴⁵

A third, minimalist approach is what, in effect, the District of Columbia accomplished by slimming down lawyer advertising rules to a few essentials. The District has only two lawyer-advertising rules.¹⁴⁶ Its

142. *Id.* r. 8.5(a). Furthermore, MR 8.5(a)’s last sentence provides a bridge to MR 8.5(b). *Id.* (“A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.”).

143. I ignore here an alternative method of simplification, often called for but not likely ever to occur—Congressional enactment of a uniform choice-of-law rule for interstate and international law practice. *See, e.g.*, Weiss, *supra* note 12, at 35–40. Even more unrealistic are the occasional calls for Congressional enactment of a nationally uniform lawyer code covering all or most of the topics covered by the ABA Model Rules.

144. *See supra* note 39 and accompanying text.

145. MODEL RULES OF PROF’L CONDUCT r. 7.2 cmt. 1 (2002) (“To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising.”).

146. D.C. RULES OF PROF’L CONDUCT r. 7.1 (2007); *id.* r. 7.5.

Rule 7.1 outlaws false and deceptive advertising in some detail. The next D.C. rule, Rule 7.5, appears non-consecutively after Rule 7.1. It deals with the prosaic topic of firm names and letterheads. These two rules comprise the totality of the D.C. advertising rules. For present purposes, the gap in numbering can be taken as marking the difference between the District's lean lawyer-advertising rules and the ABA's far more prolix model. The District is also the only jurisdiction in which lawyers can permissibly engage in in-person solicitation, although it is often overlooked that its more permissive solicitation rule authorizes soliciting clients only in the immediate vicinity of the single local courthouse. It seems that the District's far simpler lawyer-advertising rules have not led to greater local concern over lawyer advertising (including Internet advertising) by lawyers, judges, clients, and the public than can be found in the vast majority of states that regulate lawyer advertising far more extensively.

Decades ago, the topic of lawyer advertising dominated discussions of legal ethics. Today, that obsession has receded considerably. Nonetheless, a strong case can be made for redirecting lawyer disciplinary efforts away from the minutiae still too often found in states' rules on lawyer advertising. To be sure, avoiding choice-of-law issues would be a secondary reason, at best, for simplifying lawyer-advertising rules. But simplification could surely be welcomed for that reason, as well as for much weightier reasons of encouraging a more informative flow of information to the public about the availability of legal services.

Conclusion: Lawyers Living with Uncertainty

As suggested at the outset, lawyers' clients must frequently live with the reality that choice-of-law considerations bearing on the clients' affairs often introduce significant uncertainty and may require complicated and unwanted preventive measures, such as avoiding what would otherwise be significant revenue-generating activities for clients. Unlike a generation ago, today's lawyers generally understand that, in significant ways, lawyers have themselves become clients—in the sense of now being consumers of extensive regulation of their businesses. As with their clients, lawyers practicing in a multijurisdictional practice across our multistate republic must—to put it colloquially—suck it up. Muttering darkly about the unfairness of the law's uncertainty might provide useful venting in which lawyers can indulge before more or less sympathetic audiences at bars, therapists' offices, bar association meetings, and similarly supportive gatherings. But,

back in their offices, lawyers, as with their clients, must continue with their work, knowing that they do so with considerable, inescapable uncertainty about the law that will ultimately govern their work. That includes their efforts to communicate information about their practice with prospective clients and other members of the public. Drafters of state and national lawyer code rules have not done much to relieve that uncertainty and have, through their tinkering, merely created a different set of uncertainties.