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### Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States

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# Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States

*By the Committee on Counsel Responsibility\**

The purpose of this report is to bring to the attention of individual lawyers, courts, and rule-making bodies the perception of the Committee on Counsel Responsibility of the American Bar Association's ("ABA") Section of Business Law of an increasingly serious problem in the area of professional responsibility.

## **THE PROBLEM**

Several phenomena of recent years—(i) the expansion of multi-state as well as international law practice,<sup>1</sup> and (ii) increasing disparity among the states in

\*This report was prepared for the Committee by Ted J. Fiflis, professor of law at the University of Colorado Law School. Mr. Fiflis is chair of a subcommittee composed of himself, W. Loeber Landau, Esq., New York, and Stanley A. Kaplan, professor of law at the University of Chicago Law School (emeritus). Much of the useful analysis was suggested by Messrs. Landau and Kaplan. Any shortcomings are the responsibility of Professor Fiflis.

1. The fact that ever-increasing numbers of lawyers are admitted in two or more jurisdictions or are in partnerships with lawyers admitted in different states has been well documented. *See, e.g., O'Brien, Multistate Practice and Conflicting Ethical Obligations*, 16 Seton Hall L. Rev. 678 (1986) (citing authorities). Further, even small inland firms find that international practice is unavoidable. Some of the ethical conflict-of-laws problems in the international context are discussed in Gwartzman, *The International Lawyer: Extraterritorial Application of Professional Responsibility Standards*, in *Lawyers' Ethics: Contemporary Dilemmas* 251 (A. Gerson ed. 1980).

O'Brien points out that a lawyer is subject to disciplinary jurisdiction in each state where admitted, even for out-of-state conduct. O'Brien, 16 Seton Hall L. Rev. at 678. *See also* *People ex rel. Colo. Bar Ass'n v. Lindsay*, 86 Colo. 458, 478, 283 P. 539, 546 (1929); *Theard v. U.S.*, 354 U.S. 278 (1957); *In re Isserman*, 345 U.S. 286 (1953); *In re Sawyer*, 260 F.2d 189 (9th Cir. 1958), *rev'd on other grounds*, 360 U.S. 622 (1959); *Office of Disciplinary Counsel v. Cashman*, 63 Haw. 382, 629 P.2d 105 (1981); *In re Scallen*, 269 N.W.2d 834 (Minn. 1978); *Comm. on Legal Ethics v. Blair*, 327 S.E.2d 671 (W. Va. 1984); *Waters v. Barr*, 103 Nev. 694, 747 P.2d 900 (1987); *Standards for Lawyer Discipline and Disability Proceedings* § 4.1 (1983) [hereinafter *ABA Standards*].

Further, as clients' activities have expanded geographically, lawyers increasingly have sought admission *pro hac vice* before foreign tribunals, thereby subjecting themselves to an additional set of rules of professional responsibility. *Id.* § 4.2 *See, e.g., Elder v. Metropolitan Freight Carriers*, 543 F.2d 513 (3d Cir. 1976) (New York lawyer admitted *pro hac vice* in New Jersey is bound in that proceeding by New Jersey rule limiting contingent fee arrangements). For a distinctly unattractive

their rules of professional responsibility<sup>2</sup>—pose new conflict-of-laws problems for lawyers not only in disciplinary proceedings but also for malpractice liability to clients, tort liability to third parties, disqualification from appearing before a tribunal, and fee disputes.<sup>3</sup> Four distinct difficulties arise.

(1) Because this situation is of recent origin, many lawyers, when they engage in a representation touching other jurisdictions, may recognize the problem too late to avoid it.

view which seems incorrect, see *Norris v. Kunes*, 166 Ga. App. 686, 305 S.E.2d 426 (1983) (upholding contingent fee contract of Georgia counsel despite Maine rule prohibiting it in a Maine tribunal proceeding). Even more widespread are lawyers' activities for clients in states where they are not admitted and do not have an office, or in states where the firm may have an office although the individual attorney is not admitted. In addition, with the increase in alternative dispute resolution techniques not involving courts, many lawyers now conduct litigation in foreign states without *pro hac vice* admission. One common occurrence is arbitration hearings involving out-of-state attorneys on one side or even both.

Such cases raise issues of choice of law for unauthorized practice as well. Note, *Attorneys: Interstate and Federal Practice*, 80 Harv. L. Rev. 1711 (1967). But the economic pressures seem most likely to result in a modification of the rules against unauthorized practice and in greater reliance on attorney discipline.

The O'Brien paper is an excellent article which served as a substantial source for much of the material in this report.

2. In the 1970s, amendments were made by the ABA to its Model Code of Professional Responsibility ("CPR"). These amendments were widely enacted, but several states failed to adopt them, and calls were made for recodification to establish uniformity. O'Brien, *supra* note 1, at 678. As a result, the ABA launched its effort resulting in the 1983 promulgation of its Model Rules of Professional Conduct ("Model Rules"). *Id.* But the Model Rules themselves have been modified when adopted in numerous states, resulting in a much wider disparity from state to state in rules covering particular conduct. *Id.* at 680. G. Hazard & W. Hodes, *The Law of Lawyering* 853 app. 4 (1988 Supp.) (describing variations in the Model Rules from state to state). See also Myrick, *States Not Afraid to Make Changes to ABA Model Rules*, 7 Of Counsel No. 14, at 3 (Jul. 18, 1988). In Model Rule 1.6, involving client confidences, where the greatest disagreement exists, three distinct classes of rules may be found, variously permitting, mandating, or prohibiting disclosure of client confidences. See Hazard & Hodes, *supra*, at 856.1.

3. Some lawyers bridle at the suggestion that violations of rules of professional responsibility could also form a basis for malpractice or other liability. They urge that a clear distinction should be made between these matters. Both the CPR (Preliminary Statement) and the Model Rules (Scope, paragraph 6) state that a lawyer's violation of a mandatory rule should not, alone, be a basis for civil liability. But the fact remains that courts, making a traditional duty analysis, frequently ground a liability determination on a breach of professional responsibility. See, e.g., C. Wolfram, *Modern Legal Ethics* 52-53, 216 (1986) (citing numerous cases).

See also *infra* note 7 regarding the duty analysis.

Many courts have not been insensitive to the distinction. See, e.g., *Gould v. Lumonics Research Limited*, 495 F. Supp. 294, 297 (N.D. Ill. 1980) ("there is some question as to [plaintiff's] right to enforce the Code [prohibition against lawyers' financing litigation] by disqualifying the law firm, as distinct from the right of the appropriate disciplinary authorities to institute proceedings against the alleged offending lawyers"); *L & H Airco Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989) (Held, that a lawyer who learned of prior contacts between his client and an arbitrator and who failed to disclose that fact to the other party "may have had an ethical duty to disclose . . . under Minn. R. Prof. Conduct 3.3(a)(2).") However the ethical duty was not intended to run to the personal benefit of the opponent (three judges dissenting.).

For example, if L, licensed in state X, has regularly represented a corporate client, C, in state X, and then is admitted in state Y *pro hac vice* on behalf of C, state Y's rules of professional responsibility may well apply in that specific representation.<sup>4</sup> But it may not be sufficient for L thereafter merely to abide by rules of conduct of both states. Thus, if state Y's rules compel disclosure of a confidence previously prohibited or merely permitted to be disclosed in state X, not only may C be adversely affected if L is forced to disclose the confidence, but that may result in L being guilty of a breach of the disciplinary code of X or Y, or both, as well as of malpractice, for failing to obtain C's informed consent before seeking the *pro hac vice* admission.<sup>5</sup> Moreover, C may dispute the obligation to pay L's fees in that or another representation.<sup>6</sup> Alternatively, if L fails to make the disclosure, tort liability to a third party, T, may arguably arise on the basis that the duty of disclosure is owed to T under Y state law, the breach of which may be actionable.<sup>7</sup>

In fact, this may not be a realistic problem as it is here stated. Whether or not state X prohibits disclosure while state Y compels it is unlikely to matter because L presumably will not represent C in the state Y proceedings (in any event, not after L learns of C's intent to commit the fraud). However, other more probable cases may be posited; for example, it may be that while L is learning the facts but before concluding that the client intends to commit fraud, L has sought the *pro hac vice* admission.

There are many other illustrations of how lawyers or their clients today may be affected by inadequate planning concerning conflicts in rules of professional responsibility. For example, the traditional view that only a state where a lawyer has been admitted to practice has jurisdiction to discipline the lawyer<sup>8</sup> may be giving way. At least two states claim jurisdiction to discipline even unadmitted attorneys.<sup>9</sup> In these states, L will not have even the triggering

4. See *supra* note 1. The boundary between that representation and the other activities of L on behalf of C will often be difficult to ascertain.

5. Failure to obtain informed consent where required is a violation of disciplinary rules. Model Rules 1.4(b). O'Brien, *supra* note 1, at 706-07 (discussing the duty).

6. See Wolfram, *supra* note 3, at 555-56.

7. See *supra* note 3. For an analysis of how a duty under a disciplinary rule may form the basis for a tort claim by a third party to whom the duty is owed, see Fiflis, *Choice of Federal or State Law for Attorneys' Professional Responsibility in Securities Matters*, 56 N.Y.U. L. Rev. 1236, 1242-50 (1981).

8. The traditional rule is set forth at ABA Standards, *supra* note 1, § 4.1 commentary. See Attorney Grievance Comm'n of Md. v. Hyatt, 302 Md. 683, 689-90, 490 A.2d 1224, 1227 (1985) (member of Ohio bar not subject to discipline in Maryland).

9. See *Waters v. Barr*, 103 Nev. 694, 747 P.2d 900 (Nev. 1987) (applying Nevada Sup. Ct. Rule 99.1 to extend jurisdiction to anyone practicing law in Nevada even if not admitted there). Nev. Sup. Ct. R. 99.1 reads in pertinent part:

Every attorney . . . practicing law here, whether specially admitted or not, is subject to the exclusive disciplinary jurisdiction of the supreme court and the disciplinary boards and hearing panels created by these rules.

Arkansas Rule 8.5, Model Rules of Professional Conduct (1989), is applicable to unadmitted lawyers practicing in that state. It reads:

mechanism of application for general or special admission to remind him or her of the wisdom of looking in advance for potential pitfalls.

In still other cases, mere inattentiveness to the need to adapt to new modes of conduct in a foreign jurisdiction may cause inadvertent violations.

(2) The newness of the problem also causes a second category of difficulties even for the alert lawyer: choice-of-law principles for professional responsibility have not become sufficiently settled to enable a lawyer to ascertain which state's rules apply in many situations.<sup>10</sup>

Thus, in the hypothetical case involving conflicting rules about disclosure of a client's confidence, numerous choice-of-law issues arise. If C brings a malpractice action in state X, where both C and L reside and L is admitted, or L sues C for his fee in state X, will L's duty to seek informed consent be based on the law of X or that of Y? And if L violated the state Y duty to disclose by remaining silent, and is sued in either state X or state Y by T for damage caused by breach of that duty, which state's law will govern the various issues?

Not only are there unresolved choice-of-law issues, but there are new unresolved questions of jurisdiction to decide in states that do not have explicit rules as in Arkansas and Nevada.<sup>11</sup> Thus, if L, admitted only in X, represents C in a commercial arbitration hearing in Y, does Y have jurisdiction to discipline L? Whether or not Y does have such jurisdiction, are X or are Y rules of professional responsibility applicable to L in a proceeding in the appropriate jurisdiction?

A further example of uncertainty on issues of both jurisdiction to decide and choice of law is an air crash disaster in state Z in which many of the victims and survivors are state Y residents who are solicited by state X lawyers not admitted in Y. May X or Y, or both, regulate these solicitations? If so, do X or do Y rules apply? Another complication would result if state Z's courts are employed for the litigation.

Stanley Kaplan raises still other difficulties of uncertainty in choice of law caused by the modern phenomenon of multistate law firms.<sup>12</sup> He poses two typical situations which show how lack of clear rules may result in grave difficulties.

Case 1:

[A]ssume that a law firm with its largest and original office in Los Angeles and substantial branch offices in New York, Chicago, Washington and Houston, is engaged at its Washington office to handle a matter which has its main operational contacts in Texas and which is serviced primarily

A lawyer admitted to practice or practicing in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Ark. Model Rules of Professional Conduct Rule 8.5.

10. For the scant authority, most of which is cited in this report, see, e.g., Wolfram, *supra* note 3, at 50-51; O'Brien, *supra* note 1, at 700-13; Kaplan, *The Securities Bar, Professional Responsibility: Which State's Rules Apply?* 2 Insights, Feb. 1988, at 17.

11. See *supra* note 9.

12. See Kaplan, *supra* note 10, at 17.

by Chicago and New York partners. The client is a nationwide business corporation chartered in Delaware with main offices in New Jersey. . . . If a suit for malpractice were brought against the law firm, the question of culpability might be determined by the rules of: (1) the places in which the individual lawyers were admitted to the bar; (2) the places in which the branch offices with which they are associated are located; (3) the location of the primary office of the firm; (4) the place at which the client engaged the law firm; (5) the place where the case is being litigated; or (6) the place in which most of the legal work was actually done.

Kaplan notes:

If the place of bar admission of the individual lawyers or the location of their respective offices is used to determine the applicable standard, then different lawyers will be treated differently and a uniform standard applicable to the firm as a whole will not be achieved.

Case 2:

[A] lawyer in the State A office of a multistate firm wishes to represent a prospective client from State B in State B and ascertains that he will have to seek the assistance of a specialist partner from the firm's office in State C. The lawyer from State C had formerly been associated with a law office in State C which represented the proposed defendant that the prospective client wants to sue. The lawyer from State C did not himself represent the proposed defendant but a former partner or associate did, and that other lawyer's disability may be imputed to him. Let us also assume that the doctrine of imputed disqualification would not apply on these facts under the decisions of States A or B, but that it would apply in State C. If the doctrine of imputed disqualification would exclude the State C lawyer in a case brought in State C, would that doctrine have the same effect in a suit brought in State A? Further, would the result be different if the lawyer from State C were also admitted to the bar in State A, or, indeed, if the initial lawyer in State A were admitted to practice in State C?

(3) There is a third category of difficulties. Even where it is known which state's law applies, often the answer is that both do, and sometimes the two laws are in direct conflict—with the result that compliance with one state's rule means violation of the other's. This is the so-called "conflict-of-obedience."<sup>13</sup>

This class of difficulty is especially likely to occur with respect to client confidences, because in many jurisdictions the ABA's Model Rules policy of preserving confidences has been overridden by a policy of required disclosure, for example, where financial harm may be avoided. Delaware, like several other states, *prohibits* disclosure of client confidences, even if disclosure might avoid a criminal act likely to result in substantial injury to the financial interest or

13. The term "conflict-of-obedience" is used in Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 Calif. L. Rev. 29, 36 (1987).

property of another.<sup>14</sup> Florida rules, on the other hand, *require* disclosure of this information.<sup>15</sup> A lawyer admitted generally or specially in both states is thus subject to directly conflicting instructions. Query: does the same conflict arise when two partners are admitted, one in each state, to do the client's work solely with respect to their own states?

Although constitutional limitations, particularly under the Commerce Clause, may ultimately be held to avoid such conflicts, case law has not yet developed and lawyers are at risk of being bound to violate one or the other state's rule.<sup>16</sup>

(4) Where the two rules both apply but are not in direct conflict and may both be complied with (the so-called "two hurdle" conflict),<sup>17</sup> the result may be that the higher hurdle governs and the policy of the state with the lower hurdle is subverted. Thus, where state X would permit disclosure of a particular confidence in certain circumstances, leaving discretion to the lawyer for any of a number of policy reasons, the lawyer's discretionary power so endowed by state X is removed if state Y either compels or prohibits disclosure.<sup>18</sup>

## REMEDIES

What may be done to remedy or ameliorate these four difficulties caused by the increase in multistate practice and the conflicting rules of professional conduct?

14. Delaware Lawyer's Rules Of Professional Conduct Rule 1.6.

15. Florida Rules Of Professional Conduct Rule 4-1.6(b)(1).

16. See *infra* note 32, and Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 Harv. L. Rev. 806 (1971); Cf. Buxbaum, *supra* note 13, at 29.

17. See Buxbaum, *supra* note 13, at 36.

18. See, e.g., Pennsylvania Rules Of Professional Conduct 1.6(c)(1). This rule permits disclosure of confidences to prevent a substantial injury to the financial or property interest of another, while Florida compels disclosure and Delaware prohibits it. See *supra* notes 14-15 and accompanying text.

Incidentally one problem area seems to have become quiescent in recent years—although the problem may arise again if the current ripples of discontent with deregulation result in a new wave of federal regulation. In the 1970s, when the SEC led the way in seeking to enlist lawyers and accountants in enforcing securities regulations against their clients, there arose the specter of a federal law of professional responsibility in limited areas. The peak was approached in *SEC v. National Student Marketing Corp.*, 538 F.2d 404 (D.C. Cir. 1976), which then crested in *In re William R. Carter*, Sec. Exchange Act Release No. 17,597, 22 SEC Docket 292 (Feb. 28, 1981), an administrative proceeding. The Commission now, however, as a matter of policy both has minimized its use of rule 2(e) against lawyers and apparently accepted the view that federal law, where applicable, should borrow from state law which, but for the federal context, would otherwise apply. See Greene, *Lawyer Disciplinary Proceedings Before the Securities and Exchange Commission*, 14 Sec. Reg. L. Rep. 168, 169 (1982). For the legal underpinnings of this position, see Fflis, *supra* note 7. Address by Commissioner Fleischman, Seventh Annual Ray Garrett, Jr., Corporate and Securities Law Inst. (Apr. 30, 1987) (stating the view that rule 2(e) proceedings should not be used to establish standards of professional conduct).

The jurisdiction where the attorney is admitted of course may impose discipline for violation of federal law, including federal securities laws. See, e.g., *In re Hutchinson*, 518 A.2d 995 (D.C. App. 1986).



## INDIVIDUAL LAWYERS

Individual lawyers may alleviate the problems only by (i) remaining alert to the potential for conflicting rules of professional responsibility and (ii) advance planning when they engage in a multistate matter.

As already illustrated, such measures will assist in protecting clients as well as the lawyer. Thus, in the first hypothetical case above, very often a lawyer aware that a transaction will touch another jurisdiction with a conflicting set of rules would be well-advised to abstain from the foreign representation and allow other counsel to be retained.<sup>19</sup> L in possession of a confidence protected in state X usually will have no obligation to disclose it to counsel retained in state Y, having a contrary rule, if L avoids involvement in the state Y matter; nevertheless, specific cases may be expected to raise thorny issues in this regard.

As another measure, it may be that the potential conflict may be avoided by the engagement contract with the client through the use of a clause selecting the governing forum and law, although this is untried ground.<sup>20</sup> For example, disciplinary authorities may uphold fee agreements valid in state X where L and C, both residing in X, have agreed that disputes shall be heard in X and shall be governed by the law of X when L engages in activity for C in both X and Y, and when Y's rule would prohibit the agreement. Courts may be quite sympathetic to this result. Particular cases must be thoroughly analyzed to ascertain whether this will be so. For example, if the state Y activity is the conduct of litigation there, upholding a fee agreement contrary to Y's rule would seem incorrect.<sup>21</sup>

## THE BAR, COURTS, AND LEGISLATURES

### *Uniformity of the Rules of Professional Responsibility*

The most obvious (and most difficult to attain) remedy for conflicting rules is establishment of uniform rules to the maximum extent feasible—the original driving force behind proposal of the Model Rules. Given the competing considerations for many problems of professional responsibility in a federal system, it is to be expected that disparate rules will be adopted by the different jurisdictions. Nevertheless several measures may be feasible which could result in minimizing such conflicts.

First, the organized bar should be more concerned than it recently has been with the obvious disadvantages of conflicting rules, and it should urge enacting bodies more emphatically to take this factor into account in determining whether to follow a uniform code. This would be a reversal of the view expressed by many who were instrumental in causing the ABA's approval of the Model Rules in 1983. In that debate, in order to encourage adoption, alteration

19. See *supra* text accompanying note 4.

20. Presumably, informed consent will be a condition of upholding such a choice of forum and choice of law stipulation.

21. Cf. *Elder v. Metropolitan Freight Carriers*, 543 F.2d 513 (3d Cir. 1976). But see *Norris v. Kunes*, 166 Ga. App. 686, 305 S.E.2d 426 (1983).

of the Model Rules by state enacting bodies was expressly condoned by at least one of the proponents.<sup>22</sup>

In addition, the desirability of uniformity among the states should be expressed in disciplinary and other adjudicatory proceedings. This policy will sometimes support the position of a party, who may then be expected to raise it. But even when it is not raised by a party, adjudicators should always keep it in mind.

Third, one reason for the disparity in rules concerning client confidences is the abortive process which was followed by the ABA in enacting its Model Rules, whereby badly-worded floor amendments in the House of Delegates debate resulted in numerous inconsistencies within the commentary of the Model Rules. These have been fully explicated by several writers.<sup>23</sup>

Like the official condoning of disparity among the states, the built-in ambiguity of the poorly-worded confidentiality commentary probably has caused an increased number of conflicts among the states. But it is not too late to undo some of that mischief. The most direct cure for these inconsistencies would be to reopen the matter. But there appears to be little appetite for this in the bar. That may ultimately become necessary; however, other more feasible steps may be taken to help resolve some of the problems.

One useful measure has already been initiated. The ABA's Standing Committee on Ethics and Professional Responsibility has been requested by the Section of Business Law Committee on Counsel Responsibility to answer several specific questions posed by hypothetical cases concerning the meaning of Model Rule 1.6 on confidentiality and Model Rule 1.16 on withdrawal from representation.<sup>24</sup> These queries are intended to elicit clarifications of what the rules permit by way of communicating notice of withdrawal to various persons, while still complying with the duty of confidentiality in the context of a crime or fraud involving a client which is a business organization.

The Standing Committee may be able to further uniform application of the Model Rules in this and other areas by issuing opinions clarifying and rationalizing the rules, thereby making them more generally acceptable.

Another promising effort toward uniformity is in progress with the American Law Institute's ("ALI") project to develop a Restatement of the Law Governing Lawyers.<sup>25</sup> Presumably this Restatement will become a major reference for courts and professional bodies concerned with disciplinary, tort, and contract issues concerning lawyers and involving, among other matters, current ambigu-

22. Quade, *New Ethics Code Now Is Up to the States*, 9 B. Leader, Nov.-Dec. 1983, at 24 (quoting a member of the ABA Special Committee on Implementation of the Model Rules of Professional Conduct). For a description of the debate, see 2 Hazard & Hodes, *supra* note 2, at 854. See also Myrick, *supra* note 2.

23. See, e.g., 2 Hazard & Hodes, *supra* note 2, at app. 4.

24. See letter from George J. Hauptfuhrer, Chair of the Comm. on Counsel Responsibility of the Business Law Section of the ABA, to M. Peter Moses, Chair of the ABA Standing Comm. on Ethics and Professional Responsibility (Oct. 30, 1989).

25. See Restatement of the Law Governing Lawyers, (Tent. Draft No. 1, 1988) and (Tent. Draft No. 2, 1989).

ties in the Model Rules. Again, rationality should lead to more general acceptance of the views of the Restatement.

### ***Development of Choice of Law Rules***

The greatest difficulty posed by lawyers alert to choice-of-law issues is the previously noted sparseness of settled choice-of-law rules, thus hindering adequate planning.<sup>26</sup> A lawyer faced with a potential choice-of-law problem has little useful case law to resolve the issues, regardless of the additional question of whether the resolution is a desirable one. If there is any hope of developing a coherent set of such principles, it appears to lie in the ALI's Restatement project because of the paucity of cases and the fact that the existing Restatement of Conflicts (Second), like its predecessor, does not address problems of professional responsibility except under general tort and contract provisions. The Lawyer's Restatement must be far more specific than the Restatement (2d) Conflict of Laws approach for choice-of-law matters in general. It will do little good to advise lawyers, as the Conflicts Restatement does, that, in resolving questions of choice of law, they should consider the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states, and the relative interests of those states in the determination of the particular issue, the protection of justified expectations, the basic policies underlying the particular field of law, certainty, predictability, and uniformity of result, and ease in the determination and application of the law to be applied.<sup>27</sup>

Instead, as in certain areas of the Restatement (2d) Conflicts, such as the rules on corporate internal affairs,<sup>28</sup> very specific rules will be the only useful ones. Perhaps the way to achieve this is for legal scholars to begin addressing choice-of-law problems now in preparation for the Restatement of the Law Governing Lawyers debate.

The content of these choice-of-law rules will require consideration of numerous questions, such as those raised in the first part of this report.

### ***Minimizing Conflicts of Obeisance and of the Two-Hurdle Variety***

Courts and rule-making bodies and the new Restatement, concerned with rules of governance for lawyers, may help minimize conflicts not only by greater

26. See *supra* note 10.

27. In *Nelson v. Nationwide Mortgage Corporation*, 659 F. Supp. 611 (D.D.C. 1987), the court applied this Second Restatement test where a District of Columbia resident, not represented by an attorney, closed a mortgage in Virginia on D.C. real estate and received legal advice from the Virginia mortgagees' Virginia attorney, which was alleged to be negligently supplied. *Id.* at 613. It said the Restatement "rule favors application of the substantive law of Virginia on the facts alleged. . . . The only factor weighing in favor of the District of Columbia is that it is the plaintiff's domicile." *Id.* at 616.

28. Restatement (Second) Conflict of Laws § 302 (1971).

uniformity and by intelligible rules of choice of law, but by several other means as well.

Constitutional constraints on the applicability of two or more states' laws to the same set of facts are extremely limited and cannot be expected completely to solve the difficulties. Nevertheless, there is some room for their application. Due process, equal protection, impairment of contracts, and full faith and credit concepts are largely inapplicable to choice-of-law issues.<sup>29</sup> The only remaining relevant limitation lies in the dormant Commerce Clause.<sup>30</sup> The interstate or international practice of law is probably commercial,<sup>31</sup> the excessive regulation of which by a state may be invalid. Thus, one may find succor in the Commerce Clause in a case where a lawyer regulated by two directly conflicting rules may not engage in the activity without violating one rule or the other (the "conflict-of-obedience" type case), although no such case has yet been litigated.<sup>32</sup>

Codes of conduct may help avoid conflicts of obedience by various statesman-like provisions. For example, California's rules of professional responsibility [rule 1-100(D)(1)] were amended in 1989 to provide that the California rules are binding on members of the California bar acting in another jurisdiction, unless the rules of the other jurisdiction require conduct different from that required or permitted pursuant to the California rules.

A further illustration of this approach of comity is an ethics opinion issued by the Maryland State Bar Committee on Ethics.<sup>33</sup> It was determined that Constantinople should hold that when in Rome, an attorney should do as the Romans do, at least where the Roman rule is less onerous than that of the attorney's state of admission. There, Maryland attorneys (one of whom was also admitted in the District of Columbia), defending in a District of Columbia court, followed the D.C. rule requiring only that the client be asked to rectify the wrong but permitting silence otherwise when the attorneys discovered the client had presented forged evidence. The Maryland rule would require the attorneys to reveal the fraud. The opinion stated that, when a Maryland attorney acted lawfully in a foreign jurisdiction, "his conduct is ethical per se. Where the Maryland Code of Professional Responsibility may impose different

29. See Horowitz and Buxbaum, *supra* note 16.

30. *Id.* The "dormant" concept of the Commerce Clause is the concept encompassing those cases in which, although Congress has not legislated, the regulation of the particular activity by a state is nevertheless deemed to be an improper interference with commerce.

31. *Cf.* Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975).

32. *Cf.* Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (striking down an Illinois statute requiring a certain type of mudguard for trucks when the guard would be illegal in other states where the trucks were operated).

Of course, even if the conflicting rules are held invalid, the vacuum thus established is likely to be viewed as abhorrent. Further, would such a result be carried to the logical extreme of invalidating rules which *potentially* are in direct conflict with as-yet-unenacted rules of other jurisdictions? Or would only the more generally accepted of the two conflicting rules be upheld? Or the first in time? Or the least restrictive?

33. Md. State Bar Ass'n Comm. on Ethics, Opinion No. 56-28, 1 ABA/BNA Lawyers Manual on Professional Conduct 1122 (1988). For a benighted, opposing opinion, see *In re Porep*, 60 Nev. 393, 111 P.2d 533 (1941).

or more stringent requirements on its attorneys, it does not require its attorneys to behave in a manner that is inconsistent or at variance with the code of conduct prescribed by another jurisdiction when practicing there.”<sup>34</sup>

Most situations involving two or more different rules of conduct, where both apply, are of the “two-hurdle” type—rules which may be complied with simply by meeting the rule which invokes the higher hurdle. For example, state X mandates or prohibits disclosure of a client confidence while state Y permits disclosure. As has been stated, in the two-hurdle conflict, compliance is perfectly feasible, but the result is to require the lawyer to ignore the policy of the state establishing the lower hurdle.

This fact suggests that state rule-making and adjudication bodies may well consider whether the higher hurdle should be required at all, and, if so, whether it is wise to require it in every case where the state has power to impose its rule.

Thus, courts and rule-making bodies in state X may well reconsider whether the higher hurdle should be limited to situations in which the state’s interest is paramount to those of other jurisdictions. This restraint may be applied either in the terms of the rule itself or by conflict-of-laws rules calling for adjudicatory restraint through application of the familiar concept of comity with other states.<sup>35</sup>

## CONCLUSIONS

During preparation of this report, an informal poll of several dozen lawyers made clear that most were not alert to the choice-of-laws perils of interstate practice. Given the potentially serious consequences, lawyers should plan for such matters. But more importantly, the organized bar, courts, and legislatures should

- (i) maximize uniformity of rules of professional responsibility;
- (ii) focus on development of clear and simple choice-of-law rules concerning professional responsibility; and
- (iii) seek by various rules of comity to minimize conflicts by limiting application of conflicting rules.

34. For an even more clear-cut case calling for benign comity, see Comm. on Prof. and Judicial Ethics of the State Bar of Mich., Informal Op. CI-709, at 1 (Dec. 28, 1981) (lawyer licensed in California and Michigan, but practicing solely in California, violated Michigan rule, although his action conformed to California requirements; he should not be disciplined by Michigan).

35. Restatement (Second) Conflict of Laws § 6(2)(C) directs courts, *inter alia*, to give consideration not only to the forums’ relevant policies, but also to those of all other interested states. 1 Conflict of Laws, *supra* note 28, § 6(2)(C).

