MULTISTATE PRACTICE AND CONFLICTING ETHICAL OBLIGATIONS

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I. INTRODUCTION

Multistate or interstate practice of the law has become increasingly common in recent years. The 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 all contributed to this phenomenon. Another factor responsible for, or perhaps responding to, this increase in multijurisdictional practice is the easing of residency requirements for admission to the bar.

Lawyers admitted to practice in more than one state are subject to the disciplinary jurisdiction of each state to which they are admitted. Similarly, an out-of-state attorney admitted pro hac vice submits to the disciplinary system of the admitting state. In addition, a lawyer not admitted in a state may have to conform his conduct to that state's ethical code if he is engaged in substantial legal activity there.

Until recently, the fact that a lawyer might be subject to more than one state's disciplinary standards was not a matter of concern. First, few lawyers were involved in multijurisdictional practice. Second, the standards of professional responsibility did not differ significantly from state to state. From 1908 to 1969, the American Bar Association (ABA) Canons of Ethics were the

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1 Brakel & Loh, Regulating the Multistate Practice of Law, 50 Wash. L. Rev. 699, 699 (1975).
2 Id. at 699-700; see Note, Regulating Multistate Law Firms, 32 Stan. L. Rev. 1211, 1215-17 (1980); see also Leis v. Flynt, 439 U.S. 438, 449-50 (1979) (Stevens, J., dissenting) (discussing the metamorphosis of law practice).
4 See, e.g., Standards for Lawyer Discipline and Disability Proceedings § 4.1 (1983) [hereinafter cited as ABA Standards].
5 See id. § 4.2.
6 See infra notes 178-195 and accompanying text.
source of ethical standards in most jurisdictions. In 1969, the ABA House of Delegates unanimously approved the Model Code of Professional Responsibility (Model Code). Three years later, the Model Code “had been adopted by court rule or unified bar resolution in nearly all states, usually with no more than minor changes.” By 1977, forty-nine states had adopted the Model Code, and the remaining state, California, had established a very similar set of standards.

Subsequently, small discrepancies among state standards became apparent as the Model Code was amended by the ABA and only some states adopted the changes. Rules relating to client confidentiality, advertising, and solicitation displayed the most significant differences. The Model Code was thus reconsidered in the late 1970’s to address, among other things, its “failure . . . to consider the problem of conflicting standards” of ethics. The Commission on Evaluation of Professional Standards then drafted a new code—the Model Rules of Professional Conduct (Model Rules). In August of 1983, the ABA House of Delegates approved the Model Rules as a replacement for the Model

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10 See generally STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, AM. BAR ASS’N, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1977) (comparing the Model Code to the professional standards adopted by 49 states).
11 See CAL. RULES OF PROFESSIONAL CONDUCT Rules 1-100 to 8-101.
12 Moser, A Major Improvement, the Rules Should Be Adopted, 69 A.B.A.J. 867, 868 (1983). For example, Disciplinary Rule 7-102 states that “[a] lawyer who receives information . . . that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.” MODEL CODE, supra note 8, DR 7-102(B)(1) (emphasis added). The italicized section, which was not included in the original version of the rule, was adopted by amendment by the ABA in 1974. Moser, supra, at 868. The amended version was “adopted in no more than four or five states.” Id.
15 MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as MODEL RULES].
The Model Rules differ substantially from the Model Code in many areas. Since approval of the Model Rules, ten states have adopted new standards for professional conduct based on the Model Rules. Consequently, there are currently two very different standards in force in the United States—the Model Code and the Model Rules. This situation will not change in the near future; the approval procedure is moving slowly, and some state bar associations have rejected the new rules.

In addition, each state that has enacted a new code of conduct based on the Model Rules has modified them. Such modification was encouraged by the head of the ABA Special Committee on Implementation of the Model Rules of Professional Conduct, who stated, "You can shape these rules to your

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16 See id. at 1.
17 See infra notes 25-117 and accompanying text.
18 To date, the following states have adopted codes based on the Model Rules: Arizona, Arkansas, Delaware, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, and Washington. See Arizona Adopts New Rules of Professional Conduct, 1 LAW. MAN. ON PROF. CONDUCT (ABA/BNA), 445, 445 (Oct. 3, 1984) [hereinafter cited as LAW. MAN.]; Arkansas Adopts New Code Based on ABA Model Rules, 1 LAW. MAN., supra, at 1126, 1126 (Jan. 8, 1986); Delaware and Washington Adopt New Ethics Rules, 1 LAW. MAN., supra, at 961, 961-62 (Sept. 18, 1985); Two More States Adopt Versions of Model Rules, 1 LAW. MAN., supra, at 855, 855-56 (July 10, 1985) (Minnesota and Montana); Missouri Adopts New Code Based on ABA Model Rules, 1 LAW. MAN., supra, at 924, 924 (Aug. 21, 1985); Nevada Adopts Model Rules; Bars Elsewhere Issue Reports, 2 LAW. MAN., supra, at 37, 37 (Feb. 19, 1986); Model Rules Adopted in N.H., Advance in Two Other States, 1 LAW. MAN., supra, at 1142, 1142 (Jan. 22, 1986); New Jersey Adopts New Code Based on Model Rules, 1 LAW. MAN., supra, at 334, 334-35 (July 25, 1984).

North Carolina has also adopted a new code using the rule-and-comment form of the Model Rules; however, it is arranged under 10 canons like the Model Code. See North Carolina Adopts Rules with Mixed Influences, Format, 1 LAW. MAN., supra, at 1026, 1026 (Oct. 30, 1985).

19 See Winter, supra note 13, at 4; see also Mallen, The New ABA Ethics Code: Looking at the Changes, 13 BRIEF, Feb. 1984, at 8, 8 ("The Code has been construed by disciplinary bodies and courts for a decade and a half. There will be a natural and justified reluctance to abandon years of judicial construction and settled meaning only to start the process all over again."); Reaves, 40 States Are at Work on New Ethics Code, 6 B. LEADER, Mar.-Apr. 1984, at 24, 24 (discussing the adoption procedure of the Model Rules by various states).

20 The New York State Bar rejected adoption of the rules because it believed "that the current ethics code [the Model Code] was basically sound and that any necessary changes could be accomplished through the amendment process." New York, Oregon State Bars Reject Model-Rule Packages, 1 LAW. MAN., supra note 18, at 1047, 1047 (Nov. 13, 1985). In addition, the Oregon State Bar decided to retain its current code because of the body of law existing under it. Id. at 1048. Vermont has likewise rejected adoption of the Model Rules. Two More States Adopt Versions of Model Rules, supra note 18, at 856.

21 See articles cited supra note 18.
own states when you get home.' "22 Furthermore, in the several states where the Model Rules have been presented to the highest courts of the states for final approval, many changes have been suggested.23 As one commentator noted, it is possible that "'[w]e'll end up with a multitude of codes that have a little something in common but are all basically different.' "24

Thus, a lawyer in interstate practice will be subject to the jurisdiction of several states, each of which may have a unique code of ethics. When those standards call for inconsistent courses of conduct, the lawyer will need to know which code will be considered controlling. At the present time, there are no rules for deciding that question. This article will examine that problem. First, it will set out some major differences among state standards of ethical responsibility and describe the current system for regulating lawyers in interstate practice. Next, the question of which state's standard of professional conduct will be applied to a lawyer involved in multijurisdictional practice will be analyzed. This discussion will focus on the interpretation of the comment to Model Rule 8.5, which calls for conflict-of-laws principles to be applied. Finally, some suggestions for improving the system of regulating lawyers' ethics in multistate practice will be made.

II. MAJOR DIFFERENCES IN ETHICAL STANDARDS

As indicated above, the major sources of ethical standards for the states are the Model Code and the Model Rules. Another important source of disciplinary rules is the final draft of the Model Rules of Professional Conduct (Draft Rules).25 The differences in several major areas among these standards, as well as


24 Quade, supra note 22, at 24 (quoting Charles Kettlewell, past president of the National Organization of Bar Counsel).

25 Model Rules of Professional Conduct (Final Draft 1982) [hereinafter cited as Draft Rules]. For example, the proposed rules presented to the Pennsylvania Supreme Court substituted Draft Rule 7.3 for Model Rule 7.3 to regulate direct contact with prospective clients. See States Take Steps Toward Adoption of Model Rules, 1 Law. Man., supra note 18, at 17, 17 (Jan. 25, 1984).
among some of the new sets of rules proposed or adopted by the states, are discussed below.

A. Confidentiality

1. General Principles

Under the Model Code, a lawyer is directed to preserve confidences—"information protected by the attorney-client privilege"—and secrets—"information . . . that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Model Rule 1.6 and Draft Rule 1.6 prevent the lawyer from revealing "information relating to representation of a client." It is clear that the protection afforded by the Model Rules is substantially broader than that provided by the Model Code. In addition, Model Rule 1.6 and Draft Rule 1.6 "[do] not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental."28

2. Exceptions

a. General Exception

Under the Model Code, a lawyer may disclose confidences or secrets if a client consents after full disclosure. Under the Model Rules and the Draft Rules, however, "full disclosure" has been replaced by a requirement of "consultation," and an exception has been made "for disclosures that are impliedly authorized in order to carry out the representation." Thus, the Model Rules and the Draft Rules have eliminated the requirement of client consent in certain circumstances.

b. Future Crimes

The Model Code provides that "[a] lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." The Model Rules permit a

26 MODEL CODE, supra note 8, DR 4-101(A).
27 MODEL RULES, supra note 15, Rule 1.6(a); DRAFT RULES, supra note 25, Rule 1.6(a).
28 MODEL RULES, supra note 15, Rule 1.6 note on code comparison; DRAFT RULES, supra note 25, Rule 1.6 note on code comparison.
29 MODEL CODE, supra note 8, DR 4-101(C).
30 MODEL RULES, supra note 15, Rule 1.6(a); DRAFT RULES, supra note 25, Rule 1.6(a).
31 MODEL CODE, supra note 8, DR 4-101(C)(3).
lawyer to reveal confidential information he "reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." The corresponding Draft Rule allows a lawyer to divulge information if the client is about to commit "a criminal or fraudulent act . . . likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another."

All three provisions are permissive—a lawyer is not required to reveal such information. The Model Code allows disclosure of information relating to any future crime, while the Model Rules apply only to very serious crimes involving injury to a person. The exception contained in the Draft Rules falls between the two major standards, allowing revelation in cases of serious crimes affecting people or property.

If a lawyer in multijurisdictional practice is subject to two or more of these standards, he can comply with all of them by keeping everything confidential or by revealing information relating only to serious crimes involving injuries to people. The standards enacted by some states, however, create the potential for a lawyer's being subject to conflicting ethical obligations. In Virginia, for example, a lawyer is required to disclose his client's stated intention to commit a crime. Thus, a lawyer admitted in Virginia and in another state where Model Rule 1.6 is adopted

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32 Model Rules, supra note 15, Rule 1.6(b)(1).
33 Draft Rules, supra note 25, Rule 1.6(b)(1).
34 The Draft Rule also applies to frauds; the other standards do not. See Draft Rules, supra note 25, Rule 1.6(b)(2).
35 See Va. Code of Professional Responsibility DR 4-101(D)(1). This disciplinary rule states, "A lawyer shall reveal . . . the intention of his client, as stated by the client, to commit a crime and the information necessary to prevent the crime." Id. (emphasis added).
36 Other states have a rule similar to Virginia's. New Jersey, the first state to adopt a new ethics code based on the Model Rules, also enacted a standard that requires a lawyer to reveal his client's intention to commit a crime. N. J. Rules of Professional Conduct Rule 1.6(b). Rule 1.6 requires disclosure to prevent a client from committing a crime or fraudulent act that would result in another's death, substantial bodily harm, or serious financial harm. Id. Nevada has adopted a similar rule. See Nevada Adopts Model Rules; Bars Elsewhere Issue Reports, supra note 18, at 37.
37 Connecticut has proposed a similar amendment to rule 1.6. Connecticut, Indiana Bars Urge Model Rules' Adoption, supra note 23, at 1065.

In a report submitted to the District of Columbia Bar, the professional conduct committee, headed by Robert E. Jordan III, suggested adoption of a rule requiring disclosure to prevent a criminal act likely to result in death or bodily harm. See District of Columbia Bar Model Rules of Professional Conduct Committee, The Model Rules of Professional Conduct with Proposed Revisions 47 (submitted to the Board of Governors of the District of Columbia Bar on Sept. 10, 1985) (hereinafter
intact, whose client tells him that he is going to commit a crime involving serious property or financial damage, is under a Virginia obligation to reveal the information and another state's obligation to remain silent.

This particular conflict will not be the only one to arise. A range of confidentiality exceptions may be adopted by the various states. For example, Arizona, which has approved a new code of ethics based on the Model Rules, requires disclosure "of a client's intent to commit a crime" likely to result in death or substantial bodily harm and permits disclosure in cases of less serious crimes. In Maryland and Michigan the rules recommended for adoption contain a confidentiality rule substantially similar to Draft Rule 1.6. The version of rule 1.6 suggested in New York permitted revelation of confidential information where an "injury 'of a comparable seriousness' to death or substantial bodily harm" was likely. These different exceptions to one rule indicate that a lawyer practicing in several states may have to conform his conduct to a corresponding number of ethical codes.

c. Future Frauds Involving Third Persons

Draft Rule 4.1 and Model Rule 4.1, which deal with truthfulness in statements made to persons other than clients, contain the following common language: "In representing a client a lawyer shall not knowingly . . . fail to disclose a material fact to a

37 Delaware, Missouri, and Montana have adopted the Model Rules' version of rule 1.6. Delaware and Washington Adopt New Ethics Rules, supra note 18, at 961; Missouri Adopts New Code Based on ABA Model Rules, supra note 18, at 924; Two More States Adopt Versions of Model Rules, supra note 18, at 855. Furthermore, the Idaho, Indiana, and New Mexico Bar Associations have recommended adoption of rule 1.6. Nevada Adopts Model Rules; Bars Elsewhere Issue Reports, supra note 18, at 37-38; Connecticut, Indiana Bars Urge Model Rules' Adoption, supra note 23, at 1066; New Mexico Court Gets Proposal on Model Rules, 1 LAW. MAN., supra note 18, at 812, 812 (June 12, 1985).

38 Arizona Adopts New Rules of Professional Conduct, supra note 18, at 446.


41 Although the New York Bar rejected adoption of the Model Rules, it may eventually amend the Model Code to reflect some of the changes discussed when it considered the Model Rules. See supra note 20.

42 New York State Bar Committee Issues Report on Model Rules, 1 LAW. MAN., supra note 18, at 613, 613 (Jan. 23, 1985).
third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." While the Draft Rule applies even if the information is protected under the confidentiality provision of rule 1.6, the Model Rule is limited to disclosure of nonconfidential information under rule 1.6. Consequently, an attorney admitted to practice in a state operating under Model Rule 4.1 and in a state following Draft Rule 4.1, who has confidential information that his client intends to commit a fraud, will be subject to contrasting obligations in dealing with third persons who may be harmed.

d. Past Crimes or Frauds

The Draft Rules permit a lawyer to reveal information necessary "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services have been used." The Model Code, which is in force in a majority of states, mandates that "[a] lawyer who receives information . . . [that] his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal." The Model Code provision is not only mandatory, but broader in application—"in the course of representation" covers more than "in the furtherance of which the lawyer's services have been used." Under the Model Code, a lawyer must also warn his client and give him a chance to make amends before disclosing any information. Such disclosure, however, is required only

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44 Draft Rules, supra note 25, Rule 4.1(b).
45 Model Rules, supra note 15, Rule 4.1.
46 Delaware has adopted the Model Rules. Delaware and Washington Adopt New Ethics Rules, supra note 18, at 961.
47 See, e.g., N. J. Rules of Professional Conduct Rule 4.1. In New Jersey, a lawyer must reveal information if his client intends to commit a fraudulent act that would result in death, substantial bodily harm, or serious financial loss. Id. Rule 1.6(b)(1). In contrast, the District of Columbia Bar Model Rules of Professional Conduct Committee stated that it considered a rule that favored disclosure over confidentiality undesirable for several reasons: "clients would no longer feel free to entrust their lawyers with their confidences," the rule would lead to "'selective ignorance'" on the part of lawyers, and "frauds would be committed without any opportunity for the lawyers to prevent them by persuasion." Jordan Report, supra note 36, at 49.
48 Draft Rules, supra note 25, Rule 1.6(b)(2).
49 Model Code, supra note 8, DR 7-102(B)(1).
50 Id.
with respect to past frauds and not with respect to past crimes involving the lawyer's services.\(^{51}\)

The Model Rules contain no rule analogous to the ones set forth above. Thus, in this area as well, a variety of rules may be established by the states. For example, Draft Rule 1.6(b)(2) has been recommended to the supreme courts of Maryland\(^ {52}\) and Wisconsin.\(^ {55}\) New Jersey Rule 1.6 requires disclosure of a fraud on a tribunal and permits disclosure to rectify consequences of a fraud if the lawyer's services have been used.\(^ {54}\) In addition, as discussed above, two versions of the Model Code rule are already in effect.\(^ {55}\)

**B. Litigation Costs**

Both the Model Rules and the Draft Rules state that "a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."\(^ {56}\) The Model Code grants similar permission, but provides that "the client remains ultimately liable for such expenses."\(^ {57}\) Consequently, there may be a conflict. This conflict will continue even if the Model Code is supplanted because when adopting the Model Rules, some states have inserted the Model Code limitation.\(^ {58}\)

In a related area, the Model Rules and the Draft Rules both provide that "a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client."\(^ {59}\) The Model Code contains no analogous provision.

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51 See id.
53 See Model Rules Recommendations Are Sent to Wisconsin Court, 1 LAW. MAN., supra note 18, at 630, 630-31 (Feb. 6, 1985).
54 N. J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2), (c)(1).
55 See supra note 12 and accompanying text.
56 MODEL RULES, supra note 15, Rule 1.8(e)(1); DRAFT RULES, supra note 25, Rule 1.8(e)(1).
57 MODEL CODE, supra note 8, DR 5-103(B).
58 Arizona and Washington have continued the restriction in their new rules. Arizona Adopts New Rules of Professional Conduct, supra note 18, at 446; Delaware and Washington Adopt New Ethics Rules, supra note 18, at 962. In addition, the New Mexico and West Virginia committees have proposed that the limitations be included in their rules. New Mexico Court Gets Proposal on Model Rules, supra note 37, at 812; Model Rules Adopted in N.H., Advance in Two Other States, supra note 18, at 1142.
59 MODEL RULES, supra note 15, Rule 1.8(e)(2); DRAFT RULES, supra note 25, Rule 1.8(e)(2).
C. Fees

1. Contingent Fees

The Draft Rules permit contingent fees in criminal cases.\textsuperscript{60} Both the Model Rules and the Model Code, on the other hand, prohibit contingent fees in such cases.\textsuperscript{61} It is likely that the Draft Rules' version will be followed in some states. Already, the rules suggested to the Florida bar governors have modified rule 1.5 to follow the Draft Rules' version.\textsuperscript{62} Contingent fee arrangements must be in writing according to both the Draft Rules and the Model Rules.\textsuperscript{63} Although a written fee agreement is suggested in the ethical considerations,\textsuperscript{64} the Model Code contains no such requirement.

2. Division of Fees

Division of fees between lawyers who are not in the same firm is allowed under all three of the primary sets of standards, but the conditions on division vary among them. The Model Code\textsuperscript{65} and the Draft Rules\textsuperscript{66} both require that the client consent, while the Model Rules only require that the client not object after being advised.\textsuperscript{67} The Model Code permits division only in proportion to the services performed by each lawyer,\textsuperscript{68} while the newer codes allow division in disproportionate amounts if the client agrees in writing and each lawyer assumes joint responsibility.\textsuperscript{69} Some states have adopted Model Rule 1.5 without amending it,\textsuperscript{70} while others have retained the Model Code's requirement that the client consent to division.\textsuperscript{71}

\textsuperscript{60} DRAFT RULES, supra note 25, Rule 1.5(c).
\textsuperscript{61} MODEL RULES, supra note 15, Rule 1.5(d)(2); MODEL CODE, supra note 8, DR 2-106(c).
\textsuperscript{62} See Modified Rules of Conduct Go to Florida Bar Governors, supra note 23, at 191.
\textsuperscript{63} MODEL RULES, supra note 15, Rule 1.5(c); DRAFT RULES, supra note 25, Rule 1.5(c).
\textsuperscript{64} MODEL CODE, supra note 8, EC 2-19.
\textsuperscript{65} Id. DR 2-107(A)(1).
\textsuperscript{66} DRAFT RULES, supra note 25, Rule 1.5(e)(2).
\textsuperscript{67} MODEL RULES, supra note 15, Rule 1.5(e)(2).
\textsuperscript{68} MODEL CODE, supra note 8, DR 2-107(A)(2).
\textsuperscript{69} MODEL RULES, supra note 15, Rule 1.5(e)(1); DRAFT RULES, supra note 25, Rule 1.5(e)(1).
\textsuperscript{70} See, e.g., Delaware and Washington Adopt New Ethics Rules, supra note 18, at 961 (Delaware); Missouri Adopts New Code Based on ABA Model Rules, supra note 18, at 924.
\textsuperscript{71} E.g., Nevada Adopts Model Rules as They Take Effect in N.H., 2 LAW. MAN. supra note 18, at 14, 14 (Feb. 5, 1986) (New Hampshire). The Jordan Committee in the District of Columbia proposed giving the client much more information about what lawyers will be involved, how responsibility will be divided among those lawyers,
D. Successive Government and Private Employment

The Model Code establishes the rule that “[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.”\(^{72}\) Rule 1.11 of the newer codes follows this general principle, but allows the government to consent to the ex-employee’s representation.\(^{73}\) In addition, rule 1.11 allows the lawyer’s firm to undertake the representation so long as the disqualified lawyer is screened from participation, receives no fee, and the government is notified.\(^{74}\)

The Draft and Model Rules contain provisions regarding a private lawyer’s use of confidential information obtained while employed by the government and a government lawyer’s participation in matters in which he was involved while in private practice.\(^{75}\) There are no equivalent sections in the Model Code. As with other rules, this Model Rule has been modified by some states prior to adoption. In New Jersey, for example, the government cannot consent to a lawyer’s participation in matters in which he was previously substantially involved.\(^{76}\) Moreover, even if a lawyer had not substantially participated in the matter while in public service, he may still be disqualified under the New Jersey Rules if there is an “appearance of impropriety.”\(^{77}\) Furthermore, the disqualified lawyer’s firm cannot become involved if the lawyer had substantially participated in the matter unless the disqualification is based only upon an appearance of impropriety and the disqualified lawyer is properly screened.\(^{78}\)

E. Organizational Clients

Unlike the Model Code, which contains no mandatory standards for representing an organizational client,\(^ {79}\) the Model

\(^{72}\) MODEL CODE, supra note 8, DR 9-101(B).
\(^{73}\) MODEL RULES, supra note 15, Rule 1.11(a); DRAFT RULES, supra note 25, Rule 1.11(a).
\(^{74}\) MODEL RULES, supra note 15, Rule 1.11(a)(1), (2); DRAFT RULES, supra note 25, Rule 1.11(a)(1), (2).
\(^{75}\) MODEL RULES, supra note 15, Rule 1.11(b), (c); DRAFT RULES, supra note 25, Rule 1.11(b), (c).
\(^{76}\) See N. J. RULES OF PROFESSIONAL CONDUCT Rule 1.11(a).
\(^{77}\) Id. Rule 1.11(b).
\(^{78}\) Id.
\(^{79}\) The ethical considerations accompanying Canon 5 provide that a lawyer in such circumstances “owes his allegiance to the entity.” MODEL CODE, supra note 8, EC 5-18.
Rules and the Draft Rules establish guidelines for an attorney representing such a client. The Draft Rules differ from the Model Rules, however, in situations where "the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization."80 The Draft Rules allow the lawyer in such a situation to reveal information otherwise protected by the confidentiality provisions of Rule 1.6,81 whereas the Model Rules only permit a lawyer to resign under the same circumstances.82

Michigan83 and Maryland84 have indicated a preference for permissive disclosure under such circumstances, such as that found in the Draft Rules' version of rule 1.13. Minnesota has adopted a variation of rule 1.13 omitting the last requirement of substantial injury to the organization.85 Therefore, there is once again the potential for two or more different standards to be in force in the states adopting ethical codes based on the new rules. Moreover, it is likely that lawyers representing large corporations will be engaged in multistate practice. These corporate lawyers will thus be subject to conflicting rules about when they should or must "blow the whistle" on their clients.

F. Role as an Advocate

1. Meritorious Claims and Contentions

The Model Code provides that a lawyer may not act "on behalf of [a] client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."86 In contrast, Model Rule and Draft Rule 3.1 establish an objective standard: An attorney shall act on behalf of his client only if "there is a basis for doing so that is not frivolous."87 Some states have retained the subjective standard when adopting the Model Rules. For instance, New Jersey requires an attorney to know or have a reasonable belief that his actions are not frivo-

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80 See Draft Rules, supra note 25, Rule 1.13(c).
81 Id.
82 Model Rules, supra note 15, Rule 1.13(c).
86 Model Code, supra note 8, DR 7-102(A)(1).
87 Model Rules, supra note 15, Rule 3.1; Draft Rules, supra note 25, Rule 3.1.
lous. The rules adopted by the Delaware Supreme Court also contain a subjective standard.

2. Candor Toward the Tribunal

All three of the major standards prohibit a lawyer from knowingly presenting perjured testimony or false evidence. Differences arise in reference to a lawyer's discovery of false evidence after it has been offered. Both the Model Rules and the Draft Rules require a lawyer to take remedial measures, including disclosure of information otherwise protected under Rule 1.6. The Model Code similarly requires a lawyer to reveal the "fraud" to the court if the client refuses to do so, but limits the information he can reveal to unprivileged material.

In tailoring the Model Rules to their jurisdictions, some states have added another requirement to Rule 3.3, obliging the lawyer to disclose a material fact, the omission of which might tend to mislead the tribunal. Other states have recommended that a lawyer's duty of candor to the tribunal be extended beyond the conclusion of the proceedings. Under the Model Rules, the attorney's obligation terminates along with the proceedings.

G. Information About Legal Services

Rules regarding advertising of legal services are not likely to be the same in any two states. Most state commissions that have recommended adopting the Model Rules have suggested changes in rules 7.1 through 7.5.

The Model Rules generally prohibit a lawyer from making false or misleading statements about himself or his services.

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88 N. J. RULES OF PROFESSIONAL CONDUCT Rule 3.1.
89 Delaware and Washington Adopt New Ethics Rules, supra note 18, at 962.
90 MODEL CODE, supra note 8, DR 7-102(A)(4); MODEL RULES, supra note 15, Rule 3.3(a)(4); DRAFT RULES, supra note 25, Rule 3.3(a)(4).
91 MODEL RULES, supra note 15, Rule 3.3(a)(4), (b); DRAFT RULES, supra note 25, Rule 3.3(a)(4), (b).
92 See supra note 12.
93 See, e.g., N. J. RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(5).
94 See Modified Rules of Conduct Go to Florida Bar Governors, supra note 23, at 191; Minnesota Committee Urges Adoption of Amended Rules, 1 LAW. MAN., supra note 18, at 237, 238 (May 30, 1984).
95 MODEL RULES, supra note 15, Rule 3.3(b).
96 Modified Rules of Conduct Go to Florida Bar Governors, supra note 23, at 192; Maryland Group Releases Report on Model Rules, supra note 23, at 534-35; Minnesota Committee Urges Adoption of Amended Rules, supra note 94, at 238; States Take Steps Toward Adoption of Model Rules, supra note 25, at 17 (New Jersey and Pennsylvania).
97 MODEL RULES, supra note 15, Rule 7.1.
Comparisons with other lawyers are allowed if based on fact.\textsuperscript{98} The corresponding New Jersey rule prohibits any such comparisons, whether or not based on fact.\textsuperscript{99} Prior to adoption, Arizona proposed a prohibition against any "self-laudatory" communications.\textsuperscript{100} Wisconsin, on the other hand, may permit "testimonials or paid endorsements" if the recommended version of rule 7.1 is adopted.\textsuperscript{101}

When pecuniary gain is a "significant motive," the Model Rules limit direct solicitation to clients, former clients, and relatives.\textsuperscript{102} Solicitation by way of advertising circulars distributed or mailed to unknown persons is allowed, however.\textsuperscript{103} Arizona has gone further by deleting the "significant motive" provision, thereby prohibiting solicitation if there is any pecuniary motive.\textsuperscript{104} Delaware, in one of its few amendments to the Model Rules, enacted a provision proscribing direct solicitation altogether.\textsuperscript{105} Taking a different approach, New Jersey,\textsuperscript{106} Montana,\textsuperscript{107} and Missouri\textsuperscript{108} adopted, and the Maryland,\textsuperscript{109} Connecticut,\textsuperscript{110} and Wisconsin\textsuperscript{111} committees endorsed, Draft Rule 7.3. That version of the rule prohibits contact with a prospective client if the targeted person lacks the capability to exercise reasonable judgment, has made it known that he does not want to receive information, or if "the communication involves coercion, duress, or harassment."\textsuperscript{112} Personal contact is allowed only with

\textsuperscript{98} Id. Rule 7.1(c).
\textsuperscript{99} N. J. RULES OF PROFESSIONAL CONDUCT Rule 7.1(a)(3).
\textsuperscript{100} Arizona Bar Wants Adoption of Model Rules with Amendments, 1 LAW. MAN., supra note 18, at 264, 264 (June 13, 1984).
\textsuperscript{101} Model Rules Recommendations Are Sent to Wisconsin Court, supra note 53, at 631.
\textsuperscript{102} MODEL RULES, supra note 15, Rule 7.3.
\textsuperscript{103} Id.
\textsuperscript{104} Arizona Adopts New Rules of Professional Conduct, supra note 18, at 446.
\textsuperscript{105} Two More States Adopt Versions of Model Rules, supra note 18, at 855.
\textsuperscript{106} Missouri Adopts New Code Based on ABA Model Rules, supra note 18, at 924.
\textsuperscript{107} See Delaware and Washington Adopt New Ethics Rules, supra note 18, at 961.
\textsuperscript{108} See N. J. RULES OF PROFESSIONAL CONDUCT Rule 7.3(b).
\textsuperscript{109} Maryland Group Releases Report on Model Rules, supra note 23, at 535.
\textsuperscript{110} Connecticut, Indiana Bars Urge Model Rules' Adoption, supra note 23, at 1065-66.
\textsuperscript{111} Draft Rules, supra note 25, Rule 7.3(b). The restrictions on advertising and solicitation proposed by the District of Columbia's Jordan Committee represent an approach taken by many states in this area of professional responsibility. The rules recommended by this committee collapse Model Rules 7.1 through 7.4 into one rule. Rather than creating separate rules for advertising, contact with prospective clients, and discussion of fields of practice, the Jordan Committee formulated one standard for all lawyer advertising and solicitation. The general rule proposed by the committee is as follows: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Jordan Report, supra note 36, at
The differences discussed above do not come close to exhausting the variations among the three major standards. Conflicts in rules regarding diligence, communication with clients, and permissive withdrawal are some of the many other areas of conflict. Even the Model Rule providing for the application of choice-of-law principles to resolve these conflicts is not being uniformly recommended.

In summary, a lawyer practicing in more than one state is subject to codes of professional responsibility that differ in many areas, sometimes in quite significant ways. Whether the diverse obligations interfere with the lawyer's practice depends on whether each state to which he is admitted expects him to obey its standards at all times. The remainder of this article will examine this question.

III. JURISDICTION OVER LAWYERS IN MULTISTATE PRACTICE

A. Jurisdiction over Lawyers Admitted to Regular Practice

1. In Theory

It is the general rule that a lawyer admitted to practice in a state is subject to discipline for his misconduct no matter where the misconduct occurs. The ABA Standards for Lawyer Disci-

206 (proposed rule 7.1(a)). A communication is defined as being false or misleading if it contains a material misrepresentation, omits a material fact, or "contains an assertion about the lawyer or the lawyer's services that cannot be substantiated." Id. (proposed rule 7.1(a)(1), (2)). Statements concerning fields of practice and solicitation of clients by mail are governed only by the general principle. See id. at 210-11. Regarding personal contacts, the committee decided not to adopt the "broad restrictions" of Model Rule 7.3, opting instead to identify "the particular abuses at which the Rule" had been aimed. Id. at 211. Therefore, the provision suggested by the Jordan Committee prohibits misleading statements, the use of undue influence, solicitation of clients who cannot "exercise reasonable, considered judgment in selecting a lawyer," or "use of an intermediary where the lawyer knows or could reasonably ascertain that the intermediary's actions violate the intermediary's contractual or other legal obligation." Id.

113 DRAFT RULES, supra note 25, Rule 7.3(a).
114 Compare MODEL RULES, supra note 15, Rule 1.3 with MODEL CODE, supra note 8, DR 6-101(A)(3), EC 6-4, DR 7-101(A)(1), (3).
115 Compare MODEL RULES, supra note 15, Rule 1.4 with MODEL CODE, supra note 8, DR 9-102(B)(1), EC 7-8, EC 9-2.
116 Compare MODEL RULES, supra note 15, Rule 1.16(b) with MODEL CODE, supra note 8, DR 2-110(C).
117 For a discussion of Model Rule 8.5, see infra notes 182-201.
118 See In re Kimball, 40 A.D.2d 252, 254, 339 N.Y.S.2d 302, 305 ("[T]he sensitive office of an attorney must be continually subject to the control of the courts in
pline and Disability Proceedings (ABA Standards) provide that “[a] lawyer admitted to practice in a state should be subject to the jurisdiction of its agency.” The accompanying commentary further explains that

[a]dmission to practice triggers the jurisdiction of the agency, regardless of the location of the lawyer, the place where the act occurred, or whether the lawyer is actively engaged in the practice of law. The license is the court’s proclamation to the public that the lawyer is qualified to practice; the court has the right and the obligation to inquire into any facts bearing upon the proclamation.

A 1982 survey of state bar counsel indicated that, in all of the thirty-five states responding, bars’ counsels have the authority to investigate and discipline attorneys licensed to practice by the state, without regard to whether the misconduct occurs within or without the state. My own survey of state supreme court and bar rules indicates that none contains a provision contrary to the general rule that “[a]ny lawyer admitted to practice law in this state . . . is subject to the disciplinary jurisdiction of this court and the board.”

While the Model Code does not contain a provision on jurisdiction, Model Rule 8.5 explicitly incorporates the principles set forth above. The rule states that “[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.”


ABA STANDARDS, supra note 4, § 4.1.

Id. § 4.1 commentary.

See Cox, Regulation of Attorneys Practicing Before Federal Agencies, 34 CASE W. RES. L. REV. 173, 230 (1984) (responses to the survey are on file with the Case Western Reserve Law Review). Only 33 states affirmed the following statement: “You have authority to investigate, discipline, etc. an attorney licensed to practice by your State, without regard to whether misconduct occurs within or without your State.” Id. The comments of the other two states, however, indicate that they also retain the power to discipline lawyers for out-of-state misconduct. See id. Maine, one of the two states to answer negatively, indicated that its jurisdiction extended to cases outside of Maine involving a lawyer’s moral turpitude or wrongdoing involving cheating, lying, or stealing. Id. Maine stated that it answered negatively because it assumed that a lawyer practicing elsewhere would not be engaged in the unauthorized practice of law, but would be admitted to practice in the other state and would be subject to that state’s disciplinary jurisdiction. Id. The other state to answer negatively, South Carolina, indicated that it retains jurisdiction over an admitted attorney practicing elsewhere, but that it relies on the regulatory agency of the other state to initiate disciplinary action. Id.

See, e.g., ALA. R. SUP. CT. 1(a); ARIZ. R. SUP. CT. 46(a).

MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 6(A) (1985).

MODEL RULES, supra note 15, Rule 8.5. For an extended discussion of Model
2. In Practice

The state that admits a lawyer who does not practice solely in that state has a problem in policing the lawyer’s out-of-state conduct. It needs to receive information about the lawyer’s conduct in the foreign jurisdiction. A state can receive such information through one or more of the following means: broadcast or publication in the admitting state of material concerning the lawyer, a complaint made to the admitting state, conviction of a crime, or disciplinary action taken elsewhere.

a. Broadcast or Publication of Information

While testifying in the 1974 trial of Maurice Stans and John Mitchell in the Southern District of New York, a former chairman of the Securities and Exchange Commission, who was a member of the Nebraska Bar, admitted to having lied in a previous Watergate-related trial. The press reported this information, and it came to the attention of the attorney’s colleagues in Nebraska. Although he was never prosecuted for perjury, his conduct outside the state and outside the practice of law caused the attorney to be suspended from the practice of law in Nebraska for three years.

Similarly, the Nevada Supreme Court disciplined an attorney for out-of-state conduct. In 1938, a lawyer admitted to practice in Nevada and California published an advertisement in a California newspaper. This advertisement attracted the attention of the State Bar of Nevada, which determined that by his actions in California, the attorney had violated a Nevada rule against soliciting professional employment. In reviewing the determination of the administrative committee, the Supreme Court of Nevada held that it had jurisdiction even though the attorney’s actions occurred in California and imposed sanctions on the attorney for violation of the ethical standards of Nevada.

Rule 8.5 and its implication in various situations, see infra notes 182-265 and accompanying text.

126 Id. at 365-66, 232 N.W.2d at 121.
127 Id.
128 See id. at 388, 232 N.W.2d at 132.
129 In re Porep, 60 Nev. 393, 394-95, 111 P.2d 533, 534 (1941).
130 Id. at 395, 111 P.2d at 534.
131 Id. at 396, 400-01, 111 P.2d at 535, 537.
b. Complaint

Someone who perceives misconduct by a lawyer engaged in practice out-of-state will most likely report that misconduct to the disciplinary authorities in the state where it occurs, rather than in the home state of the lawyer. If the aggrieved person knows where the attorney is admitted, however, a complaint to the home state may result. For example, in March of 1981, a Maryland resident complained to the West Virginia and Maryland Bars that her lawyer, admitted in West Virginia and representing her pro hac vice in a Maryland case, had attempted to obstruct justice and had failed to assist his successor counsel. The West Virginia Supreme Court of Appeals held that a West Virginia lawyer admitted pro hac vice to the bar of another state remains subject to the West Virginia State Bar's jurisdiction.

c. Conviction of a Crime

The Model Rules for Lawyer Disciplinary Enforcement provide that "[i]t shall be a ground for discipline for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Likewise, the ABA Standards state that "[d]iscipline may be imposed for . . . conviction of a crime." In most states, statutes, court rules, or bar rules establish conviction of a crime—wherever committed—as grounds for discipline. Even in the absence of such rules, however, courts have generally held that an attorney's conviction in another state may provide the basis for disciplinary action in the state where the attorney is admitted. For instance, without discussing any disciplinary rules, the Alaska Supreme Court held that a conviction of grand larceny upon a guilty plea in Washington was grounds for disbarment in Alaska.

Although the conviction of a crime in another state facilitates the disciplinary process, it is not absolutely necessary. Usually,
the actions that lead to the attorney's conviction also violate the ethical standards of the state. For example, in one case, the Hawaii Supreme Court based discipline of a lawyer convicted in California for grand theft on his violations of Hawaii's Model Code of Professional Responsibility.139

d. Reciprocal Discipline

The Special Committee on Evaluation of Disciplinary Enforcement of the American Bar Association (ABA Special Committee) has stated that "[w]hen an attorney admitted to practice in several jurisdictions is disciplined in one of them, his license in the other is not affected automatically. A separate disciplinary proceeding in each jurisdiction in which the attorney is admitted is required."140 Until recently, the lack of communication and coordination among states has been a major problem in policing the ethics of lawyers engaged in multistate practice.141 In 1967, only three states provided by statute that disbarment in one state was grounds for disbarment proceedings in the second state.142 In 1970, the ABA Special Committee found that most jurisdictions had not considered what effect should "be given to discipline imposed on a member of their bar by another jurisdiction."143

In some states, courts have held that the judgment of a sister state disbarring a lawyer has to be given effect locally under the full faith and credit clause of the Constitution.144 In other states, courts have decided that the judgment of a sister state disbarring a lawyer is entitled to recognition in disciplinary proceedings against the lawyer in the forum state under the doctrine of comity.145 More recently, however, courts have held that the full faith

141 See Note, Attorneys: Interstate and Federal Practice, 80 Harv. L. Rev. 1711, 1728 (1967). The author states that there was "apparently no explicit understanding among any states that questionable conduct in one jurisdiction [would] lead to an investigation in the attorney's home state." Id.
142 Id.
143 Problems and Recommendations, supra note 140, at 116.
144 See, e.g., In re Van Bever, 55 Ariz. 368, 373, 101 P.2d 790, 792 (1940); In re Leverston, 195 Minn. 42, 43, 261 N.W. 480, 481 (1935) (per curiam); In re Veach, 365 Mo. 776, 784-85, 287 S.W.2d 753, 759 (1956).
145 Copren v. State Bar, 64 Nev. 364, 384, 183 P.2d 833, 842 (1947); In re Brown, 60 S.D. 628, 629-30, 245 N.W. 824, 824 (1932) (per curiam).
and credit clause does not require the imposition of discipline by
the forum state.¹⁴⁶ Those decisions have determined that foreign
judgments do not purport to disbar the attorney in foreign
states.¹⁴⁷ Nevertheless, those courts have also held that the for-
eign jurisdictions' findings of fact are conclusive.¹⁴⁸

In most states today, the problem of reciprocal discipline is
dealt with by court rule, statute, or bar rule.¹⁴⁹ The rule for reci-
procal discipline proposed by the ABA Special Committee sug-
gested that the home state impose the same discipline as the for-
epage 697

1986]  

MULTISTATE PRACTICE  697

146 See, e.g., Florida Bar v. Wilkes, 179 So. 2d 193, 196 (Fla. 1965); Kentucky Bar Ass'n v. Signer, 533 S.W.2d 534, 536 (Ky. 1976) (per curiam); In re Weiner, 530 S.W.2d 222, 224 (Mo. 1975) (en banc); In re Kimball, 40 A.D.2d 252, 254, 339 N.Y.S.2d 302, 305 (1973) (per curiam).
147 Florida Bar v. Wilkes, 179 So. 2d 193, 196 (Fla. 1965); Kentucky Bar Ass'n v. Signer, 533 S.W.2d 534, 536 (Ky. 1976) (per curiam).
148 Florida Bar v. Wilkes, 179 So. 2d 193, 197 (Fla. 1965); Kentucky Bar Ass'n v. Signer, 533 S.W.2d 534, 537 (Ky. 1976) (per curiam).
150 PROBLEMS AND RECOMMENDATIONS, supra note 140, at 121.
151 id. The ABA Standards permit the bar's counsel to argue for greater dis-
cipline. ABA STANDARDS, supra note 4, § 10.3; see also Florida Bar v. Baker, 419 So. 2d 1054, 1055 (Fla. 1982) (per curiam) (greater discipline ordered in Florida than had been imposed in New York).
152 See, e.g., Therd v. United States, 354 U.S. 278, 282 (1957); Selling v. Rad-
ford, 243 U.S. 46, 51 (1917); In re Rhodes, 370 F.2d 411, 413 (8th Cir. 1967).
153 See ABA STANDARDS, supra note 4, § 10.
154 See MODEL RULES FOR DISCIPLINARY ENFORCEMENT, supra note 123, Rule 21.
155 Id. Rule 21(A).
156 Id.
lawyer is then given notice of receipt of the foreign order and is
directed to explain within thirty days why identical discipline
should not be imposed.\textsuperscript{157} The identical discipline is imposed un-
less the lawyer or the bar's counsel can demonstrate that any of
the factors mentioned in the rule proposed by the ABA Special
Committee are present.\textsuperscript{158} In all other aspects, the final adjudica-
tion in the foreign jurisdiction conclusively establishes the mis-
conduct for the purposes of the forum state's disciplinary
proceeding.\textsuperscript{159}

Many states now have rules imposing reciprocal disci-
pline.\textsuperscript{160} Most of them have a rule very similar to that proposed
by the ABA Special Committee and embodied in the ABA Stan-
dards and Model Rules for Disciplinary Enforcement.\textsuperscript{161} By es-
establishing regular rules for reciprocal discipline, states have
taken a step toward solving what has been considered a major
problem with multistate practice—ensuring that the lawyer is
held responsible for his misconduct.

B. Jurisdiction over Foreign Lawyers

1. Pro Hac Vice

An out-of-state attorney who wishes to appear before a court
in a state where he is not admitted must apply for admission pro
hac vice. In forty-nine states and the District of Columbia, court
rules or statutes governing admission to the bar regulate admis-
sion pro hac vice.\textsuperscript{162} Among other things, such rules help "en-
sure that lawyers are amenable to the jurisdiction's disciplinary
proceedings for any unethical conduct arising from practice

\textsuperscript{157} Id. Rule 21(B).
\textsuperscript{158} ABA Standards, supra note 4, § 10.2 commentary; Model Rules for Disci-
plinary Enforcement, supra note 123, Rule 21(D). The burden is on the lawyer to
show that less punishment is called for and on the bar's counsel to show that more
is deserved. ABA Standards, supra note 4, § 10.3.
\textsuperscript{159} ABA Standards, supra note 4, § 10.2; Model Rules for Disciplinary En-
forcement, supra note 123, Rule 21(E).
\textsuperscript{160} Twenty-two states provide that the bar association's counsel must be notified
by a lawyer when the lawyer is convicted of a crime. ABA Center for Professional
Responsibility, Survey of Lawyer Disciplinary Procedures in the United States 30
(May 1984). Thirty-eight states have a rule similar to ABA Standard § 9.4 provid-
ing that bar counsel need only prove entry of a foreign criminal judgment against
the lawyer, leaving the disciplinary board to consider only the nature and extent of
the discipline to be imposed upon the convicted lawyer. Id.
\textsuperscript{161} Twenty-four states have adopted rules similar to ABA Standard § 10.1, and
32 states have rules much like ABA Standard § 10.2. Id. at 31.
\textsuperscript{162} See E. MICHELMAN, PRO HAC VICE REGULATION—IN THE NATIONAL INTEREST?
4 (1984). Ohio is the exception to the rule. Id. at 4 & n.13.
MULTISTATE PRACTICE

within the jurisdiction." The commentary to ABA Standard 4.2 explains that

[i]t is inappropriate for the state in which the lawyer is specially admitted to rely exclusively upon the lawyer's home jurisdiction to enforce ethical standards. The witnesses and other evidence of misconduct are likely to be located in the adopted jurisdiction. Moreover, the jurisdiction in which the misconduct occurred will be far more interested in pursuing the matter.164

Most pro hac vice regulations provide that the forum state acquires disciplinary jurisdiction when the lawyer requests admission to appear pro hac vice or files a statement submitting himself to the jurisdiction of the court.165 For example, the Model Rules for Disciplinary Enforcement state that "any lawyer specially admitted by a court of this state for a particular proceeding . . . is subject to the disciplinary jurisdiction of this court and the board."166 Thus, it is clear that a lawyer specially admitted to practice in another state is subject to that state's disciplinary power.167

2. Out-of-State Office Practice

The general rule governing jurisdiction over out-of-state attorneys engaged in activities outside of court is that

a person licensed as a lawyer in another jurisdiction, not generally or specially admitted to practice in the state, should not be subject to the jurisdiction of the state’s agency. . . . If that lawyer engages in misconduct in the state, the matter should be referred to the state where the lawyer is licensed. If the

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163 Id. at 2.
164 ABA STANDARDS, supra note 4, § 4.2 commentary. The standard itself states, "All lawyers specially admitted to practice in a state for a limited purpose should be subject to the jurisdiction of the [disciplinary] agency in the state with respect to any misconduct related to that purpose." Id. § 4.2.
165 E. MICHELMAN, supra note 162, at 6 & nn.35-36. Under a uniform pro hac vice standard proposed in 1980, an attorney so admitted to practice would be deemed to have submitted to the disciplinary system of the specially admitting state. ABA Annual Meeting, 49 U.S.L.W. 2125, 2125 (1980). The rule was rejected by the ABA House of Delegates because they believed the proposed standard made it too easy to cross state lines. Id.
166 MODEL RULES FOR DISCIPLINARY ENFORCEMENT, supra note 123, Rule 6(A). Many state disciplinary rules resemble rule 6(A). E.g., ARIZ. R. SUP. CT. 46(b); COLO. CT. R. 241.1(b).
167 See, e.g., Kentucky Bar Ass'n v. Shane, 553 S.W.2d 467 (Ky. 1977) (per curiam) (holding member of Ohio Bar, who was co-counsel in Kentucky civil court action, subject to jurisdiction of Supreme Court of Kentucky). In Washington, the Model Rules apply to lawyers both licensed and specially admitted in the state. Delaware and Washington Adopt New Ethics Rules, supra note 18, at 963.
misconduct involved practice of law in a state in which the lawyer is not admitted, he may be prosecuted by that state for unauthorized practice.\(^{168}\)

Thus, while he is not subject to discipline in the foreign state,\(^{169}\) an out-of-state lawyer risks violating the restrictions on unauthorized practice of the foreign state. In thirty-seven states, such action is a misdemeanor.\(^{170}\) In seven other states, contempt-of-court statutes provide for enforcement of the rules governing unauthorized practice.\(^{171}\) Moreover, such unauthorized practice is a violation of both the Model Code\(^{172}\) and the Model Rules.\(^{173}\)

IV. Ethical Standard To Be Applied

A. Lawyer Admitted in One Jurisdiction

1. Prior to the Model Rules

When a lawyer is subject to the jurisdiction of a state disciplinary agency, he is expected to conform his conduct to that state's ethical code. Most states' rules permit discipline to be imposed when the attorney violates a professional-conduct rule of that jurisdiction.\(^{174}\) The Model Rules for Disciplinary Enforcement establish the following as grounds for discipline: to "[v]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."\(^{175}\)

Because the state retains jurisdiction over the lawyer when

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\(^{168}\) ABA Standards, supra note 4, § 4.1 commentary; see also Attorney Grievance Comm'n v. Hyatt, 302 Md. 683, 689-90, 490 A.2d 1224, 1227 (1985) (member of Ohio Bar never admitted in Maryland not considered an attorney in Maryland and therefore not subject to discipline).

\(^{169}\) But see Arkansas Adopts New Code Based on ABA Model Rules, supra note 18, at 1126 (Arkansas Rule 8.5 applicable to all lawyers practicing in state, even if not formally admitted); Model Rules for Disciplinary Enforcement, supra note 123, Rule 6(A) (alternative version stating standards apply to "any lawyer not admitted in this state who practices law or renders legal services in this state").


\(^{171}\) Id. at 11 n.38.

\(^{172}\) Model Code, supra note 8, DR 3-101(B). The rule states, "A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." Id.

\(^{173}\) Model Rules, supra note 15, Rule 5.5(a). The rule states, "A lawyer shall not . . . practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." Id.

\(^{174}\) See ABA Standards, supra note 4, § 5.1(b). Many state rules are almost identical to the ABA Standards. See, e.g., Ariz. R. Sup. Ct. 51(b); Ark. Rules Regulating Professional Conduct of Attorneys at Law Rule 1.

\(^{175}\) Model Rules for Disciplinary Enforcement, supra note 123, Rule 9(a).
he engages in out-of-state activities, it is expected that he will continue to obey the state's standard of professional conduct when he acts outside the state.\footnote{See, e.g., Committee on Legal Ethics v. Blair, 327 S.E.2d 671, 673 (W. Va. 1984), cert. denied, 105 S. Ct. 1395 (1985).} As one court has observed,

\begin{quote}
\textit{The . . . oath of office as an attorney and counselor at law is not only binding here . . . but everywhere. He cannot put it aside or renounce it at pleasure. It abides with him at all times and places, and he will be held responsible to this court for his misconduct as an attorney so long as his name continues on the roll; nor can he put himself in a position which will place him beyond the inherent power of this court to purify the bar of its unworthy members, and to keep its roster clean.}\footnote{People ex rel. Colo. Bar Ass'n v. Lindsey, 86 Colo. 458, 478, 283 P. 539, 546 (1929).}
\end{quote}

Under the now prevailing rules, if a lawyer commits an unethical act in a state where he is not admitted, he will either be subject to laws restricting unauthorized practice,\footnote{See supra notes 168-173 and accompanying text.} or the foreign state will refer the matter to the licensing state.\footnote{See ABA Standards, supra note 4, § 4.1 commentary.} The referring state—in accordance with the analysis above—expects that the lawyer will be disciplined according to the standards of the jurisdiction to which he is admitted.\footnote{Telephone interview with Robert Wells, ABA liaison to the National Organization of Bar Counsel (Apr. 9, 1985); Telephone interview with Melvin Herschman, Bar Counsel to the Maryland Attorney Grievance Commission (Apr. 12, 1985).}

Why then should there be any concern about conflicting ethical obligations if the lawyer is admitted only in one jurisdiction? Because an unelaborated comment to Model Rule 8.5 suggests that "principles of conflict of laws may apply."\footnote{\textit{Model Rules, supra note 15, Rule 8.5 comment.} See id. Rule 8.5. The rule states, "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." \textit{Id.}}

2. Model Rule 8.5

Model Rule 8.5 restates the usual rule of jurisdiction.\footnote{See id. Rule 8.5. The rule states, "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." \textit{Id.}} It clearly establishes that lawyers who "act outside the territorial limits of the jurisdiction in which they are licensed to practice . . . remain subject to the governing authority of the jurisdiction in which they are licensed to practice."\footnote{\textit{Id.} Rule 8.5 comment.} By itself, this rule presents no unusual problems because it is jurisdictional only. The accompanying comment, on the other hand, goes beyond
jurisdiction into the realm of conflict of laws. The references to conflict of laws were included in the comment to "wave a flag [and] signal a problem." Unfortunately, however, the committee that drafted the Model Rules did not "have the faintest idea of what it means" or how it should be applied.

The comment to rule 8.5 provides as follows:

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.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation.

a. A Literal Reading of Model Rule 8.5

In interpreting the comment to rule 8.5, it is not at all clear when "principles of conflict of laws may apply." The reference in the second sentence to "similar problems" with regard to a lawyer admitted in more than one jurisdiction clearly indicates that the first sentence applies to a lawyer admitted in only one jurisdiction. On its face, the first sentence suggests that whenever a lawyer acts outside of his jurisdiction, he must take into consideration another state's ethical code. One of the few discussions of this comment concurs with such a literal reading:

The express statement in [the comment to] Rule 8.5 that the rules of choice of law and the conflict of laws may govern the situation means that the one-jurisdictional estate planner's conduct will also be tested against the ethical codes and unlawful practice rules of foreign jurisdictions touched by his client's estate plan, if choice of law rules bring then [sic] into operation.

If enforced, however, such an interpretation would heavily burden the practice of law. A lawyer practicing largely in one jurisdiction would have to educate himself in the ethical obligations

184 Telephone interview with Professor Geoffrey C. Hazard, Reporter to the ABA Commission on Evaluation of Professional Standards (Apr. 4, 1985). The main reason Model Rule 8.5 was included in the new rules was that foreign countries, especially France, wanted it made clear that United States lawyers practicing abroad would still be subject to discipline by the states in which they were licensed. Id.
185 Id.
186 MODEL RULES, supra note 15, Rule 8.5 comment.
187 Id.
188 Hendrickson, Ethical Concerns in Multi-jurisdictional Est. Planning, 123 Tr. & Est., Nov. 1984, at 31, 35.
imposed by states in which he has not been licensed. He would have
to keep in mind all of the possible jurisdictions where his activities
might have consequences or whose laws he might be inter-
preting. The complexity of these activities and the potential exposure
to disciplinary action for violations of standards of which the attor-
ney was unaware would make the practice of law much more ineffi-
cient and expensive. A limited application of this portion of the
comment is thus desirable.

b. Limitation to Unauthorized Practice

If the Model Rules are designed to govern those engaged in
the practice of law, then someone must be considered to be
practicing law in order for the Model Rules to apply. Because
"[t]he definition of the practice of law is established by law and
varies from one jurisdiction to another," a conflict might arise
concerning the characterization of a lawyer's conduct. A one-ju-
risdictional lawyer working in a foreign state might be violating
the rule prohibiting unauthorized practice if what he was doing is
considered to be practicing law in that state. In determining
whether the lawyer is engaged in the practice of law, choice-of-
law principles suggest that the law of the foreign jurisdiction
should govern this decision. If the lawyer was engaged in un-
authorized practice violative of rule 5.5, the lawyer should thus
be disciplined in his home state in accordance with the foreign
state's definition of the practice of law—even though, according

189 If, in a disciplinary action, an attorney is held to the standards of another state
with which he has only tangential contact, due process problems of notice may
arise. The Supreme Court has held that a state may not deprive a person of the
right to practice law without affording him due process. See, e.g., In re Ruffalo, 390
190 See Draft Rules, supra note 25, chairman's introductory note ("The Model
Rules are first and foremost intended to serve as a national model of the regulatory
law . . . governing the practice of law.").
191 MODEL RULES, supra note 15, Rule 5.5 comment; see also Rhode, supra note
170, at 45. Some jurisdictions prohibit unauthorized practice without defining the
practice of law. Id. at 145 n.135. Others define it as what lawyers do. Id. at 145
n.136. For example, the Model Code states that "the practice of law relates to the
rendition of services for others that call for the professional judgment of a lawyer."
MODEL CODE, supra note 8, EC 5-5. Some states provide lists of legal activities, but
these are usually only illustrative and contain more nebulous terms such as "legal
advice." See Rhode, supra note 170, at 46 & nn.140-44.
192 See MODEL RULES, supra note 15, Rule 5.5(a).
193 Applying an interest-analysis theory, the state where the lawyer acted in viola-
tion of Model Rule 5.5 would have a greater interest than the state where the lawyer
was admitted.
to his home state's definition, he was not practicing law and therefore not subject to the Model Rules.

It is difficult to foresee how such an interpretation will work in practice, however. First, the licensing state has no incentive, except a weak interest in reciprocity, to regulate its lawyers' unauthorized practice of law in other states. It also lacks the resources necessary to acquire information about its lawyers' activities in other states. Thus, it is unlikely that the home state will ever discipline a lawyer for violating Model Rule 5.5 if sanctions have not first been imposed on the lawyer by the foreign jurisdiction.

Second, enforcement of prohibitions against unauthorized practice varies greatly from state to state. Consequently, the presumption that an attorney is not practicing law in the foreign state if he is not charged by the foreign state with unauthorized practice will be difficult to rebut in the home state.

Furthermore, the limitation of the first sentence of the comment to unauthorized-practice situations does not exhaust the implications of its general call for the application of conflict-of-laws principles when ethical codes differ. Therefore, something else must be governed by the first sentence.

c. Limitation to Special Admissions

Under another interpretation, application of the first sentence could be limited to situations in which the lawyer is specially admitted to a second state. The second sentence refers only to "similar problems . . . when a lawyer is licensed to practice in more than one jurisdiction." Because an attorney specially admitted pro hac vice or otherwise is not licensed in the second jurisdiction, the second sentence does not refer to him. This leaves the first sentence.

When a lawyer is admitted for a particular proceeding, he agrees to obey the ethical standards of the second state. If there is a conflict between the rules of his licensing state and those of the specially admitting state—both of which have jurisdiction as well as significant interests in overseeing his conduct—
conflict-of-laws principles will have to be applied. By going beyond a mere literal reading, such an interpretation is a reasonable way of giving life to the comment.

d. Limitation to International Situations

An alternative construction of the first sentence focuses on the reason for including rule 8.5 in the new code.\textsuperscript{198} In most foreign countries, the practice of law is "much more narrowly defined than in the United States."\textsuperscript{199} It is often limited to litigation, arbitration, and other "case-like" matters.\textsuperscript{200} Thus, a United States lawyer engaging in other types of legal work abroad may not be subject to the prohibitions on unauthorized practice or to the foreign ethical codes. The comment could thus be viewed as indicating that the Model Rules would govern the lawyer's conduct when no foreign law applies because the lawyer's foreign activity would be considered the practice of law in the licensing state. In the presence of a foreign regulation, however, conflict of laws principles may apply.

The literal-interpretation and special-admission readings of the first sentence seem the best. The limitation to international situations has no basis in the words of the statute, and the unauthorized-practice construction creates too many problems. If unauthorized-practice laws are significantly relaxed, however, a foreign attorney may be allowed to become substantially involved in activities in a state where he is not licensed. The broadening of the scope of some states' disciplinary jurisdiction indicates that this is already happening. Conflict-of-laws principles applicable to a lawyer admitted in more than one jurisdiction should apply in such situations.\textsuperscript{201} With regard to the single-jurisdiction practitioner, conflict-of-laws principles should be applied only to special admissions.

B. Lawyer Admitted Pro Hac Vice

The lawyer admitted pro hac vice is subject to the jurisdiction of the state where he has been specially admitted,\textsuperscript{202} as well as to the jurisdiction of the states that have licensed him.\textsuperscript{203} It

\textsuperscript{198} See supra note 184.
\textsuperscript{199} Hendrickson, Ethical Considerations in International Estate Planning, in \textit{Current Legal Aspects of International Estate Planning} 7 (1981).
\textsuperscript{200} Id.
\textsuperscript{201} See infra notes 207-266 and accompanying text (discussing conflict of laws).
\textsuperscript{202} See supra notes 162-167 and accompanying text.
\textsuperscript{203} See supra notes 118-124 and accompanying text.
seems logical that if the ethical standards of the states having jurisdic-
tion conflict, the lawyer should be bound by the standards of the specially admitting state in matters relating to the particular proceeding for which he has been admitted. The commentary to ABA Standard 4.2, regarding lawyers specially admitted to practice in a state, concludes that "misconduct should in the first instance be judged by the ethical standards of the jurisdiction where it occurred." The passage assumes that misconduct in connection with a pro hac vice admission takes place, or should be considered to take place, in the specially admitting state. The specially admitting state is thus viewed as having a more significant interest in conduct related to the special admission, and thus its code should be applied. Furthermore, the attorney admitted pro hac vice usually consents to the jurisdiction of the admitting state. Given the general rule that a court with jurisdiction will apply its own ethical standards, the attorney will know beforehand that his consent causes the foreign state's standards to be applicable to his conduct in connection with the special admission.

One question that the application of the admitting state's standards will raise is what activities are sufficiently related to the special admission to be covered by the foreign state's rules. Depending on the contents of the conflicting provisions at issue, a lawyer may try to limit the activities governed by the pro hac vice admission to trial work or, in the alternative, to expand the coverage to any matter connected to the court appearance, no matter how distant. A uniform rule defining what acts are significantly related to the specially admitting state would be an important development. At this time, however, it is sufficient to state the general rule that acts related to the pro hac vice admission should be governed by the specially admitting state's code.

A second problem arises concerning the lawyer's relationship with his client. Because his ethical obligations may be altered when he represents the client pro hac vice in another state, the lawyer must explain the situation so that his client can choose

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204 ABA Standards, supra note 4, § 4.2 commentary. The reference to "in the first instance" appears to imply that upon consideration by the licensing state, the misconduct may be judged by the standards of that state. This is consistent with Model Rule for Disciplinary Enforcement 21(D)(4), which suggests that substantially different discipline may be warranted in the home state. See Model Rules for Disciplinary Enforcement, supra note 123, Rule 21(D)(4).

205 See supra note 165 and accompanying text.
another lawyer if necessary. For example, client confidences may be tightly protected in the state where the lawyer is licensed and regularly represents the client. In another state where the client is sued or wishes to bring suit, the ethical standards may require the lawyer to reveal client confidences in many more situations than in the licensing state. This situation may impinge on the client’s interest in employing counsel of his choice and force him to take the time, effort, and expense to establish a relationship with a new lawyer, to whom he will not reveal all his confidences and secrets.

C. Lawyer Licensed in Two Jurisdictions

The comment to Model Rule 8.5 states that “[w]here the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation.” It contains no hint as to what the “applicable” choice-of-law rules are. How this rule will be applied is thus very uncertain. A first step toward answering this question requires examination of how conflicts in ethical codes are handled today.

1. Current Handling of Conflicting Standards

When “disciplining their attorneys,” bar counsel currently apply their states’ rules exclusively. The bar counsel have not yet dealt with the problem of conflicting obligations—probably because it has not yet arisen. In general, disciplinary agencies expect that their states’ ethical rules will be obeyed when a lawyer

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206 See Model Rules, supra note 15, Rule 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).
207 Id. Rule 8.5 comment.
208 Telephone interview with Professor Geoffrey C. Hazard, supra note 184. Professor Hazard indicated that conflicts of ethical codes and choice of law were viewed as a “peripheral problem” when the Model Rules were drafted. Id.
209 Id. Professor Hazard stated that a person would have to be “out of [his] mind to say what will be applied” and that “choice of law is in chaos.” Id. Another commentator stated in reference to rule 8.5 that “this is an area which will have to be developed on a case by case basis until some norms can be identified. It is unquestionably an area in which additional rules are needed.” Benasutti, The New ABA Model Rules of Professional Conduct, 54 Pa. B.A.Q. 239, 256 (1983).
210 Telephone interview with Robert Wells, supra note 180.
211 Id.; Telephone interview with David Johnson, Director of the New Jersey Office of Attorney Ethics (Apr. 9, 1985); Telephone interview with Alice Flanagan, Administrative Liaison to the New York Committee on Professional Ethics (Apr. 9, 1985).
in multistate practice is practicing law in their state.\textsuperscript{212} It is not clear, however, what contacts with the state are sufficient to constitute "practicing law in the state."

In the 1941 case of \textit{In re Porep},\textsuperscript{213} California authorities declined to discipline a lawyer for advertising in a California newspaper.\textsuperscript{214} The Nevada Supreme Court, however, despite the propriety and legality of the attorney's action under California standards, found that by Nevada standards, he had engaged in professional misconduct.\textsuperscript{215} The court failed to consider whether one state or another had a stronger interest in the attorney's actions. It determined instead that each state should apply its own standards to the attorney's conduct,\textsuperscript{216} presumably because each had an interest in it.

In a more recent opinion, the New Jersey Supreme Court held that because New Jersey lawyers could not advertise on television, neither could they advertise in print their association with multijurisdictional law firms whose television advertising reached New Jersey consumers.\textsuperscript{217} Even though the multistate law firm in question had been in compliance with the laws of the states where the television advertisements originated, the court reasoned that its associates in New Jersey would violate their own professional standards by taking advantage of the advertising.\textsuperscript{218} Thus, a small contact in the home state—such as reception of out-of-state television broadcasts—may be enough to cause the home state to expect its rules to be followed.

Other states have considered the contacts necessary to justify regulation of an attorney's out-of-state conduct. For example, in a 1981 informal ethics opinion, the Michigan Bar ruled on the case of a lawyer licensed in Michigan and California—states that had differing ethical codes—who was practicing in California.\textsuperscript{219} Although his conduct technically violated the Michigan code, the opinion concluded that the attorney would not be sub-

\textsuperscript{212} Telephone interview with David Johnson, \textit{supra} note 211; Telephone interview with Alice Flanagan, \textit{supra} note 211; Telephone interview with Melvin Herschman, \textit{supra} note 180.

\textsuperscript{213} 60 Nev. 393, 111 P.2d 533 (1941); see \textit{supra} text accompanying notes 128-130.

\textsuperscript{214} \textit{Porep}, 60 Nev. at 396-97, 111 P.2d at 535.

\textsuperscript{215} \textit{Id.} at 400-01, 111 P.2d at 537.

\textsuperscript{216} \textit{See id.} at 396-97, 111 P.2d at 535.


\textsuperscript{218} \textit{See id.} at 89, 444 A.2d at 1099-1100.

ject to discipline in Michigan if he conformed with the California standards. The bar committee stated that the Michigan ethics code "assumes some relationship or contact between the lawyer's activities and the State of Michigan beyond the single fact of the lawyer's membership in the State Bar of Michigan." Nonetheless, it refused to establish a test for "[exactly what that relationship or contact must be to render [the] Code applicable." The bar committee did list some relevant contacts, however, the absence of which led it to say that Michigan's rules should not apply to this case. Those contacts included (1) having Michigan clients, (2) practicing in Michigan, (3) holding himself out as a Michigan lawyer (e.g., advising as to the law of Michigan), (4) practicing under or by virtue of a Michigan license, and (5) having a practice with significant connection or relationship to Michigan.

While this list of contacts may or may not be helpful, the case itself is so extreme on its facts that the result is not surprising. Michigan has no interest in someone practicing exclusively in California. Unless someone in Michigan received information about the attorney's California practice, Michigan would never have considered disciplining him.

In 1985, the Committee on Ethics of the Maryland State Bar Association considered the case of an attorney who was a member of both the Maryland and District of Columbia bars and who was representing a client in the District of Columbia. The case presented the question of which jurisdiction's ethical code governed the attorney's conduct. The attorney knew that his client had created fraudulent material that had been introduced into evidence in the District of Columbia proceedings. The District of Columbia Code provided that the lawyer should call on his client to rectify the fraud, while the stricter Maryland Code required the lawyer to reveal the fraud to the court if the client did not rectify it. Although this case involved one jurisdiction with a more restrictive standard than another, the Maryland Bar rec-

\[220 \text{Id. at 3.}
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\[221 \text{Id.}
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\[222 \text{Id.}
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\[223 \text{See id. at 1, 3.}
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\[224 \text{Id.}
\]
\[225 \text{See supra notes 125-161 and accompanying text.}
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\]
\[227 \text{Id. at 1-2.}
\]
\[228 \text{Id. at 1.}
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\[229 \text{Id. at 2.}
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ognized that "it is . . . conceivable that one jurisdiction could pass a rule requiring the attorneys subject to its control to act in a manner contrary to that which is required by another jurisdiction."\(^\text{230}\) Both ethical standards in the case were based on the Model Code, which lacks any provision regarding conflicting obligations. The ethics committee therefore referred to Model Rule 8.5 and the accompanying comment.\(^\text{231}\) The committee also relied on the Michigan ethics opinion discussed earlier to conclude that

\[\text{the practice of law frequently requires lawyers to act in more than one jurisdiction. Obviously, each jurisdiction has the authority to determine what ethical conduct is required of its attorneys and what conduct is proscribed. Where a Maryland attorney is acting in a foreign jurisdiction in accordance with that jurisdiction's Code of Professional Responsibility, it is the opinion of this Committee that his conduct is ethical per se. While the Maryland Code of Professional Responsibility may impose different 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 law there.}\(^\text{232}\)

The Maryland decision must have been keyed to a determination that because he was appearing before a court in the District of Columbia, the lawyer in question was "practicing law" there. If the Maryland committee considered the attorney to be practicing law only in the District of Columbia, its decision that he had to conform his conduct only to the District of Columbia standards was logical.

These cases reveal that in states operating under the Model Code, lawyers licensed in more than one state and subject to differing ethical standards must have some contact beyond merely being licensed in the enforcing state for that state to apply its rules. The lawyer must be "practicing law in the state."\(^\text{233}\) This may involve having clients in the state, advising on the state's law, having an office in the state, or appearing in court in the state.\(^\text{234}\) Such a list of contacts is reminiscent of the nebulous lists of activities some states employ in their unauthorized-practice statutes.\(^\text{235}\)

\(^{230}\) Id.
\(^{231}\) See id. at 3.
\(^{232}\) Id. at 3-4.
\(^{233}\) Telephone interview with David Johnson, supra note 211; Telephone interview with Alice Flanagan, supra note 211; Telephone interview with Melvin Herschman, supra note 180.
\(^{234}\) See supra text accompanying notes 223-224.
\(^{235}\) See supra note 191.
If the lawyer meets the requirements of "practicing law in the state"—whether under the unauthorized-practice or some other test—the state expects its rules to be followed.\textsuperscript{236} States do not take into account the possibility that another state, with a different ethical agenda, may consider the same activities to be the practice of law and therefore subject to their code. In fact, the lawyer is expected to obey both sets of standards.\textsuperscript{237}

While it may be possible to comply with both state standards—for example, if one is simply more stringent than another,\textsuperscript{238} or if one is mandatory and the other permissive\textsuperscript{239}—there are some directly conflicting obligations even among states operating under the Model Code.\textsuperscript{240} Eventually, some lawyer will be forced to obey one state's ethical provision in obvious violation of another state's. The state whose code has been violated could ignore the fact that the lawyer was involved in practice in both states and stubbornly discipline the attorney for violating its rules. On the other hand, it could apply choice-of-law principles, as one would hope the lawyer had done when he made his decision about which standard to obey—and as the Model Rules suggest.

2. Choice of Law Under the Model Rules

a. Analogy to Current Choice-of-Law Standards

If we assume that, by whatever definitions the states employ, a lawyer licensed in two states is engaged in the practice of law in both states, that each state has a different ethical code, and that, in the absence of another interested state, each state would apply its own ethical rules, it is necessary to apply choice-of-law rules to resolve the conflict. Because there is no precedent in this area of

\textsuperscript{236} See, e.g., Comm. on Professional and Judicial Ethics of the State Bar of Mich., Informal Op. CI-709 (Dec. 28, 1981); see also supra notes 181 & 212 and accompanying text.

\textsuperscript{237} Telephone interview with Alice Flanagan, supra note 211. Ms. Flanagan stated that a lawyer broadcasting an advertisement received in two states where he practices should conform to both standards. \textit{Id.} In reference to advertising standards, the Legal Ethics Committee of the Oregon Bar stated that an interstate law firm "would have to establish . . . rules that utilized the strictest ethical restrictions in any of the states in which the firm practiced." Oregon Legal Ethics Comm., Op. 492, at 537 (Sept. 1983).

\textsuperscript{238} Compare \textit{Model Rules}, supra note 15, Rule 7.2(b) (requiring advertisements to be kept on file for two years) with \textit{Ariz. R. Sup. Ct. 42, ER 7.2(b) (requiring advertisements to be kept on file for three years).}

\textsuperscript{239} Compare \textit{Model Code}, supra note 8, DR 4-101(C) ( permitting disclosure of client confidences) with \textit{Va. R. Sup. Ct. DR 4-101(D) (requiring disclosure under certain circumstances).}

\textsuperscript{240} See supra note 12 and accompanying text.
conflict of laws, analogies must be drawn to other conflict rules. Malpractice cases provide a source of analogous choice-of-law principles because misconduct by a lawyer may not only be grounds for disciplinary action, but also the subject of a malpractice suit.

The first problem with analogizing to legal malpractice, however, is that it may be brought as either a tort action or a contract action. Misconduct leading to a suit in tort under one state's law might be the basis for an action in contract according to another state's law. Moreover, the question of which state's law governs may turn on whether the action is in tort or contract. Strict reference to choice of law in legal malpractice could thus lead to enormous complexity. As a first step in minimizing confusion, conflicts principles could be used to determine whether a malpractice action lies in contract or tort. The following example illustrates the problem:

Example 1. Lawyer L is admitted and practicing in states A and B. A and B prescribe different ethical obligations.
(a) If L follows A's rule, B institutes disciplinary proceedings. In determining what rule L should have obeyed, B analogizes to malpractice law. It determines that under the law of B, such a malpractice action would be in tort. Under B's conflict rules governing tort actions, its standards should apply.
(b) If L follows B's rule, A begins disciplinary action. When referring to malpractice cases, A finds that L's conduct

242 Compare Sitton v. Clements, 385 F.2d 869 (6th Cir. 1967) with Yazzie v. Olney, Levy, Kaplan & Tenner, 593 F.2d 100 (9th Cir. 1979). In Sitton, the court held that under Tennessee law, an action by a client against his attorney for negligently failing to institute a suit within the statute of limitations was a contract action. Sitton, 385 F.2d at 870. In contrast, the Yazzie court found that the same sort of misconduct, under Arizona law, did not give rise to a contract action, but to a tort action. See Yazzie, 593 F.2d at 105.
243 See, e.g., Hood v. McConemy, 53 F.R.D. 435, 443 n.10 (D. Del. 1971). In Hood, residents of Pennsylvania hired a Pennsylvania attorney to represent them in a malpractice suit against a Delaware physician. Id. at 438. Much of the lawyer's performance took place in Delaware, although some of his mishandling of the case occurred in Pennsylvania. See id. at 438-39. The action was filed and dismissed in Delaware. Id. at 443. The Federal district judge, applying the conflicts rules of Delaware, determined that if the action were on the contract, Pennsylvania law would govern because that was where the contract was made. Id. at 443 n.10. If the action were in tort, however, Delaware law might govern if it was determined to be the place of the tort. Id. The court left both questions—the location of the tort and whether the action was in contract or tort—unresolved because their determination became unnecessary. Id. at 443.
would lead to a contract action under the law of $A$. Pursuant to $A$'s conflict rules governing contract actions, $A$'s standards should apply.

The characterization of a malpractice claim as an action in tort or contract should likewise be determined according to conflicts rules, or in some other uniform manner. Even if states $A$ and $B$ both view the misconduct as a basis for the same type of malpractice action, the choice-of-law rules may differ in each state, thereby producing contrasting results. The following example illustrates this problem:

Example 2. Lawyer $L$ is admitted and practicing in states $A$ and $B$. $A$ and $B$ prescribe different ethical obligations. Under a hypothetical uniform rule adopted by both $A$ and $B$, $L$'s conduct would be viewed as the subject of a contract action.

(a) $L$ follows $A$'s ethical rule and $B$ begins disciplinary proceedings. $B$ finds that its choice-of-law rules for contracts call for $B$'s standards to be applied because $B$ is the place where the contract was made.

(b) $L$ follows $B$'s ethical rule and $A$ starts the disciplinary process. Under $A$'s choice-of-law rules for contracts, $A$'s standards should be applied because the contract was centered there.

If states look to the choice-of-law rules applied in legal malpractice cases in order to create corresponding rules for attorney ethics, it will be very difficult to produce consistent and predictable results. Therefore, a uniform choice-of-law rule for attorney ethics should be drafted.244

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Given the Federal legislative and judicial precedent, this area will not be a fruitful source of analogous conflict-of-laws rules for interstate questions. Federal
b. A New, Uniform Choice-of-Law Standard

Conflicting ethical codes will cause attorneys in multistate practice concern; conflicting rules on which state’s ethical code is applicable will create utter confusion. As one commentator notes, “People repeatedly subjected . . . to two or more inconsistent sets of directions, without means of resolving the inconsistencies, [will] not fail in the end to react as [Pavlov’s] dogs did. The society, collectively, [will] suffer a nervous breakdown.”

A uniformly applicable choice-of-law rule would not require analogy to the malpractice laws of individual states. Factors to be considered under a uniform rule would draw on both tort and contract conflicts standards. Such considerations would include the following:
(a) the place where any injury resulting from the misconduct occurred,
(b) the place where the misconduct causing the injury occurred,
(c) the place where the lawyer entered into a contract with any affected client,
(d) the place where any such contract was negotiated,
(e) the place of performance of the lawyer’s services,
(f) the location of any property that is the subject of the lawyer’s representation,
(g) the domicile, residence, place of business and place of incorporation of the lawyer and any affected parties.

Thus, choice of law in Federal-state conflicts is governed by the rules of the forum in which the attorney is acting. This is similar to the choice-of-law doctrine in colonial America and, at the same time, in England. At that time, choice of law was identified with choice of court. Nelson, The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws, in Law in Colonial Massachusetts: 1630-1800, at 419, 426-27 (D. Coquillette ed. 1984). Each type of court applied its “own peculiar brand of law.” Id. at 426. The only determination to be made was which court had jurisdiction. Id. at 428-29.

246 Restatement (Second) of Conflict of Laws § 145(2)(a) (1971).
247 Id. § 145(2)(b).
248 Id. § 188(2)(a).
249 Id. § 188(2)(b).
250 See id. §§ 188(2)(c), 196.
251 Id. § 188(2)(d).
252 See id. §§ 145(2)(c), 188(2)(e).
(h) the place where the lawyer's relationship with the affected parties is centered.\textsuperscript{253} and

(i) the interests of the state.\textsuperscript{254}

Enactment of a uniform rule containing the guidelines listed above would ease the application of Model Rule 8.5.

i. Where It Should Not Be Applied

Although this proposed rule might effectively deal with some interstate ethical problems, there are certain types of conduct to which it should not be applied. Rules dealing with the lawyer's relationship to the legal profession, for example, are not likely to be conflicting. They may be different in two states—one may be permissive and the other mandatory—but they will not require contradictory types of conduct. For instance, state $A$ may require pro bono service while state $B$ only suggests it, or $A$ may prohibit laudatory advertising while $B$ permits it. It is highly unlikely, however, that $B$ will prohibit pro bono work when $A$ requires it, or that $A$ will require laudatory advertising when $B$ prohibits it. Therefore, a lawyer will be able to conform to both states' standards in these areas.

Nevertheless, each state has a strong interest in maintaining its own regulations in such areas. If lawyer $L$ is permitted to engage in laudatory advertising that reaches state $A$—where such advertising is prohibited—because he is primarily engaged in practice in state $B$—where such advertising is allowed—he will gain a significant business advantage over his fellow lawyers in state $A$.\textsuperscript{255} Thus, any advertisements published or broadcast in state $B$ must satisfy $B$'s ethical code. If those advertisements reach consumers in state $A$ as well, however, they must meet the requirements of both states $A$ and $B$. The burden is therefore on the advertising attorney to know how many states his advertisement will reach and what is required by the ethical codes in those states.

The rule described above should be confined to the few situations in which the states in question have equal interests in the lawyer’s conduct and in which it is possible for the lawyer to satisfy both sets of rules. So long as states maintain differing rules

\textsuperscript{253} Id. § 145(2)(d).

\textsuperscript{254} Id. § 6(2)(b), (c).

on advertising and solicitation, this standard will be necessary.\textsuperscript{256}

This rule of maximum compliance should not carry over to other areas where the interests of each state may differ in intensity, however.\textsuperscript{257} It will be much easier, in most situations, for a lawyer to determine in which state his activities are centered and which state thus has the stronger interest in having its law applied. It will be more difficult for the lawyer to decide whether he has satisfied a second state's threshold-of-interest test and whether he should follow the second state's code at the same time. The lawyer would have to obey the stricter of the two standards in order to obey both. Therefore, if it has a stricter standard, the state with the minimal interest in the lawyer's conduct would end up controlling the lawyer's behavior because he could not risk complying only with the permissive rules of the other state.

\textbf{ii. Court Appearances}

The ability of the courts to discipline lawyers stems from the courts' inherent power to control their officers.\textsuperscript{258} Given this traditional basis for the power to regulate the ethics of attorneys, conflicts involving practice before a state court should be resolved in favor of the disciplinary standards in force in that state.\textsuperscript{259} Such a rule, however, will be subject to the same problem as pro hac vice appearances\textsuperscript{260}—defining what activities are sufficiently related to the court appearance to be governed by the rule. Model Rules 3.1 through 3.7 and Model Rule 8.3 will nonetheless be enforced according to the version enacted by the state where the court is located because they are closely related to appearances before courts. The problem with using this rule in other areas is illustrated in the following example:

\textbf{Example 3.} Lawyer L regularly represents client C in state A. L is admitted in state A and state B. C is being prosecuted.

\textsuperscript{256} For a discussion of national standards, see infra note 274 and accompanying text.
\textsuperscript{257} But see Cox, supra note 121, at 211. Cox states that "an attorney may choose the stricter standard to insure avoidance of disciplinary action. This approach assumes that an attorney knows he is subject to both standards." Id. It may indeed be advisable to comply with two states' rules whenever possible if choice-of-law rules fail to yield a definite answer.
\textsuperscript{258} See Ex parte Wall, 107 U.S. 265 (1882); In re Echeles, 430 F.2d 347 (7th Cir. 1970); In re Rhodes, 370 F.2d 411 (8th Cir. 1967).
\textsuperscript{260} See supra notes 162-173 and accompanying text.
for fraud in state B. In the course of preparing for the trial, L learns that C is engaged in a separate fraud involving serious financial harm to people in state D. Rule 1.6 in state A requires that this information be kept confidential, while rule 1.6 in state B mandates disclosure (assume that state D is not sufficiently interested to have its rule considered). Which provision governs L's conduct?

While most of his contact with C has been in state A, the information was uncovered in connection with preparation for a trial in state B. Nonetheless it seems that L's contacts with state A are stronger with regard to this information. L and C presumably have offices in state A, legal services were expected to be and were usually rendered there, and L and C began their relationship there. The data with regard to the other fraud does not have any impact on the court appearance in state B, as would, for example, a fraud on the state B court or a continuance of the activity that led to the prosecution in state B. Consequently, rule 1.6 of state A should control. Thus, while the presence of a court appearance invokes a clear rule, the scope of the rule must be carefully defined and limited. By making application of the rule certain in the cases so defined, such limitations may be beneficial.

iii. Clients v. Outside Parties

Example 4. Lawyer L is admitted in states A and B. He has offices in cities on opposite banks of the river separating the states. Client C has its main offices in state A. L has been representing C in similar business deals in both states. A majority of the parties with whom C is dealing are located in state B. Some transactions have been closed. Some are still being negotiated. In the course of his representation of C, L discovers that C is defrauding the other parties. The ethical code of state A requires that L keep this information confidential. The professional responsibility rules of state B oblige L to inform the affected parties of the fraud. What should L do?

If L maintains his silence, he may be disciplined in state B. If he reveals the information, he is subject to sanctions in state A. Assuming that L's services have been rendered equally in states A and B, the problem boils down to weighing the interests of the affected parties in L's conduct against the interests of the client. Neither set of

261 See Model Rules, supra note 15, Rule 3.3(a)(2).
262 See id. Rule 3.3(a)(1), (2), (4).
263 A lawyer should reveal to his client any new ethical obligations that could affect his representation of the client in litigation in a foreign court. See supra note 206 and accompanying text.
interests necessarily outweighs the other. Choice-of-law rules should emphasize the location of the client more than the location of the affected parties. The client became involved with the lawyer before the other parties were introduced to the situation. If the client had any expectation of what laws would govern the lawyer's dealings with him, it would probably have been those of state A. Moreover, a lawyer is often thought of as owing his primary duty to his client.  

This is not necessarily the result that must be reached, but a rule must be established. The weighing of the interests discussed above is a policy decision. This decision should not be left to the states, however, if uniform choice-of-law rules are expected. The state that opted for disclosure has already indicated that it places greater emphasis on the interests of victimized third persons than the state that enacted the strict confidentiality standard. Thus, state B is likely to weigh third parties' interests more heavily in its choice-of-law rule, and state A is likely to favor the client's location in its choice-of-law standard. Consequently, if left on their own to arrive at conflict of laws guidelines, the states might adopt different standards—and thus fail to resolve the lawyer's conflict. A uniform rule based on the location of the client does not make an ethical choice because it does not know what the ethical rule will be in the state of the client. It sets up a neutral mechanism for choosing among the ethical choices the states have each made. It is a tool that will enable the lawyer to know what is expected of him.

The specifics of a uniform choice-of-law rule have yet to be hammered out. This article has indicated some of the principles the author believes it should contain—the interest of the state in continuous application of rules relating to the legal profession, the interest of the courts, and, all other things being equal, the location of the client over the location of the affected parties.

Most importantly, the choice-of-law rules should be uniform.

264 See Model Rules, supra note 15, preamble. In the Model Rules, the first responsibility of a lawyer listed is representation of clients. See id. Rules 1.1-1.16.

265 Of course, a state that has decided to protect victims may not favor such a choice-of-law rule because an out-of-state client with an out-of-state lawyer might circumvent the rule. It is probably just as likely, however, that lawyers and clients from that state may be taking advantage of people in other states.

266 In contrast, a choice-of-law standard that dictated the selection of the state standard most favorable to one type of party (e.g., the client), rather than the selection of the rule of the state where the client is located, would make an ethical choice. As a consequence, it would never be uniformly adopted. States that had promulgated rules weighing the location of the affected parties more heavily would not adopt this choice-of-law standard because their rules would never be chosen.
throughout the states. While some states may balk at certain specific provisions, uniformity should be the main concern. Otherwise, conflicting ethical obligations may be left unresolved by conflicting choice-of-law rules. Although a choice-of-law standard may cause the lawyer to be removed from some representations, diverse choice-of-law rules could lead to a lawyer’s not engaging in any multistate representations where ethical obligations conflict. Such a system would be inefficient as well as unfair to honest clients who would not wish to involve the lawyer in troublesome situations.

V. Some Additional Suggestions and Discussion

A. Defining Unauthorized Practice

For several reasons, it would be worthwhile to have “a uniform definition of the practice of law as it applies to lawyers rendering legal services in an interstate context.” First, lawyers in multijurisdictional practice would know what activities they could engage in without risking criminal and disciplinary penalties. Second, assuming the definition would recognize that a lawyer sometimes needs to engage in at least incidental activities across state lines, a lawyer licensed in only one jurisdiction could be obliged to follow the ethical obligations of another state if he were engaged in substantial activities there. The presumption that the lawyer was either engaged in unauthorized practice in the other state and therefore in violation of rule 5.5, or not engaged in practice in the other state and thus not subject to the foreign state’s ethical code would no longer be necessary. The same choice-of-law rules that would apply to lawyers licensed in more than one state would apply to the lawyer licensed in only one state but occasionally acting in other states.

B. Model Rule for Disciplinary Enforcement 21(D)(4)

Rule 21(D)(4) provides that in reciprocal disciplinary proceedings, identical discipline need not be imposed if “[t]he misconduct established [by the record of the foreign proceedings] warrants substantially different discipline in this state.” This

267 E. MICHELMAN, supra note 162, at 14.
268 See supra notes 170-174 and accompanying text.
269 See PROBLEMS AND RECOMMENDATIONS, supra note 140, at 68 (suggesting court rule “that any attorney who regularly engages in the practice of law within a jurisdiction . . . thereby submits himself to the disciplinary jurisdiction of that court regardless of where he may be formally admitted”).
270 See supra text accompanying notes 188-195.
271 MODEL RULES FOR DISCIPLINARY ENFORCEMENT, supra note 123, Rule 21(D)(4).
provision is included in the disciplinary rules of many of the states.\textsuperscript{272}

An exception that allows less punishment to be imposed\textsuperscript{273} because the states have different ethical codes does not belong in a reciprocal discipline statute. This is true now and should be even clearer when choice-of-law rules are created. If a lawyer has violated a standard of professional responsibility in another state, the home state will be acting in a very provincial and shortsighted manner if it excuses the violation because it does not apply the same rule. Professional misconduct is a serious matter; it demonstrates a lawyer's lack of respect for the legal system. If the home state wants lawyers admitted in other states to respect its rules, it should not allow a lawyer who has violated other states' rules to go unpunished. Once choice-of-law guidelines are established, the need for eliminating this exception will be stronger—each state will regularly be applying the standards of another state. Reciprocal enforcement of another state's standards, even if they conflict with the home state's, is and will be a central factor in maintaining out-of-state lawyers' respect for foreign states' ethical codes.

C. Uniformity of Ethical Codes/National Bar Regulation

If a uniform ethical code were imposed on all lawyers in all jurisdictions, a new area of conflicts law would not have to be developed. Avoiding a choice-of-law problem is, by itself, an insufficient reason to make the drastic reforms in the regulation of the legal system that would allow the imposition of a national ethical code.\textsuperscript{274} Nevertheless, a uniform ethical code is appealing

\textsuperscript{272} See, e.g., Ala. Rules of Disciplinary Enforcement 17(d)(3); Ariz. R. Sup. Ct. 58(c)(4); Iowa Rules Governing Admission to the Bar 118.17; Ky. R. Sup. Ct. 3.435.

\textsuperscript{273} The provision also allows greater sanctions to be levied. See supra note 151.

\textsuperscript{274} In 1983, Senator Arlen Specter, a Republican from Pennsylvania, proposed the Lawyer's Duty of Disclosure Act of 1983. See S. 485, 98th Cong., 1st Sess. (1983). The proposed act would have amended the Federal mail fraud statute to provide that an attorney could be fined up to $5000 or imprisoned for up to one year if he used the mails for the delivery of documents that could enable a client to commit a criminal or fraudulent act and if he did not disclose his discovery of his client's intent to commit or commission of a criminal or fraudulent act to Federal law enforcement authorities. Id. The proposed statute was criticized as impinging on fifth amendment due process rights, the sixth amendment right to counsel, and self-regulation of the legal profession. Cady, Attorney Disclosure: The Model Rules in the Corporate/Securities Area, 12 Colo. Law. 1975, 1978 (1983).

A less drastic reform that has been proposed is Federal Trade Commission regulation, rather than state ethical control, of advertising and solicitation. But see
for other reasons. A lawyer in interstate practice would not have to investigate the ethical obligations of each state where he engages in practice and would not have to calculate which state's standards would apply to each of his actions under the choice-of-law rules. In addition, there might be less public criticism of the profession.  

Diversity in the professional responsibility rules does have some appeal, however. It can lead to greater debate over and more careful examination of controversial issues. Moreover, the different policy choices can be "field tested" in "different laboratories."  

VI. Conclusion

The promulgation of conflicting standards of ethical obligations will create problems for the increasing number of lawyers in multistate practice. They will have to educate themselves in the codes of professional responsibility in all the states where they are licensed or otherwise engaged in practice. Furthermore, they will have to decide which jurisdictions' rules to obey at which times.

Currently, there are no guidelines for deciding which standards to follow. If each state interpreted the choice-of-law comment to Model Rule 8.5 differently and set up varying rules for selecting the applicable ethical standard, the confusion would be multiplied many times. Therefore, the problem should not be approached on the state level. The choice-of-law comment to Model Rule 8.5 should be studied further and a uniform method for resolving conflicts among ethical codes should be established nationally—perhaps as an amendment to the ABA Standards—and enacted by the states.


275 See generally Manson, Preserving the Client's Confidences—The Lawyer's Dilemma, 10 VA. B.A.J., Summer 1984, at 5, 6. ("Although diversity may be beneficial under some circumstances, here it can only result in public criticism of the legal profession. With such important interests at stake, surely the legal profession should continue to strive for a uniform, coherent resolution of these issues.").


277 Winter, supra note 13, at 4 (quoting Michael Franck, executive director of the State Bar of Michigan).