

Important Choices: Choice of Law under Model Rule 8.5(b)

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Handle professional responsibility matters for lawyers, law firms and legal departments throughout the Northwest. Washington and Oregon began reciprocal admission with each other in 2002 and adopted multijurisdictional practice rules patterned on ABA Model Rule 5.5 in, respectively, 2006 and 2005.¹ Reflecting earlier and continuing regional economic integration, however, lawyers in the Northwest had for many years before commonly been admitted in both jurisdictions and their firms often followed by establishing offices in both states. An overlooked aspect of more frequent cross-border practice is the increasing importance of choice of law analysis. Although the Northwest (and similar areas elsewhere) may have wrestled with the practical import of choice of law analysis in professional responsibility matters longer than some other regions, the national trend in cross-border practice will likely lead to corresponding experience on a broader scale.

This article will examine three principal elements of choice of law analysis. First, it will briefly survey the history of ABA Model Rule 8.5(b), the Model Rules' choice of law provision. Second, it will examine how that rule is moving beyond purely regulatory matters to influence other aspects of the law of lawyering. Third, it will conclude with a practical discussion of the legal and strategic roles that choice of law analysis can play in handling professional responsibility cases involving cross-border practice.

Model Rule 8.5(b)

Choice of law is not new to the law of lawyering. It has been part of multijurisdictional legal malpractice and related lawyer civil liability cases for a long time, with courts in those settings often examining choice of law issues under the general principles outlined in the Restatement (Second) Conflicts of Law (1971).²

A choice of law provision directly part of the professional rules, however, is comparatively new. Neither the ABA Canons of Professional Ethics nor the ABA Model Code of Professional Responsibility had choice of law provisions. In fact, the ABA Model Rules of Professional Conduct as adopted in 1983 did not have a choice of law provision either.³ Rather, Model Rule 8.5 as originally enacted in 1983 dealt solely with disciplinary jurisdiction.⁴ The ABA introduced choice of law into the Model Rules in 1993 with Model Rule 8.5(b) and then revised it in 2002 in conjunction with the "Ethics 2000" amendments and the contemporaneous recommendations of the Commission on Multijurisdictional Practice.⁵

As currently configured, Model Rule 8.5(b) addresses litigation and non-litigation matters separately. The law of the tribunal concerned generally applies to the former and the

law of the location where the conduct—or its "predominant effect"—occurred generally applies to the latter:

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

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

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

Recent examples of both prongs in the regulatory context include, on the former, *In re Ponds*, 876 A.2d 636 (D.C. 2005) (applying the Maryland RPCs in a District of Columbia disciplinary matter where the conduct at issue occurred in a Maryland court proceeding), and on the latter, *In re Overboe*, 745 N.W.2d 852 (Minn. 2008) (applying North Dakota law in a Minnesota regulatory case involving trust account violations that had their predominate effect in North Dakota).

Comment 6 to Model Rule 8.5 expresses the hope that if two states are examining the same conduct they will both apply the same law. As is discussed in more detail later, however, this is an aspiration only and no mechanism exists in Model Rule 8.5 for one jurisdiction to be designated as the "lead" with the other staying its investigation pending an outcome in the jurisdiction whose law applies.

Expansion Beyond Discipline

Although the Restatement of Conflicts and general choice of law principles continue to guide most legal malpractice and related lawyer civil liability cases, Model Rule 8.5(b) has found its way into several areas beyond purely regulatory matters, including disqualification, sanctions and fee disputes. Examples of each include:

- *Disqualification. Philin Corporation v. Westhood, Inc.*, No. CV-04-1288-HU, 2005 WL 582695 (D. Or. Mar. 11, 2005) (unpublished), involved a disqualification motion painted against the backdrop of a commercial dispute. The defendant, an Oregon corporation, sought

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the disqualification of the plaintiff's law firm based on an asserted former client conflict arising from an earlier consultation on the matter at issue with the Massachusetts office of the plaintiff's law firm. Before reaching the substantive issues (and disqualifying the law firm), the court first engaged in choice of law analysis under a local (but similar) precursor to Model Rule 8.5(b) to determine the appropriate law of lawyering to apply.⁶ In disqualification, where the professional rules effectively supply the controlling substantive law, this trend is likely to continue as more states adopt Model Rule 8.5(b)⁷ and most federal district courts, in turn, use the professional rules of the state in which they sit to regulate lawyer conduct.⁸

- *Sanctions.* *Apple Corps Limited v. International Collectors Society*, 15 F. Supp.2d 456 (D. N.J. 1998), involved a sanctions motion in a trademark case. A consent order had been entered earlier prohibiting the defendants from marketing likenesses of the Beatles and the then-current phase of the litigation concerned alleged violations of that order. In investigating the violations, New York lawyers for the plaintiffs had called sales representatives of the defendants to purchase the infringing products. The defendants contended that the contacts with the representatives were prohibited under the "no contact" rule. Before reaching that substantive issue, the court first used Model Rule 8.5(b)⁹ to assess whether New York or New Jersey law applied (and concluded that the latter did). Like disqualification, the trend to use state rules patterned on Model Rule 8.5(b) (in both state and federal court) is also likely to continue in the sanctions context when multistate issues are involved because sanctions analysis often focuses directly on lawyer conduct.
- *Fee Disputes.* Fee disputes—both with clients and among lawyers—frequently turn on a blend of contract law and the professional conduct rules. Although choice of law issues on the former are typically resolved using general choice of law authorities such as the Restatement of Conflicts, the latter are increasingly being assessed through the prism of Model Rule 8.5(b). *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 178 F. Supp.2d 9 (D. Mass. 2001),¹⁰ was a dispute involving a law professor who had assisted several claimants' counsel in multistate tobacco litigation over his share of the fees involved. The law firms defended, in part, on the ground that the clients had not approved the fee division claimed. The court used both Model Rule 8.5(b) (as adopted in the multiple jurisdictions involved) and the Restatement of Conflicts in sorting through the respective professional conduct and contract choice of law issues. With fee disputes and related fee forfeiture increasingly involving issues under the professional conduct rules,¹¹ it would not be surprising to see a corresponding increase in the use of Model Rule 8.5(b)

in assessing choice of law questions at least as they relate to fee-related requirements under the professional conduct rules.

Practical Impacts

Does choice of law really matter in practice? I suggest that it does for two principal reasons. The first is legal: in some cases the law applied determines the outcome. The second is strategic: in other cases, particularly where two jurisdictions are investigating the same conduct, differences in prosecutorial policies (both on whether to prosecute certain conduct and, if so, how it is charged) and sanctions can play an equally important if more subtle role. In short, choice of law can win cases.

Legal Impacts. Choice of law analysis from legal malpractice and lawyer breach of fiduciary duty cases has long taught us that what law applies can decide the outcome. *See, e.g., New Falls Corp. v. Lerner*, 579 F. Supp.2d 282 (D. Conn. 2008) (holding that California law applied to a legal malpractice case and dismissing the case on that basis because California law did not permit the assignment of the claim at issue); *Spirit Partners, LP v. Stoel Rives LLP*, 157 P.3d 1194 (Or. App. 2007) (finding that Oregon law applied to a breach of fiduciary duty claim and upholding dismissal on that basis as time-barred under Oregon law).

Although the adoption of the ABA Model Rules of Professional Conduct in most states has significantly tightened the alignment of the professional rules nationally, it has not eliminated all distinctions. In fact, important differences remain in

Does choice of law really matter in practice?

many states where cross-border practice is common. In the Northwest, for example, Oregon classifies a line-level employee whose conduct a claimant is seeking to attribute to the employer as falling within corporate counsel's representation under Oregon RPC 4.2 (Communication with Person Represented by Counsel). *See Oregon State Bar Formal Ethics Op. 2005-80* (2005). Washington, by contrast, excludes such employees from corporate counsel's representation under its RPC 4.2 based on a long standing Washington Supreme Court decision (*Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984)),¹² unless the employee is considered a "speaking agent" under Washington evidence law. Choice of law analysis could become dispositive on either regulatory proceedings or lawyer-related civil motions (for disqualification or sanctions) if, for example, a case involved corporate employee witness interviews in both states. Although the varying approaches to RPC 4.2 provide a ready example in the Northwest, other closely knit regions likely have similar differences in other areas such as conflict waiver requirements, exceptions to the confidentiality rule and lateral-hire screening.

Strategic Impacts. A more subtle, yet equally important, practical aspect of choice of law analysis comes into play

when parallel complaints are filed against the same lawyer in two states for the same asserted misconduct. As noted earlier, Comment 6 to Model Rule 8.5 expresses the hope that the two regulatory agencies involved will at least coordinate to the extent of agreeing on which jurisdiction's law applies but there is no formal mechanism for doing that—let alone designating one agency as the “lead” and effectively staying the other's investigation pending a result in the “lead” state. This, in turn, often forces accused lawyers to defend themselves in two states simultaneously with no agreement at the outset on which state's law controls.

In that scenario, it is important to note that states do not necessarily have the same set of regulatory imperatives for a wide variety of reasons. Again to use an example from the Northwest with the aid of the ABA's 2007 Survey on Lawyer Discipline Systems (ABA Survey),¹³ Washington has nearly twice as many active licensees (26,730) as Oregon (13,500), yet the number of lawyers Washington formally charged after preliminary investigations was roughly half (83) that of Oregon (133).¹⁴ In other words, an Oregon lawyer had nearly four times the odds of being formally prosecuted than a Washington neighbor.


Although the ABA Survey does not contain comparative statistics on the kinds of misconduct formally charged in each state, regional variation in the professional rules and state-level statistical evidence suggests that, like their contemporaries in criminal prosecution, different agencies exercise prosecutorial discretion and allocate prosecutorial resources differently. Based on 2007 annual surveys of discipline published by the Oregon and Washington state bars, for example, Oregon imposed discipline for litigation misconduct in 21 percent of its cases while that comprised only 4 percent of the cases in which Washington imposed discipline.¹⁵

Beyond the decision to prosecute and, if so, what to prosecute, states also vary in their approach on sanctions. For example, again using the 2007 Oregon and Washington surveys, Oregon used diversion in just 2 cases while the comparable number in Washington was 63.¹⁶

Even these admittedly limited statistics underscore the strategic importance when handling a multistate case of identifying the more “favorable” jurisdiction from both the perspective of the law itself and the regulatory policies employed and then attempting to cogently argue under Model Rule 8.5(b) why that “favorable” jurisdiction should control. Although regulatory agencies will usually not formally stay an investigation pending the outcome in what amounts to a “lead” jurisdiction, the informal equivalent is more common. If the *de facto* “lead” jurisdiction then reaches a “favorable” conclusion under its law, it will be difficult, as a practical matter, for the other regulatory agency not to accept that resolution given the “lead” agency's expertise and experience in interpreting and enforcing its controlling law.

Conclusion

With lawyers increasingly practicing across state lines, choice of law analysis under Model Rule 8.5(b) will likely become more common as well across a spectrum ranging from regulatory matters to disqualification and sanctions. Just as

choice of law analysis has long effectively decided outcomes in multistate legal malpractice and other lawyer civil liability contexts, it has that same legal and practical potential to decide “who wins” in multistate regulatory cases, too. 

Endnotes

1. Washington Admission to Practice Rule 18, Oregon Admission Rule 15.05 and their respective versions of RPC 5.5 are available on their state bar web sites at www.wsba.org for Washington and www.osbar.org for Oregon.

2. See generally RONALD E. MALLIN AND JEFFREY M. SMITH, 4 LEGAL MALPRACTICE § 34:8 at 1057-1062 (2008); Restatement (Second) of the Law Governing Lawyers, § 1, cmt. e and § 5, cmt. h (2000) (discussing the role the Restatement of Conflicts in resolving choice of law issues outside the regulatory context).

3. See A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 at 823-836 (2006).

4. *Id.*

5. *Id.* Model Rule 8.5(a), in turn, addresses regulatory jurisdiction.

6. Oregon adopted a new professional code based on the ABA Model Rules on January 1, 2005. The conduct at issue in *Philin* took place before that date. The *Philin* court used an Oregon bar rule that was similar in form and effect to ABA Model Rule 8.5(b).

7. For state adoption of the ABA Model Rules, see the ABA Center for Professional Responsibility's web site at http://www.abanet.org/cpr/mrpc/model_rules.html.

8. See, e.g., Western District of Washington GR 2(e) and District of Oregon LR 83.7, available at, respectively, www.wawd.uscourts.gov and www.ord.uscourts.gov.

9. At that point, New Jersey had not yet adopted ABA Model Rule 8.5(b).

10. For more on choice-of-law in this same case, see 188 F. Supp.2d 115 (D. Mass. 2002).

11. See, e.g., *Chambers v. Kay*, 56 P.3d 645 (Cal. 2002) (asserted agreement for fee division among co-counsel held invalid where client had not consented in writing); *In re Jore Corporation*, 298 B.R. 703 (Bankr. D. Mont. 2003) (fee forfeiture based on unwaived conflict).

12. *Wright* was decided under Washington's former Code of Professional Responsibility. When Washington's Rules of Professional Conduct were updated in 2006, *Wright's* gloss on RPC 4.2 was retained. See Washington RPC 4.2, cmt. 10. Because *Wright* relied expressly on Washington state evidence law, it would not necessarily apply in federal court if the Federal Rules of Evidence control the particular context involved.

13. Available on the Center for Professional Responsibility's web site at <http://www.abanet.org/cpr/discipline/sold/home.html>.

14. See ABA Survey, Chart I.

15. See Oregon State Bar 2007 Disciplinary Counsel's Office Annual Report (Oregon Survey) available at www.osbar.org/_docs/resources/DCO2007ar.pdf and Washington State Bar Association 2007 Statistical Summary of Lawyer Discipline (Washington Survey) in Washington available at www.wsba.org/info/operations/odc/2007lawyerdiscipline/statisticalsummary.pdf. The categories reported were not uniform. For example, Washington specifically categorized “litigation misconduct” (at 1) while the Oregon statistic cited was derived from adding “conduct prejudicial to justice” and “disregarding a court rule or ruling” (at 8).

16. Oregon Survey at 8; Washington Survey at 1.