

Notes

The Choice of Rules Clause: A Solution to the Choice of Law Problem in Ethics Proceedings*

When a legal transaction has ties to multiple jurisdictions there is a choice of law problem in determining which jurisdiction's ethics rules govern the conduct of the lawyers involved. The current choice of law system for ethics proceedings is insufficient. The current regime suffers from imperfect rules and a lack of uniformity across states. Consequently, it is often difficult to determine which jurisdiction's ethics rules will govern a legal transaction. Most of the scholarship in this area has focused on finding the perfect choice of law rule for ethics proceedings and developing strategies for uniform adoption of this rule by the states. This Note takes a different path. Learning lessons from the field of conflict of laws and its experience with choice of law clauses, this Note proposes that lawyers and clients should be allowed to specify which jurisdiction's ethics rules will govern their legal transaction: a choice of rules clause. With appropriate safeguards in place, choice of rules clauses have the potential to remedy many of the problems created by the current inadequate choice of law system for ethics proceedings.

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Client A, the CEO of a corporation, hires two lawyers at a firm to defend him against an anticipated claim of breach of fiduciary duty. One of the lawyers is licensed to practice in both the District of Columbia and Maryland. The other is licensed to practice in Virginia.¹ Both lawyers work in the firm's Virginia office. The client's corporation is incorporated in Maryland but has its principle place of business in Virginia. Client A resides in the District of Columbia. During the course of the representation, but before any action against Client A is filed, Client A informs the two lawyers that he plans to hire someone to intimidate the plaintiffs to prevent them from filing the action. The ethics rules of Virginia require the lawyers to disclose their client's intention to commit a crime.² The ethics rules of the District of Columbia and Maryland prohibit disclosure in this situation.³ What must each lawyer do to comply with the ethics rules?

Under the current system of choice of law for ethics proceedings, neither lawyer in the hypothetical has clear direction on the course of action he

1. These three jurisdictions were chosen to illustrate a particularly troubling problem. Since the District of Columbia borders both Maryland and Virginia, a legal transaction could very well have connections to all three jurisdictions. In a situation such as this, a lawyer often cannot be certain of which jurisdiction's ethics rules govern. Worse yet, it is possible that a lawyer will be held to the standards of Maryland in one ethics proceeding and then be subject to the conflicting rules of Virginia in another ethics proceeding.

2. VA. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2009).

3. D.C. RULES OF PROF'L CONDUCT R. 1.6 (2007); MD. LAWYERS' RULES OF PROF'L CONDUCT R. 1.6 (2007). This hypothetical assumes that the intimidation would not involve serious bodily injury.

should take. This dilemma occurs because the choice of law rules for ethics proceedings rely on vague terms, such as where the “predominant effect” of the conduct will be felt.⁴ In the above hypothetical, it is unclear whether the predominant effect of this conduct would be felt in the District of Columbia, Maryland, or Virginia because of numerous connections to all three jurisdictions. Accordingly, both of the lawyers must merely guess about which state’s ethics rules they will ultimately be held to. Worse yet, it is possible that a lawyer in this situation could be held to two conflicting ethics rules in two parallel ethics proceedings, thus creating a situation where compliance is impossible.⁵

There is a serious choice of law problem in ethics proceedings. The rules for choosing which state’s ethics rules to apply to a lawyer’s conduct are inadequate. Making matters worse, there is a lack of uniformity among the states in both ethics rules and choice of law rules for ethics proceedings.⁶ There has been much debate about how best to remedy the problems of the current system.⁷ Scholars have focused their efforts on developing a perfect choice of law rule for ethics proceedings and then ensuring its uniform adoption by every state.⁸ Perhaps this emphasis on finding the best choice of law rule is misplaced.

The field of conflict of laws has been dealing with choice of law problems for over 200 years.⁹ Yet in all this time, no one has discovered the perfect choice of law rule.¹⁰ The problems caused by this inadequate choice of law system have, however, been ameliorated by allowing parties to specify which state’s law applies to their transaction using choice of law clauses.¹¹ Similarly, much of the confusion and chaos wrought by the current choice of law system for ethics proceedings can be eliminated by allowing lawyers and clients to specify which state’s ethics rules apply to their relationship: a

4. See MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(2) (2009) (directing ethics tribunals to apply the ethics rules of the jurisdiction that feels the predominant effect of the lawyer’s conduct).

5. See *id.* R. 8.5 cmt. 2 (“A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations.”).

6. See *infra* Part II.

7. See, e.g., Jeffrey L. Rensberger, *Jurisdiction, Choice of Law, and the Multistate Attorney*, 36 S. TEX. L. REV. 799, 840 (2005) (“[A] sound choice of law approach would decide for whose benefit a particular ethical rule was adopted and consider choice of law issues from the standpoint of that person.”); 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, 921–27 (1995) (evaluating the strengths and weaknesses of the ABA Model Rule for choice of law).

8. See Roach, *supra* note 7, at 922–24, 929 (arguing that Model Rule 8.5 should be adopted in every jurisdiction).

9. See *Williamson’s Adm’rs v. Smart*, 1 N.C. (Cam. & Nor.) 355, 360 (1801) (resolving a conflict of laws dispute arising from different states’ laws governing slave ownership).

10. See *infra* Part III.

11. See William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 10–12 (2006) (asserting that choice of law clauses provide substantial economic benefits, including reduced uncertainty and greater predictability).

choice of rules clause. At present, such a clause is nearly unheard of.¹² Choice of rules clauses can solve many of the problems caused by the current inadequate choice of law system for ethics proceedings.

The aim of this Note is first to introduce and explain choice of rules clauses and then to advocate for allowing lawyers and clients to use choice of rules clauses to specify which state's ethics rules govern their legal transactions.¹³ Part I introduces the choice of law problem in ethics proceedings. Part II describes and criticizes the current choice of law regime for ethics proceedings. Part III chronicles the development of choice of law clauses in conflict of laws. Part IV proposes and advocates for choice of rules clauses. Part V considers some concerns and counterarguments weighing against choice of rules clauses. Part VI discusses the implementation of choice of rules clauses into the current choice of law system for ethics proceedings. This Note concludes with a return to the hypothetical with which it began, showing how a choice of rules clause would have brought clarity to that muddled ethics situation.

I. The Choice of Law Problem in Ethics Proceedings

A. *Multijurisdictional Practice*

With the advent of the Internet and the rise of multistate and multinational law firms, legal transactions now span jurisdictions more than ever before.¹⁴ As a result, many lawyers are now licensed to practice law in multiple jurisdictions.¹⁵ One of the consequences of the staggering growth of multijurisdictional legal practice is that regulating the conduct of lawyers through ethics rules has become more complicated. Because each jurisdiction has its own ethics rules, multijurisdictional practice has created a choice

12. See *infra* Parts II–III. There are three articles that mention something akin to choice of rules clauses, but they only briefly mention the concept. See 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, 793–95 (1995) (proposing that a lawyer and a client be allowed to include in the letter of engagement “the jurisdiction whose professional standards will govern the conduct of” the lawyer); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1753–58 (1998) (suggesting that clients and lawyers should be able to choose ethics rules through contracts); The Task Force on Conflicts of Interest, *Conflicts of Interest Issues*, 50 BUS. LAW. 1381, 1426 (1995) (suggesting that lawyers include choice of law clauses specifying which jurisdiction's conflict of interest rules would “govern the relationship”).

13. For purposes of this Note, “legal transactions” encompasses both litigation and transactional legal matters.

14. See Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678, 678 (1986) (noting that “[t]he greater mobility of lawyers and clients, the interstate scope of many business and legal transactions, the adoption of uniform acts and model codes, the growth of specialized areas of legal practice, and the pervasiveness of Federal law” have contributed to the increasingly interstate and international nature of legal practice).

15. See Daly, *supra* note 12, at 721 (noting the increasing number of lawyers admitted to practice in more than one jurisdiction); O'Brien, *supra* note 14, at 678 (remarking on the growing multistate and interstate practice of law and the easing of residency requirements for admission to the bar).

of law problem for ethics proceedings.¹⁶ With legal transactions involving numerous jurisdictions and lawyers being licensed in multiple states, it is no longer clear in many situations which jurisdiction's ethics rules should govern a lawyer's conduct.

Before examining the choice of law problem in ethics proceedings in detail, it is prudent first to determine the degree to which the ethics rules of the various states conflict with each other. If every state's ethics rules¹⁷ were the same, then the choice of law issue would be irrelevant because it would make no difference which state's ethics rules governed a particular legal transaction. However, if there are serious conflicts among state ethics rules, then the choice of law problem becomes critical.

B. Conflicting State Ethics Rules

Because the difficulties posed by the choice of law problem in ethics proceedings depend on the level of conflict among state ethics rules, an examination of the harmonies and conflicts among the various state ethics rules is in order. While there is much overlap among the state ethics rules, there are also many areas of disagreement.

There are two types of conflicts among state ethics rules: hard conflicts and soft conflicts. Hard conflicts occur when it is impossible for a lawyer to comply with the ethics rules of two or more states.¹⁸ For example, if State 1 requires a lawyer to do *X* and State 2 prohibits a lawyer from doing *X*, then a lawyer will be forced to violate the ethics rules of one of the states. Soft conflicts occur when ethics rules of two or more states differ, but not in a way that would make it impossible for a lawyer to comply with both.¹⁹ For example, if State 1 requires a lawyer to do *X* and State 2 permits but does not require a lawyer to do *X*, a lawyer can comply with both rules by doing *X*.

1. Hard Conflicts.—There are many areas in which one state's ethics rules require a lawyer to engage in a certain activity and another state's ethics rules prohibit the lawyer from engaging in that activity, resulting in a hard

16. See Daly, *supra* note 12, at 719–24 (explaining that because individual states have added differing modifications in adopting the Model Rules of Professional Conduct, the likelihood of difficulties arising during judicial proceedings has increased).

17. This Note focuses on state ethics rules. Federal courts have a wide variety of ethics rules as well. See Roach, *supra* note 7, at 914 (noting that while most federal district courts adopt the ethics rules of the state in which they sit, individual courts or circuits may adopt additional provisions or omit certain portions of the state code). While these are not discussed at length in this Note, suffice it to say that they only add to the confusion regarding choice of law in ethics proceedings. See *id.* at 914–17 (remarking that a practitioner can never be certain as to which rules will govern the proceedings in federal court).

18. Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 958 (2002).

19. See *id.* (explaining that a soft conflict exists when it is possible for an individual to abide by the differing laws of two jurisdictions).

conflict. This type of conflict is the most troublesome because there is no way to avoid violating one of the state's ethics rules.

Hard conflicts often occur when dealing with matters of confidentiality. One such conflict among the rules of Virginia, Maryland, and the District of Columbia involves the measures an attorney should take to prevent his client from committing a crime. Virginia requires a lawyer to breach confidentiality if his client has made clear his intention to commit a crime.²⁰ Maryland gives the lawyer discretion in this area, but the lawyer is permitted to breach confidentiality only if the crime meets any of a number of specified requirements, one of which is that the crime is likely to result in serious bodily harm.²¹ The District of Columbia also gives the lawyer discretion, but disclosure of client confidences is allowed only when the crime could result in serious bodily injury or involves interference with persons connected with proceedings before a tribunal.²² If a client states an intention to commit a crime that does not involve serious bodily injury, there is a hard conflict among the ethics rules of these three jurisdictions: Virginia would require disclosure; Maryland would prohibit the disclosure of confidential information; and the District of Columbia might prohibit disclosure or give the lawyer discretion, depending on the precise nature of the crime.

2. *Soft Conflicts*.—Soft conflicts are ubiquitous when dealing with state ethics rules. There are numerous instances in which one state requires or prohibits conduct that another state leaves to the lawyer's discretion.²³

One might argue that soft conflicts present no conflict at all, since the lawyer should simply follow the most restrictive rule. However, such a position fails to take into account that ethics rules are policy choices.²⁴ Deciding whether to categorically require or forbid certain conduct or rather to leave it to the lawyer's discretion involves the weighing of competing values.²⁵ When a state leaves a certain matter to the lawyer's discretion, that state has made a policy decision that the best regulatory regime is one in which the lawyer has autonomy to decide what is best under the circumstances.²⁶ To cast aside this policy judgment in favor of a sister state's categorical rule that reflects its own policy decision is to favor the policy choices of one state over those of another. Accordingly, soft conflicts represent real policy conflicts.

20. VA. RULES OF PROF'L CONDUCT R. 1.6 (2009).

21. MD. LAWYERS' RULES OF PROF'L CONDUCT R. 1.6 (2007).

22. D.C. RULES OF PROF'L CONDUCT R. 1.6 (2007).

23. *See, e.g., supra* notes 1–5 and accompanying text.

24. *See* Roach, *supra* note 7, at 923 (noting that “differences among the various jurisdictions’ ethics rules reflect decisions”).

25. *See id.* (explaining that a jurisdiction may have decided to omit an ethics rule for any number of reasons—for example, because imposing such high costs to counter a small number of dishonest attorneys would be wasteful and unfair).

26. *Id.*

Furthermore, it is not always clear which rule is the most restrictive. In the example concerning the rules of the District of Columbia, Maryland, and Virginia on disclosure of confidential information to prevent crimes, it is unclear which jurisdiction's rules impose the highest ethical standard. For those who value client confidentiality above all else, the District of Columbia's rule granting the lawyer discretion to breach confidentiality only to prevent a crime involving serious bodily injury or interference with someone connected to proceedings before a tribunal²⁷ is the most restrictive rule. On the other hand, for those who place a greater importance on crime prevention, the Virginia rule that requires disclosure of confidential information to prevent any crime²⁸ is the most restrictive rule. This example illustrates that following the most restrictive rule necessarily involves a policy judgment as to which rule is the most restrictive. Therefore, a general rule requiring lawyers to follow the most restrictive ethics rule is not a tenable solution to resolving soft conflicts.

C. *The Choice of Law Problem in Ethics Proceedings*

Given the existence of hard and soft conflicts among state ethics rules, legal transactions that cross jurisdictional lines present a choice of law problem as to which jurisdiction's ethics rules govern a particular legal transaction. Each state promulgates ethics rules to regulate the practice of law within its borders and among the members of its bar.²⁹ When a legal transaction has significant ties to multiple jurisdictions, there is a choice of law issue as to which jurisdiction's ethics rules govern that transaction.³⁰

This choice of law issue is further compounded because many states assert broad jurisdiction over lawyers for ethics issues.³¹ The American Bar Association Model Rules of Professional Conduct (ABA Model Rules), which often serve as a starting point for state ethics rules, provide for a state to have jurisdiction over more than just its own bar members.³² Indeed, ABA Model Rule 8.5 asserts jurisdiction over lawyers licensed outside the state if

27. D.C. RULES OF PROF'L CONDUCT R. 1.6.

28. VA. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2009).

29. See H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 78 (1997) (commenting on the state-based system of lawyer ethics rules).

30. See MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 2 (2009) (illustrating the choice of law problem for rules of professional conduct with hypothetical situations in which a lawyer's connections with multiple jurisdictions can lead to conflicting obligations).

31. See *id.* R. 8.5(a) (asserting broad jurisdiction over lawyers for ethics issues); see also Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015, 1030-32 (2002) (approving of state ethics rules under which lawyers are disciplined in the state in which they are admitted to the bar for conduct occurring in a different jurisdiction).

32. MODEL RULES OF PROF'L CONDUCT R. 8.5(a).

they perform legal services within the state.³³ Many states follow the ABA's example and assert jurisdiction to a similar extent.³⁴

With states asserting broad jurisdiction over lawyers practicing within their borders, often multiple states will have jurisdiction over the same lawyer for the same conduct.³⁵ Lawyers accustomed to the litigation context may not immediately see a problem with the possibility of multiple states having jurisdiction over a lawyer's conduct—after all, it is commonplace for multiple courts to have jurisdiction over, for example, a contract dispute or tort claim. But parties involved in litigation have many tools for avoiding parallel and redundant proceedings³⁶ that are not available in ethics proceedings.³⁷ There is no doctrine of *res judicata* that can prevent a sister state from exercising its jurisdiction over a lawyer when another state has already adjudicated the ethics dispute.³⁸ Indeed, ABA Model Rule 8.5 anticipates parallel and redundant state ethics proceedings: “A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.”³⁹

Since multiple states can adjudicate the same ethics issue in parallel proceedings, it becomes vitally important for there to be a consensus on a clear set of choice of law rules. If every jurisdiction adopted the same choice of law rules and applied them consistently to ethics issues, then many of the problems created by the current inadequate choice of law system would disappear. There will still be the expense and inconvenience of parallel proceedings, but at least the lawyer will be held to the same standard in each proceeding. If, however, there is not uniform agreement among the states on a common, clear set of choice of law rules, then parallel proceedings are a much larger problem. A lawyer could be held to two different and perhaps even conflicting standards for the same legal transaction. Far from a mere annoyance, parallel proceedings in this setting could very well guarantee injustice if a lawyer is held to two or more conflicting standards.

33. *Id.*

34. *See, e.g.*, DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 8.5(a) (2008) (asserting jurisdiction to the same extent as does ABA Model Rule 8.5).

35. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 2 (providing that a lawyer may be subject to more than one set of rules).

36. *See, e.g.*, *Xiao Yang Chen v. Fischer*, 843 N.E.2d 723, 725 (N.Y. 2005) (explaining that *res judicata* bars redundant suits over claims that have reached a final conclusion).

37. *See* O'Brien, *supra* note 14, at 678 (explaining that lawyers admitted to practice in multiple states are subject to disciplinary jurisdiction in each state where they are admitted); *see also* MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 2 (“A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations.”).

38. *See In re Lebbos*, 672 N.E.2d 517, 519 (Mass. 1996) (expounding the conditions in which Massachusetts's modified rule of *res judicata* will not apply to disciplinary ethics proceedings).

39. MODEL RULES OF PROF'L CONDUCT R. 8.5(a).

II. The Current Choice of Law Regime: A Failure

Since state ethics rules conflict on numerous critical issues, it is of great importance to have a uniform, clear choice of law rule for state ethics proceedings. The ABA Model Rules⁴⁰ and every state's ethics rules have a choice of law rule that attempts to resolve the problems created by conflicting state ethics rules.⁴¹ Unfortunately, the current patchwork of varying and vague choice of law rules is woefully inadequate.

A. ABA Model Rule 8.5

The American Bar Association (ABA) takes the lead on ethics issues by promulgating a code of model ethics rules.⁴² These rules are technically non-binding since the ABA has no inherent authority to regulate the conduct of lawyers.⁴³ But many states adopt the ABA Model Rules in whole or in part.⁴⁴ Accordingly, the ABA Model Rules play an important role in the regulation of lawyer conduct.

ABA Model Rule 8.5 is the choice of law rule for ethics issues.⁴⁵ The first part of this rule addresses the jurisdiction of a state with regard to ethics issues:

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.⁴⁶

This first half of the rule confers broad disciplinary authority, including jurisdiction over conduct occurring outside the state, upon the state or states in which the lawyer is admitted to practice.⁴⁷ Additionally, it grants jurisdiction over ethics matters to any state in which the lawyer in question provides

40. *Id.* R. 8.5.

41. *See, e.g.*, TEX. DISCIPLINARY R. PROF'L CONDUCT R. 8.05 cmt. 3 (2005), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

42. *See generally* MODEL RULES OF PROF'L CONDUCT.

43. *See* John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEXAS L. REV. 405, 459 n.271 (2002) (stating that California is a state that consistently refuses to adopt the ABA Rules).

44. *See* American Bar Ass'n, Model Rules of Professional Conduct: Dates of Adoption, http://www.abanet.org/cpr/mrpc/alpha_states.html (showing that every state except California currently uses the ABA Model Rules as the template for its state rules).

45. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5 (announcing the choice of law rules for ethics proceedings).

46. *Id.* R. 8.5(a).

47. *Id.*

legal services.⁴⁸ Interestingly, this part of the rule anticipates and even appears to legitimize parallel ethical proceedings for the same conduct.⁴⁹

The second part of ABA Model Rule 8.5 deals directly with choice of law.⁵⁰ This part of the rule has special sections to deal with litigation and transactional matters.⁵¹ The part of the rule that governs “conduct in connection with a matter pending before a tribunal” provides that “the rules of the jurisdiction in which the tribunal sits [will be applied], unless the rules of the tribunal provide otherwise.”⁵² This part of the rule appears to succeed in creating a simple, clear choice of law rule for matters before a court or other tribunal.

As for transactional matters or work related to a case that has not yet been filed in a court,

[T]he rules of the jurisdiction in which the lawyer’s conduct occurred [will be applied], or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.⁵³

This part of the rule is more complex and nuanced. The default choice of law rule is that the ethics rules of the state in which the lawyer’s conduct occurred govern.⁵⁴ But if the predominant effect of the lawyer’s conduct is felt in another jurisdiction, then that jurisdiction’s ethics rules govern.⁵⁵ This part of the rule also has a good faith provision that shields a lawyer from disciplinary action if he conformed his conduct to the rules of a jurisdiction where he reasonably believed the predominant effect of his conduct would occur.⁵⁶

While ABA Model Rule 8.5 has some virtues, it is ultimately flawed. The litigation section of the rule puts lawyers at the mercy of the court’s ethics rules.⁵⁷ Unfortunately, many federal courts have convoluted and even contradictory ethics rules.⁵⁸ The ABA Model Rule arguably exacerbates this problem by endorsing the application of the ethics rules of the court where

48. *Id.*

49. *See id.* (acknowledging the possibility of parallel ethics proceedings).

50. *Id.* R. 8.5(b).

51. *See id.* (distinguishing between matters pending before a tribunal and matters not before a tribunal in the application of the rules of professional conduct).

52. *Id.* R. 8.5(b)(1).

53. *Id.* R. 8.5(b)(2).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* R. 8.5(b)(1).

58. *See Roach, supra* note 7, at 914–17 (criticizing the wide variety of current ethics rules for federal courts).

the matter is filed.⁵⁹ Furthermore, this part of the rule operates only when the legal matter has been filed with a court or other tribunal.⁶⁰ For litigation-related activities prior to the case being filed with a court, lawyers are forced to rely on the second part of the rule for guidance.⁶¹

The use of vague terms in the second part of the ABA Model Rule sets the stage for chaos and confusion in choice of law for ethics proceedings. Determining where certain conduct occurred is not as simple as it may seem.⁶² Technology complicates this inquiry. With e-mail, videoconferencing, telephone calls, and facsimiles, it becomes quite difficult to determine where a particular legal transaction occurred. The “predominant effect” language further complicates the choice of law issue. Such a vague term gives rise to reasonable disagreement over its precise meaning.⁶³ The difficulty of consistently applying this part of the rule places great strain on the good faith provision.⁶⁴ Since parallel ethics proceedings by multiple jurisdictions are allowed,⁶⁵ a lawyer faced with a difficult ethics choice of law issue will have to hope that every jurisdiction conducting ethics proceedings against him agrees that his belief about the predominant effect of his conduct was reasonable.⁶⁶ In short, ABA Model Rule 8.5 fails to bring clarity and certainty to the choice of law problem in ethics proceedings.

B. State Ethics Rules

Even if one were to overlook the flaws in ABA Model Rule 8.5, the states must uniformly adopt this rule for it to have any chance of success.

59. MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(1); *see also* Carla C. Ward, Student Commentary, *The Law of Choice: Implementation of ABA Model Rule 8.5*, 30 J. LEGAL PROF. 173, 177 (2006) (observing that the ABA's attempt to resolve the contradictory ethics rules that exist in different states by amending Model Rule 8.5 has actually led to even greater disparity in state ethics rules).

60. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(1) (establishing that when a legal matter is before a tribunal, the ethical rules of the jurisdiction in which the tribunal sits apply).

61. *See id.* R. 8.5 cmt. 4 (pronouncing that Rule 8.5(b)(2) governs choice of law rules for conduct that is not yet pending before a tribunal).

62. *See generally* John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 916 (1999) (providing examples of the difficulty of determining where certain types of online conduct occur).

63. *See* Mark H. Aultman, *A Post Conference Reflection: Does Amended Model Rule 8.5 Help Anyone?*, 36 S. TEX. L. REV. 1055, 1062 (1995) (voicing concern that the phrase “predominant effect” lacks clarity and that different jurisdictions may disagree on where the predominant effect of conduct occurs).

64. *See id.* at 1062–63 (demonstrating that the vague predominant effect language could result in the discipline of a lawyer who has conformed his conduct to the rules of the jurisdiction in which he reasonably believed the predominant effect of his conduct would occur).

65. *See supra* note 49 and accompanying text.

66. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2) (explaining that the good faith provision hinges on the reasonable belief of the lawyer concerning which jurisdiction would feel the predominant effect of his conduct).

Since parallel ethics proceedings are often inevitable, even a few states' rejection of the ABA Model Rule would likely result in conflicting ethics standards being applied to the same conduct.

State adoption of ABA Model Rule 8.5 has been well short of uniform.⁶⁷ Only twenty-three states have adopted the ABA Model Rule.⁶⁸ Twenty-seven states have chosen a different choice of law rule for ethics proceedings.⁶⁹ Many of the states in the latter category have adopted a choice of law rule at odds with ABA Model Rule 8.5.⁷⁰

This lack of uniformity is another weakness of the current choice of law system for ethics proceedings. With states adopting such a wide variety of choice of law rules for ethics proceedings, uncertainty over which state's ethics rules apply to a particular legal transaction is virtually guaranteed. Moreover, states applying different choice of law rules could very well apply conflicting ethics rules to the same conduct. Such a result is a recipe for injustice.

C. *Consequences of the Current Inadequate System*

The flawed ABA Model Rule 8.5, combined with a lack of uniformity in state choice of law rules for ethics proceedings, results in myriad negative consequences. The current system creates a high level of uncertainty about which state's ethics rules govern a particular legal transaction.⁷¹ One of the by-products of this uncertainty is the expense lawyers incur in hiring ethics experts to advise them on which state's rules govern a legal transaction.⁷² If an ethics complaint is actually filed, then there is the additional cost of liti-

67. See AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MODEL RULE 8.5, at 1 (2009), http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf (listing the states that have adopted Model Rule 8.5 or similar rules).

68. *Id.*

69. *Id.*

70. See, e.g., HAW. RULES OF PROF'L CONDUCT R. 8.5 cmt. 2 (2009) ("If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply."); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.05 cmt. 3 (2005) (choosing to rely on "principles of conflict of laws" instead of following ABA Model Rule 8.5); W. VA. PROF'L CONDUCT R. 8.5 cmt. (2009) ("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.").

71. *Is Total Attorneys Complaint a Total Joke?*, Posting of Robert J. Ambrogi to Legal Blog Watch, http://legalblogwatch.typepad.com/legal_blog_watch/2009/09/is-total-attorneys-complaint-a-total-joke.html (Sept. 15, 2009, 02:34 PM) ("To the extent that these complaints point to the lack of clarity and consistency in the rules of conduct governing lawyers, they are no joke. Complaints filed in 47 different states could conceivably result in 47 different outcomes. That kind of uncertainty doesn't help lawyers or consumers.").

72. See Caplin & Drysdale Att'ys, Representing Lawyers and Law Firms Facing Ethics Challenges, <http://www.capdale.com/practices/servicedetail.aspx?service=872> (advertising legal services related to choice of law questions in ethics proceedings); see also Carl M. Selinger, *The Problematical Role of the Legal Ethics Expert Witness*, 13 GEO. J. LEGAL ETHICS 405, 405-06 (2000) (noting that scholars in the field of legal ethics can charge up to \$500 an hour to serve as expert witnesses and are often called to appear in opposition to other legal ethicists).

gating that complaint. Both sides will need to hire experts on that jurisdiction's choice of law rule, and the actual adjudication of the issue will require the state to invest its valuable time and resources.

In addition to requiring an investment of time and resources, the current system for choice of law in ethics proceedings encroaches upon many of the core values of legal ethics. Faced with a soft conflict among state ethics rules and uncertainty as to which will ultimately govern, a lawyer may be forced to take the safe ethical route and consequently be unable to zealously defend his client. As discussed earlier, following the most restrictive rule not only intrudes on a lawyer's fiduciary duty to his client but also undermines the policy of the state with the less restrictive rule.⁷³ Moreover, some lawyers may refuse to take clients with complicated legal matters involving multiple jurisdictions where the governing ethics rules are unclear. The avoidance of such clients undermines client autonomy, another core value of legal ethics,⁷⁴ by restricting the client's choice of legal counsel.

With sad irony, ethics codes designed to further the interests of justice often guarantee injustice. This injustice is the most troubling consequence of the current choice of law system for ethics proceedings. Such injustice occurs when a lawyer is held to multiple conflicting ethics standards for the same conduct, a scenario made possible by the current system. Even when only one state's ethics rules are applied to certain conduct, injustice can still result if the lawyer acted on the good faith belief that a different state's rules governed. While the ABA Model Rule claims to provide a safe harbor for a lawyer in such a situation, many state rules do not.⁷⁵ Furthermore, protection under the ABA Model Rule hinges on how the ethics tribunal chooses to interpret and apply the rule.⁷⁶

III. The Lessons of Conflict of Laws

When one is faced with a difficult legal issue, there is no need to reinvent the wheel if an adequate solution has already been discovered. Other areas of law have faced similar problems caused by uncertainty, and there is much to learn by examining the solutions developed in these other

73. See *supra* notes 24–28 and accompanying text.

74. See Barry S. Alberts & Samuel Thompson, Jr., *Ethics Issues Faced by Lawyers and Investment Bankers in Mergers and Acquisitions: A Problem Approach and Report of Panel Discussion*, 54 U. MIAMI L. REV. 697, 735 (2000) (listing client autonomy as a core value of legal ethics).

75. E.g., D.C. RULES OF PROF'L CONDUCT R. 8.5 (2007); FL. RULES OF PROF'L CONDUCT R. 4–8.5 (2009) (both omitting ABA Model Rule 8.5's safe harbor for lawyers who reasonably believe the predominant effect of their actions will be felt in a particular jurisdiction).

76. See Moulton, *supra* note 29, at 96 (“Even where two states (or virtually all states) have adopted the same language, judicial interpretation of that language may vary significantly from state to state.”).

areas. The field of law whose experiences with uncertainty are most analogous to the choice of law problem in ethics proceedings is conflict of laws.

The field of conflict of laws shares many common features with the choice of law problem in ethics proceedings. Indeed, the choice of law issue in ethics proceedings can be described as a subset of the larger field of conflict of laws: Conflict of laws concerns which jurisdiction's law should be applied to a certain legal issue,⁷⁷ much like the choice of law issue in ethics proceedings concerns which state's ethics rules should govern certain conduct.⁷⁸ The similarities between these two areas do not end there. Conflict of laws suffers from two of the maladies that afflict the choice of law issue in ethics proceedings: inadequate rules and a lack of uniformity.

The current choice of law rules for conflict of laws are inadequate. The two main types of choice of law rules in this area of law are territorial rules and consequence-based rules.⁷⁹ Both have their failings. Territorial rules choose the applicable law based on the location of the event in question.⁸⁰ For example, a tort claim arising from a car accident that occurred in Texas would be governed by Texas law. There are two related criticisms of this approach. First, territorial rules have been criticized because the "wooden application of a few overly simple rules . . . cannot solve the complex problems which arise in modern litigation and may often yield harsh, unnecessary and unjust results."⁸¹ These rules fail to take into account both the complexities of the matter at hand and the underlying policies of the jurisdictions involved.⁸² Second, since courts cannot bring in policy through the front door, they often use the back door instead by invoking public policy as a basis for refusing to apply the law chosen by a territorial choice of law rule.⁸³ This back-door use of public policy undermines the certainty supposedly gained by using a clear choice of law rule.⁸⁴

Consequence-based rules choose the applicable law based on which jurisdiction has the strongest interest in its laws being applied.⁸⁵ For

77. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971).

78. See MODEL RULES OF PROF'L CONDUCT R. 8.5 (2009) (explaining which state's ethics rules to apply).

79. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 373-74 (2006).

80. *Id.* at 373.

81. *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 801 (Pa. 1964).

82. See *id.* at 801-06 (highlighting a number of cases in which courts refused to strictly adhere to place of injury rules because the rules did not adequately address the policies and interests underlying the particular issues).

83. See, e.g., Russell J. Weintraub, *The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?*, 43 TEX. INT'L L.J. 401, 405-06 (2008) (describing Georgia's tendency to invoke public policy to reject the law chosen by its territorial choice of law rule).

84. See WEINTRAUB, *supra* note 79, at 373-74 (explaining how random departures from a territorial rule undermine its predictability).

85. See *id.* at 373-75 (defining a consequence-based rule as one that resolves conflicts of laws by taking into account the policies underlying the laws).

example, a tort claim arising out of a car accident in Texas between two New York residents would likely be governed by New York law. The chief criticism of this approach is that it is utterly unpredictable.⁸⁶ This approach yields no easy answers to the choice of law question.⁸⁷ Rather, there are often reasonable arguments on both sides of the issue, resulting in an inconsistent application of this rule by courts.⁸⁸ Indeed, many jurisdictions have adopted a consequence-based approach and then later have come to regret this decision when faced with the chaos that ensued.⁸⁹ In short, neither territorial nor consequence-based rules are perfect.

In addition to the inherent flaws in the two main choice of law rules, conflict of laws also suffers from a lack of uniformity of rules.⁹⁰ As is the case with ethics proceedings, each state has its own choice of law rules.⁹¹ Some use consequence-based choice of law rules while others retain their traditional territorial rules.⁹² To make matters worse, states often use different rules for different legal issues.⁹³ For example, a state may use a territorial rule for determining the law to be applied to a dispute concerning title to real property but adopt a consequence-based approach for tort claims.⁹⁴

This confused conflict of laws framework has produced numerous negative consequences. Combining imperfect rules with a lack of uniformity has been a recipe for chaos in conflict of laws.⁹⁵ The most salient ill effect of this system is the expense of litigating conflict of laws issues.⁹⁶

Frustrated in their attempts to create the perfect choice of law system, some conflict of laws scholars decided to work within the existing system. The fruits of their labor has been the most successful innovation in conflict of

86. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 429–30 (1990) (decrying the uncertainty created by consequence-based rules).

87. See WEINTRAUB, *supra* note 79, at 380 (advocating for default rules in two types of cases where a consequence-based approach does not provide an answer to the choice of law problem).

88. See *Neumeier v. Kuehner*, 286 N.E.2d 454, 457 (N.Y. 1972) (discussing the inconsistency created by consequence-based choice of law rules).

89. See, e.g., *id.* at 457–58 (announcing a set of rules to bring some order to the chaos created by New York's adoption of a consequence-based approach to choice of law).

90. See WEINTRAUB, *supra* note 79, at 421 (describing the diversity of choice of law rules among states, most of which have displaced territorial rules for consequence-based rules).

91. See *id.* (listing the choice of law rules states use for tort adjudication).

92. See *id.* (indicating whether each state employs a consequence-based rule or a territorial rule for torts as of January 1, 2006).

93. Compare *Toledo Soc'y for Crippled Children v. Hickok*, 261 S.W.2d 692, 696 (Tex. 1953) (applying a territorial choice of law rule to a will dispute concerning real property), with *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979) (adopting a consequence-based choice of law rule for torts).

94. See *supra* note 93 and accompanying text.

95. See Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 1024–25 (1994) (reflecting on the chaos created by the current conflict of laws system).

96. See *Kaczmarek v. Allied Chem. Corp.*, 836 F.2d 1055, 1057 (7th Cir. 1987) (highlighting the higher litigation costs caused by the abandonment of mechanical territorial rules for more flexible consequence-based conflict of laws rules).

laws jurisprudence: the choice of law clause.⁹⁷ Helping courts and other law-makers to avoid the untenable task of developing a single set of choice of law rules that will give the correct result in every situation, the choice of law clause allows parties to specify which state's law governs disputes arising out of a contract.⁹⁸ In this way, parties contract for certainty and avoid the costly consequences of the muddled conflict of laws choice of law system.⁹⁹ Instead of having to invest valuable resources attempting to determine which state's law will apply to a certain contract at the outset and then later expending even more resources litigating the issue, the choice of law clause allows parties to simply choose the law that will govern their contract. The one issue in conflict of laws that almost all jurisdictions can agree on is that choice of law clauses should be allowed in some capacity.¹⁰⁰ Indeed, a leading conflict of laws scholar describes choice of law clauses as "sprint[ing] ahead of the field both in the United States and abroad."¹⁰¹ The near-universal agreement on the wisdom of choice of law clauses is perhaps best demonstrated by the fact that today it is common for commercial contracts to include choice of law clauses.¹⁰²

The current conflict of laws system has produced "choice of law chaos,"¹⁰³ but choice of law clauses have ameliorated the effects of the current failed system.¹⁰⁴ Contracting for certainty has spared many parties from the exorbitant expense of litigating choice of law issues.¹⁰⁵ Much of the litigation that now occurs in this area can be traced to a poorly drafted choice of law clause,¹⁰⁶ but this can be remedied through careful drafting.¹⁰⁷ Knowing the applicable law at the outset also allows parties to structure their

97. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (providing for the application of the law of the state chosen by the parties to govern their contract, subject to a few exceptions).

98. WEINTRAUB, *supra* note 79, at 482.

99. See Woodward, *supra* note 11, at 9–10 (claiming that courts ought to allow contracting parties to use a choice of law clause so the parties can better predict the law that will apply to their transaction and, in the context of negotiated contracts, better determine the value of the exchange).

100. See WEINTRAUB, *supra* note 79, at 482 (describing the widespread acceptance of choice of law clauses).

101. *Id.*

102. Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 221–22 (2007).

103. Sterk, *supra* note 95, at 1024–25.

104. See Woodward, *supra* note 11, at 9–12 (explaining that with the use of choice of law clauses, parties to contracts enjoy greater certainty and predictability).

105. See Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 403 (2003) (explaining that a choice of law clause may lower the cost of resolving disputes by reducing litigation as to the governing law, in addition to the fact that "it may reduce the need for litigation because greater certainty about their rights gives parties more incentive to settle").

106. See WEINTRAUB, *supra* note 79, at 494–97 (discussing common drafting errors in choice of law clauses, such as the parties "inadvertently choos[ing] a jurisdiction whose laws will invalidate the contract in whole or in part").

107. *Id.* at 495–96.

conduct in a more efficient manner instead of hedging against the chance that one state's or another's law will ultimately govern.¹⁰⁸ More importantly, choice of law clauses prevent the injustice of holding a party to a legal standard vastly different than the one that was reasonably expected.¹⁰⁹

IV. Choice of Rules Clauses

The debate about how best to solve the choice of law problem in ethics proceedings has been focused on developing a better choice of law rule.¹¹⁰ The solution many propose is to first discover the perfect choice of law rule and then have the states uniformly adopt it.¹¹¹ But choice of law has been a major issue in state ethics proceedings for only about the last thirty years.¹¹² The field of conflict of laws has been wrestling with this issue for much longer, well over 200 years,¹¹³ and yet no perfect choice of law rule has been discovered. Furthermore, there is no uniformity among state choice of law rules.¹¹⁴ While conflict of laws scholars are still endeavoring to develop the perfect choice of law rule, they have ameliorated the ill effects of the current broken system by allowing choice of law clauses.¹¹⁵ Perhaps the best course of action concerning the choice of law problem in ethics proceedings is to follow the lead of conflict of laws and allow parties to specify which state's ethics rules will govern their legal transaction: a choice of rules clause.

A. *Positive Effects of Choice of Rules Clauses*

Allowing lawyers and clients to specify which state's ethics rules will govern a legal transaction will result in numerous positive effects. The certainty and predictability achieved through choice of rules clauses will yield

108. See Ribstein, *supra* note 105, at 366 (explaining that the certainty provided by a choice of law clause results in more efficient behavior).

109. The silver lining in conflict of laws is that res judicata prevents a party from being held to conflicting laws in two different proceedings. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."). Since ethics proceedings are not subject to res judicata, there is a possibility of being held to conflicting ethics standards in two different proceedings. See MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 6 (2009) (imploping jurisdictions to try to avoid applying conflicting ethics rules to the same conduct in two different proceedings).

110. See, e.g., Roach, *supra* note 7, at 922–25 (supporting the adoption of the choice of law rule in the 1993 version of ABA Model Rule 8.5 primarily because it furnished clear answers to attorneys and their clients as to which jurisdiction's ethics rules governed their relationship).

111. See *id.* at 922 (advocating for uniform adoption of the 1993 ABA Model Rule 8.5).

112. See Daly, *supra* note 12, at 721 n.13 (surveying the early academic articles on choice of law in ethics proceedings). The first ABA Model Rule on choice of law in ethics proceedings was promulgated in 1993. *Id.* at 756–58.

113. See *supra* note 9 and accompanying text.

114. See *supra* notes 90–95 and accompanying text.

115. See *supra* notes 97–109 and accompanying text.

three primary benefits: (1) ameliorating the expense in determining and litigating the choice of law issue in ethics proceedings; (2) furthering the core values of legal ethics; and (3) ensuring that there are fewer injustices as a result of vague ethics rules.

Choice of rules clauses will eliminate many unnecessary costs imposed by the current inadequate choice of law system for ethics proceedings. In a legal transaction governed by a choice of rules clause, there will be no need to hire expensive ethics experts to determine which state's ethics rules will apply to certain conduct.¹¹⁶ Instead, the answer to this question will be clearly specified by the choice of rules clause. Furthermore, the cost of litigating the issue of which state's ethics rules apply to the transaction will be greatly reduced.¹¹⁷

Reducing these costs has two primary benefits. First, since the expenses eliminated by choice of rules clauses are presumably deadweight losses serving no useful function, reducing these costs results in greater economic efficiency.¹¹⁸ Equally important, though, reducing the costs attorneys must bear to represent clients will correspondingly reduce the fees that attorneys charge clients.¹¹⁹ Lower fees make legal representation more accessible for everyone.

In addition to reducing expenses, choice of rules clauses further many of the core values of legal ethics. Choice of rules clauses eliminate the impediments to zealous representation imposed by the current system.¹²⁰ Knowing which state's ethics rules will govern a legal transaction empowers an attorney to zealously represent his client to the fullest extent of the law.¹²¹ The choice of rules clause enables an attorney to do everything possible to achieve the best outcome for the client, rather than being forced to take the safest course when soft conflicts between state ethics rules arise.¹²² Additionally, with the risks of being held to multiple ethics standards substantially reduced by a choice of rules clause, many attorneys will be able

116. See Ribstein, *supra* note 105, at 403 ("The ability to determine the applicable law also reduces the parties' costs of resolving disputes because parties will have less need to adduce facts and legal arguments relevant to determining the law under vague default rules."). The fees for legal ethics expert testimony can be over \$500 per hour. Selinger, *supra* note 72, at 405–06.

117. See *supra* note 105 and accompanying text.

118. See Ribstein, *supra* note 105, at 422 n.246 (positing that a choice of law clause may reduce deadweight losses).

119. Cf. Jonathan H. Stevenson, *The "No-Profits-to-Affiliates" Rule: A Misnomer*, 10 ENERGY L.J. 315, 324 (1989) (explaining that reducing costs results in lower prices in the context of large corporations).

120. See *supra* notes 73–74 and accompanying text.

121. See Roach, *supra* note 7, at 925 (asserting that ensuring that attorneys have a clear understanding of their ethical obligations furthers the interests of clients).

122. See Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEXAS L. REV. 335, 345–55 (1994) (detailing how the states' splintering of ethics rules can compel lawyers to ignore the discretionary spirit of some sets of ethics rules in order to follow the strict mandates of other sets of rules, even where client service is hindered).

to accept clients that they would otherwise turn away under the current choice of law system.¹²³ Clients with complicated legal matters affecting numerous jurisdictions will have a greater selection of lawyers, thus furthering client autonomy, another core value of legal ethics.¹²⁴

Perhaps the most important benefit of choice of rules clauses is that fewer injustices will occur as a result of the current failed choice of law system in ethics proceedings. Choice of rules clauses greatly reduce a lawyer's chances of being held to two conflicting ethics rules. If the choice of rules clause is deemed valid and unambiguous, then a lawyer will only be held to the ethics rules of the state specified in the choice of rules clause. Since ethics rules are supposed to foster justice, it only seems natural to allow this important tool for reducing the instances of injustice.

B. Policies Supporting Choice of Law Clauses Apply to Choice of Rules Clauses

The policies supporting allowing choice of law clauses in conflict of laws apply with equal force to allowing choice of rules clauses to specify which state's ethics rules govern a legal transaction. There are two primary reasons why this is the case: (1) laws and ethics rules are very similar, and (2) there has been a long history of applying conflict of laws principles to the choice of law issue in ethics proceedings.

1. Similarities Between Laws and Ethics Rules.—The argument that the positive effects of choice of law clauses in conflict of laws will occur in the ethics proceeding context if choice of rules clauses are allowed is an argument by analogy. Since arguments by analogy depend on the strength of the underlying analogy,¹²⁵ it is necessary to demonstrate that laws chosen by choice of law clauses and ethics rules chosen by choice of rules clauses are similar.

Professor Arvid Roach has argued that laws and ethics rules are “fundamentally different.”¹²⁶ His main contention concerns contract law, and he claims that contract law is meant to facilitate transactions whereas the purpose of ethics rules is to regulate the conduct of lawyers.¹²⁷ While Professor Roach's argument may contain some grains of truth, it ultimately misses the mark. Far from being fundamentally different, laws and ethics rules are very similar.

123. See *supra* notes 73–74 and accompanying text.

124. See Alberts & Thompson, *supra* note 74, at 735 (declaring client autonomy to be a core value of legal ethics).

125. See generally A. Juthe, *Argument by Analogy*, 19 ARGUMENTATION 1 (2005) (characterizing the structure and function of arguments by analogy).

126. Roach, *supra* note 7, at 928.

127. *Id.*

There are three primary areas of commonality between laws and ethics rules: (1) both embody public policy; (2) both serve a regulatory function; and (3) both exist to facilitate transactions. Taking each of these in turn, both laws and ethics rules represent policy choices.¹²⁸ A wrongful death statute capping recovery at a certain level reflects the policy choice of allowing some recovery for wrongful death while still providing some certain limit to this liability. In much the same way, an ethics rule requiring a lawyer to breach client confidentiality in order to prevent the client from committing a violent crime reflects the policy decision that preventing serious harm to others is more important than preserving client confidentiality at all costs.

Another similarity between laws and ethics rules is that both regulate conduct. While ethics rules may regulate the conduct of only a special class of people—here, the conduct of attorneys—this is not unlike many laws. For example, pharmaceutical laws imposing strict standards on the labeling of medications regulate only pharmaceutical companies, but these laws exist to serve everyone by ensuring safe use of medications.¹²⁹ An analogous ethics rule would be one imposing restrictions on attorney advertising. Rules on advertising regulate only the attorney, but the purpose behind these rules is to protect the public and the profession from the ill effects of inappropriate advertising content.¹³⁰

A third similarity between laws and ethics rules is that both exist in some measure to facilitate transactions. Laws providing for the enforcement of contract obligations make it possible for parties to enter into contracts knowing that there is legal remedy if one party refuses to uphold his end of the bargain.¹³¹ In much the same way, ethics rules safeguarding client confidentiality facilitate effective legal representation by encouraging the free flow of information from client to lawyer without fear that sensitive information will later be used against the client.¹³²

In short, laws and ethics rules share many similar features. Indeed, they can be aptly described as two sides of the same coin. Given this similarity, the argument by analogy is strong. The policies supporting allowing choice of law clauses to specify which state's law will apply to a transaction apply with equal force to allowing choice of rules clauses to specify which state's ethics rules will apply to a legal transaction.

128. *See id.* at 923 (noting that policy choices are responsible for differences between states' ethics rules); Woodward, *supra* note 11, at 20 (noting the difficult policy questions that arise from choice of law provisions).

129. *See* Patient Package Inserts for Prescription Drug Products, 21 C.F.R. § 203 (1980) (requiring pharmaceutical companies to provide specific information about prescription drugs in order to protect the consumer).

130. *See* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383–84 (1977) (justifying limited restrictions on attorney advertising because of the public's "lack of sophistication concerning legal services").

131. RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1981).

132. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2009).

2. *Tradition of Using Conflict of Laws Principles.*—Beyond the similarities between laws and ethics rules, allowing choice of rules clauses is the natural extension of the long tradition of applying conflict of laws principles to the choice of law issue in ethics proceedings.¹³³ Indeed, until 1993 the ABA Model Rules did not have a special rule for choice of law and instead relied exclusively on the vague phrase “principles of conflict of laws.”¹³⁴ The next step in this progression is to allow choice of rules clauses in legal ethics much like choice of law clauses are allowed to resolve conflict of laws issues.

V. Concerns and Counterarguments

While there are many arguments in favor of allowing choice of rules clauses, there are also some concerns and counterarguments that should be addressed. This Part will consider and refute three counterarguments against allowing choice of rules clauses: (1) the disparity in bargaining power between lawyer and client; (2) the erosion of ethics rules caused by lawyers selecting the most lax ethics rules; and (3) the contention that ethics rules are special and should not be subject to contract.

A. *Disparity in Bargaining Power*

It is true that in some instances there will be a disparity both in bargaining power and information between the lawyer and client during the choice of rules clause negotiations. Indeed, the very nature of ethics rules governing lawyers indicates that the lawyer will know more about ethics rules than will the client. However, this is not a reason to dismiss the idea of choice of rules clauses outright. Many safeguards can be implemented to provide greater surety that lawyers will not take advantage of the disparities in bargaining power and information. The two main safeguards discussed in this section are limiting choice of rules clauses to only sophisticated clients and requiring informed consent from the client.¹³⁵

133. See Kirsten Weisenberger, *Peace Is Not the Absence of Conflict: A Response to Professor Rogers's Article "Fit and Function in Legal Ethics,"* 25 WIS. INT'L L.J. 89, 107 (2007) (discussing the long history of using conflict of laws principles to resolve choice of law problems in legal ethics).

134. MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 2 (1983); see also Rensberger, *supra* note 7, at 829 (“The former [1983] Rule blithely advised that when one encounters differences between two applicable jurisdictions’ rules of professional responsibility, ‘principles of conflict of laws may apply’ or that ‘applicable rules of choice of law may govern the situation.’ In contrast, the new [1993] Rule at least makes an attempt at formulating some choice of law rules.” (citing MODEL RULES OF PROF'L CONDUCT R. 8.5 cmts. 2–3)).

135. Whether either of these safeguards should be used to limit the use of choice of rules clauses is an issue beyond the scope of this Note. The only aim of this subpart is to show that there are mechanisms available to alleviate concerns over the disparity in bargaining power between lawyer and client.

1. *Limiting to Sophisticated Clients.*—Unsurprisingly, the same concern about disparity of bargaining power was present in the debates surrounding the use of choice of law clauses in conflict of laws.¹³⁶ A brief examination of how conflict of laws dealt with the disparity-in-bargaining-power problem will yield valuable insights. With choice of law clauses, the disparity-in-bargaining-power problem often arises with contracts of adhesion.¹³⁷ The typical case would involve a contract between a passenger and a common carrier.¹³⁸ The common carrier includes a choice of law clause absolving it from liability for negligence. This clause is valid in the common carrier's home state but is invalid in the passenger's home state. Many jurisdictions will not give effect to a choice of law clause in these circumstances because it would allow the large corporation to evade laws meant to protect consumers.¹³⁹ These jurisdictions sometimes restrict choice of law clauses to contracts between sophisticated parties only, where the disparity in bargaining power will be diminished.¹⁴⁰

Applying this lesson from choice of law clauses to choice of rules clauses, the use of choice of rules clauses could be limited to sophisticated clients. Sophisticated clients include large corporations and other clients with their own legal counsel or special knowledge of the ramifications of choice of rules clauses.¹⁴¹ These are precisely the types of clients who are most likely to have a complex legal matter touching on multiple jurisdictions, and this is the very situation where choice of rules clauses are most useful. Accordingly, limiting choice of rules clauses to sophisticated clients would likely reduce many of the ill effects of the current choice of law system while still addressing the disparity-in-bargaining-power concern.

136. See WEINTRAUB, *supra* note 79, at 492–93 (exploring whether individuals in an inferior bargaining position should be protected by preventing them from waiving home jurisdiction safeguards in choice of law clauses).

137. See *Assicurazioni Generali, S.P.A. v. Clover*, 195 F.3d 161, 165 (3d Cir. 1999) (acknowledging that some courts do not enforce choice of law clauses in contracts of adhesion because of concerns over the disparity in bargaining power).

138. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b, illus. 3 (1971) (providing a similar example of a choice of law clause involving a passenger and a steamship company).

139. See, e.g., *id.* cmt. b (observing that jurisdictions sometimes refuse to enforce choice of law clauses in contracts of adhesion); *Oceanic Steam Nav. Co. v. Corcoran*, 9 F.2d 724, 732–33 (2d Cir. 1925) (holding that the public policy concern of protecting consumers from the negligence of common carriers outweighs the choice of law rights of the carrier).

140. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b; *Caruso v. Italian Line*, 184 F. Supp. 862, 863 (S.D.N.Y. 1960) (denying effect of an adhesion forum selection clause when the consumer could read neither English nor Italian, the two languages on the contract ticket); *Fricke v. Isbrandtsen Co.*, 151 F. Supp. 465, 466–68 (S.D.N.Y. 1957) (finding an adhesion contract choice of law provision invalid when a German national bought a steamship ticket in Germany and could not read the English choice of law provisions printed on the ticket by the American common carrier).

141. See Ribstein, *supra* note 12, at 1757 (positing that sophisticated clients, such as large corporations, can screen ethical rules that unfairly advantage lawyers for the whole market).

2. *Requiring Informed Consent.*—Another possible safeguard against disparities in bargaining power and information is to require informed consent to the choice of rules clause from the client. This is a natural safeguard to implement since many other ethics protections can be waived with the informed consent of the client.¹⁴² For example, the ABA Model Rules¹⁴³ and most state ethics rules allow clients to waive conflicts of interest and confidentiality through informed consent.¹⁴⁴ Using this same procedure, a lawyer would have to explain the differences among the various state ethics rules to the client and make the ramifications of the choice of rules clause clear to the client before the client could agree to a choice of rules clause. While informed consent may not eliminate the disparity in bargaining power and information between lawyer and client, it will at least level the playing field to some extent.

B. *Erosion of Ethics Rules*

Another concern is that choice of rules clauses would cause an erosion of ethics rules, with lawyers and clients always specifying the ethics rules of the state with the most lax rules.¹⁴⁵ There are two ways to limit the choice of ethics rules under the choice of rules clause: restricting the choice to the entire set of ethics rules of a jurisdiction and restricting the choice to only those jurisdictions that have a substantial relationship to the legal transaction.¹⁴⁶

1. *Entire Set of Ethics Rules.*—One way to prevent lawyers and clients from selecting the least restrictive ethics rules is to limit their choice to the entire body of ethics rules of a jurisdiction and prohibit them from picking and choosing among the ethics rules of multiple jurisdictions. At the very least, this limitation will ensure that the legal transaction will be governed by the complete set of ethics rules of one state, thus preventing lawyers and clients from cherry-picking the most lax rules from the ethics codes of all fifty states. Moreover, as Erin O’Hara and Larry Ribstein have shown, limiting the choice to a state’s entire body of ethics rules will have the added benefit

142. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2009) (providing that informed consent from the client waives confidentiality).

143. *Id.*

144. E.g., D.C. RULES OF PROF’L CONDUCT R. 1.7 cmt. 31 (2007); N.H. RULES OF PROF’L CONDUCT R. 1.7(b)(1)–(4) (2008); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05(c)(2), 1.6(c)(2) (2005).

145. See Roach, *supra* note 7, at 928 (“The attorney’s self-interest may well lie in choosing the least onerous rule . . .”).

146. Whether either of these safeguards should be used to limit the use of choice of rules clauses is an issue beyond the scope of this Note. The only aim of this subpart is to show that there are mechanisms available to alleviate concerns over lawyers and clients contracting for the most lax ethics rules possible.

of minimizing the effects of disparities in bargaining power and information.¹⁴⁷

2. *Substantial Relationship*.—Another way to restrict the choice of lawyers and clients is to require that the state specified in the choice of rules clause have a substantial relationship to the legal transaction. While the term “substantial relationship” is somewhat vague, it is at the very least no worse than the current approach of determining the predominant effect of the legal transaction.¹⁴⁸ Furthermore, many jurisdictions have employed the substantial relationship limitation in choice of law clauses concerning conflict of laws.¹⁴⁹ Accordingly, this limitation is at least capable of being applied in a consistent manner.

Requiring a substantial relationship would guarantee that the only ethics rules that could be applied to a legal transaction would be those of a jurisdiction with at least some interest in the legal transaction. For example, if a client from New York hires a lawyer from Texas to assist in buying a company in California, all three of these jurisdictions have a substantial relationship to the legal transaction. Rather than attempt to sort out where the predominant effect occurred, allowing the lawyer and client to agree that the ethics rules of one of these jurisdictions govern their conduct makes more sense. Furthermore, limiting the choice to these three jurisdictions ensures that the jurisdiction whose ethics rules are applied to the legal transaction at least has some interest at stake.

C. *The Special Case of Ethics Rules*

A final concern about choice of rules clauses is that some feel that ethics rules should not be subject to contract.¹⁵⁰ The primary argument in support of this view is that ethics rules safeguard the interests of third parties, such as the profession as a whole and potential victims of a client’s crimes, and the lawyer and client will not protect these interests when drafting choice

147. See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1192 (2000) (“[L]imiting contractual choice to a single state’s law may help prevent bargaining or information disparities from influencing the choice.”).

148. See *supra* notes 62–63 and accompanying text.

149. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (imposing the substantial relationship limitation on choice of law clauses); Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of “Best Interest of the Child” and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 25 (2008) (“[M]any states require a nexus to the chosen state to use the laws of another state.”).

150. See Roach, *supra* note 7, at 928 (“Thus, while it is acceptable for parties to choose the law to govern their contracts by agreement, it is not acceptable for ethics rules to be chosen in this manner. It is not clear that either party to an attorney-client bargain over ethics rules has appropriate incentives.”).

of rules clauses.¹⁵¹ While this is an intelligible criticism, it can easily be rebutted.

The problem of third-party interests is not unique to ethics rules. Choice of law clauses have been allowed despite the fact that many laws protect the interests of third parties not involved in the drafting of the choice of law clause. Even if choice of law clauses harm the interests of third parties, this harm must be weighed against the myriad benefits of choice of law clauses. Furthermore, many jurisdictions limit the choices available to parties in a choice of law clause, partially in order to protect the interests of third parties.¹⁵² Perhaps the most important reason that choice of law clauses are widely accepted despite the problem of third-party interests, however, is that the principal function of many laws is to facilitate transactions—a benefit that is felt primarily by the parties to the transaction rather than by third parties.¹⁵³ In much the same way, many ethics rules are designed primarily to benefit the lawyer and client rather than third parties.¹⁵⁴ Rules protecting the client from conflicts of interest and safeguarding the confidentiality of client communications are examples of ethics rules whose chief goal is to benefit the client rather than third parties.¹⁵⁵

More importantly, the numerous limitations on choice of rules clauses discussed in this Part alleviate the concern about lawyers and clients choosing ethics rules that will undermine the interests of third parties. In particular, requiring the jurisdiction specified by a choice of rules clause to bear a substantial relationship to the legal transaction ensures that third parties will at least enjoy the level of protection afforded to them by a state with an interest in the matter.

VI. Implementation

In addition to the strong substantive arguments supporting choice of rules clauses, another reason to adopt choice of rules clauses is their ease of implementation into the current system. Far from requiring an overhaul of the current system of choice of law for ethics proceedings, choice of rules clauses can be incorporated within the existing framework rather easily.

151. *See id.* (“The client’s self-interest may be at odds with the interests of important beneficiaries of the rules. Third parties are protected by many of the ethics rules, and the broader interests of the integrity of a state’s legal profession and system of justice are implicated by virtually all of the rules.”).

152. *See* WEINTRAUB, *supra* note 79, at 486 (discussing the reasoning behind interpreting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 as imposing the “reasonable relation” limit on the validity of choice of law clauses).

153. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1981) (explaining that giving parties to a contract legal recourse in the event of a breach is a core function of contract law).

154. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2 (2009) (justifying ethics rules providing for the confidentiality of client communications on the grounds that they facilitate the free flow of information from client to lawyer, resulting in better legal representation).

155. *See, e.g., id.* R. 1.6(a), 1.7(b)(4) (addressing confidentiality and conflicts of interest).

A. *Mechanics*

Choice of rules clauses could be implemented by including them in the client engagement letters that lawyers already send to their clients.¹⁵⁶ It is common practice for a lawyer to send the client an engagement letter that specifies the scope of the representation, fee arrangement, and other important aspects of the attorney–client relationship.¹⁵⁷ Engagement letters serve the dual function of ensuring that the lawyer and client have the same understanding of their relationship and also shielding the lawyer from liability.¹⁵⁸ A choice of rules clause could be inserted into the engagement letter as another aspect of the attorney–client relationship. Indeed, engagement letters provide an existing infrastructure to support the implementation of choice of rules clauses.

B. *Enforceability*

There are two approaches to the enforceability issue of choice of rules clauses. The safest course would be to amend the ABA Model Rules and every state rule to explicitly allow choice of rules clauses, subject to whatever safeguards each jurisdiction deems necessary. Since amending every jurisdiction’s ethics rules may be a long and difficult process, another strategy is to argue for the enforcement of choice of rules clauses under the current choice of law system for ethics proceedings.

1. *Amending the Ethics Rules.*—The best course of action would be for the ABA and every jurisdiction to amend their ethics rules to explicitly allow choice of rules clauses. It is difficult to gauge the chance of success of this strategy because this Note is the first scholarly work devoted to advocating for choice of rules clauses.¹⁵⁹ Accordingly, the reason that there are no provisions for choice of rules clauses in the current ethics rules may be because states have not seriously considered this possibility. That said, the numerous safeguards available to jurisdictions that have concerns over the unintended consequences of choice of rules clauses¹⁶⁰ increase the chances that there will be widespread adoption of provisions allowing for choice of rules clause in at least some limited situations. However, even if eventually there is uniform adoption of provisions allowing for choice of rules clauses,

156. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 1215.1 (2002) (requiring lawyers to send engagement letters to clients).

157. Martha Neil, *Check, Please*, 92 A.B.A. J., May 2006, at 50, 55 (“[T]he physical act of writing a letter that defines the scope of the representation encourages lawyers to think carefully about who is and who is not a client, and to identify conflicts issues at the outset.”).

158. See *id.* (explaining that engagement letters help avoid misunderstanding and reduce the risk of malpractice suits).

159. See *supra* note 12 and accompanying text.

160. See *supra* Part V.

there is no denying that amending the rules of every jurisdiction may take many years.¹⁶¹

2. *Enforcement in the Current System.*—Since amending state ethics rules to explicitly allow for choice of rules clauses may take many years, arguing for the enforcement of choice of rules clauses under the current ethics rules provides a better strategy for the near term.

Under ABA Model Rule 8.5, legal transactions relating to litigation before a tribunal will be governed by the rules of that tribunal.¹⁶² Unfortunately, there is no language in this part of the rule that supports giving effect to choice of rules clauses. However, the second part of ABA Model Rule 8.5, relating to transactional matters, provides that “[a] lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”¹⁶³ This language provides an argument for enforcing choice of rules clauses. The choice of rules clause can act as evidence of the lawyer’s reasonable belief that his conduct would be governed by the ethics rules of the jurisdiction specified in the choice of rules clause. There is still the predominant effect provision,¹⁶⁴ but so long as the jurisdiction specified in the choice of rules clause bears a substantial relationship to the legal transaction, then there is a strong argument that the lawyer could reasonably believe that the predominant effect of his conduct would be felt there.

While there is an argument that choice of rules clauses for transactional matters can be enforced under ABA Model Rule 8.5, the problems inherent in the current choice of law system are still present. Jurisdictions have not uniformly adopted ABA Model Rule 8.5.¹⁶⁵ Of the jurisdictions that do not follow the model rule, the prospects for enforcing choice of rules clauses under the ethics rules of these jurisdictions are sometimes better and sometimes worse than under ABA Model Rule 8.5.¹⁶⁶ Therefore, depending on which

161. See Ward, *supra* note 59, at 181–84 (describing the slow amendment and adoption process for ABA Model Rule 8.5). Such a process would probably begin with the ABA forming a committee to study the proposed revision in the ABA Model Rules. *Id.* It could take years for this committee to study the rule change and make a recommendation. *Id.* If this process results in an amendment to the ABA Model Rules explicitly providing for choice of rules clauses, then every state most likely will form its own committee to study the amendment to the ABA Model Rules. *Id.* Only after this committee reports its findings would a state decide whether or not to change its ethics rules. *Id.*

162. MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(1) (2009).

163. *Id.* R. 8.5(b)(2).

164. *Id.*

165. AM. BAR ASS’N, *supra* note 67, at 1.

166. For example, the prospects for enforcing choice of rules clauses seem to be better in Texas than under the ABA Model Rules because the choice of law rule for ethics proceedings in Texas is simply to apply “principles of conflict of laws.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 8.05 cmt. 3 (2005). Since allowing choice of law clauses is one of the principles of conflict of

jurisdictions will be affected by the legal transaction, reliance on enforcement of choice of rules clauses under the current ethics rules may be imprudent.

VII. Conclusion

Returning to the hypothetical ethics situation presented at the outset of this Note, a choice of rules clause would have prevented the needless uncertainty, expense, and potential injustice caused by the current inadequate system of choice of law for ethics proceedings. If the lawyers had inserted a choice of rules clause into the client engagement letter—specifying the District of Columbia, Maryland, or Virginia as the jurisdiction whose ethics rules would govern the legal transaction—then everyone’s ethical duties would have been clear.

Choice of rules clauses are no panacea, but allowing these clauses will remedy many of the problems created by the current inadequate system for choice of law in ethics proceedings. The path has already been forged by the innovation of choice of law clauses in conflict of laws. The evidence is clear. Choice of rules clauses present the best way forward out of the chaos of the current choice of law regime in ethics proceedings.

—*J. Mark Little*

laws, then it may be possible to enforce choice of rules clauses under the current Texas ethics rules. Virginia is one jurisdiction where choice of rules clauses may be more difficult to enforce than under the ABA Model Rules because Virginia’s choice of law rule for ethics proceedings indicates that when a lawyer is licensed in only one jurisdiction, the ethics rules of that jurisdiction apply. VA. RULES OF PROF’L CONDUCT R. 8.5(b)(2)(i) (2009). This appears to foreclose the possibility of enforcing a choice of rules clause when the lawyer involved is licensed in only one jurisdiction.