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Balancing Act:
Choice of Law in Law Firm-Related Litigation

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One of the most significant developments across the legal profession in the past 25 years has been the increasing frequency of cross-border practice by law firms and individual lawyers alike. For firms, it has become common to have offices in more than one state. For individual lawyers, it has become equally common to be licensed and practice actively in multiple states. The reasons are many—ranging from regional economic integration to regulatory changes like reciprocal admission that make it easier to practice across state lines.

Generally, the increase in cross-border practice has been a positive development for both law firms and individual lawyers. At the same time, it has also sharpened the focus on choice of law issues in law firm-related litigation. This article will first survey the choice of law rules governing law firm-related litigation—including their practical effects. It will then address proactive steps law firms can take to manage this risk.

The Rules

There are two primary choice of law rules governing law firm-related litigation. The first is Idaho Rule of Professional Conduct 8.5(b), which controls choice of law in lawyer discipline and has increasingly been applied in other contexts where the RPCs are used as, in effect, substantive law such as

disqualification. The second is the Restatement (Second) Conflict of Laws (1971) and associated case law interpreting the Restatement. The Restatement typically applies in settings such as legal malpractice that are controlled by a standard of care rather than the RPCs. The Restatement also governs purely contractual aspects of lawyer-client agreements beyond the RPCs.

RPC 8.5(b). RPC 8.5(b) was adopted in 2004 as a part of Idaho's consideration of the American Bar Association's "Ethics 2000" amendments to the corresponding ABA Model Rules of Professional Conduct.[1] The text of RPC 8.5(b) has remained the same since then and sets the standard for choice of law in lawyer discipline:

> "(b) 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:
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> "(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
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> "(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 is not 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."

Comment 5 of Idaho RPC 8.5, in turn, was amended in 2014 to recognize choice of law provisions governing conflicts. The amendment was patterned on a similar change to ABA Model Rule 8.5 as a part of the ABA's "Ethics 20/20"

review of the ABA Model Rules.[2] The addition to Comment 5 adopted in 2014 reads:

> "With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement."

As noted earlier, RPC 8.5(b) controls choice of law determinations in lawyer disciplinary proceedings. *In re Summer*, 105 P.3d 848 (Or. 2005), for example, involved a lawyer whose principal office was in Idaho but who was also licensed in Oregon. The lawyer was accused of misrepresentations in handling prelitigation settlement negotiations for an Idaho client in two automobile accidents—one in Oregon and the other in Idaho. Before reaching the merits, the Oregon Supreme Court evaluated whether the Oregon or Idaho RPCs should apply using a similarly worded predecessor to ABA Model Rule 8.5(b). The Oregon Supreme Court determined that—under an equivalent to ABA Model Rule 8.5(b)(2)—the "predominant effect" of the lawyer's actions occurred in Oregon and, therefore, decided the case under the Oregon RPCs.[3]

RPC 8.5(b) has also been used beyond lawyer discipline when the matter involved focusses on a lawyer's duties under the professional rules. *Philin Corp. v. Westhood, Inc.*, No. CV-04-1228-HU, 2005 WL 582695 (D. Or. Mar. 11, 2005) (unpublished), for example, involved a disqualification motion in a commercial dispute. The defendant asserted that counsel for the plaintiff should be

disqualified because one of the defendant's directors had earlier discussed aspects of the dispute with a partner of the same law firm officed in Boston. Before reaching the substance of the motion, the federal district court first considered whether the asserted disqualifying conflict should be assessed under Oregon or Massachusetts law. The district court concluded—using an equivalent to ABA Model Rule 8.5(a)(1)—that it should review the matter under Oregon law because the case was being litigated there.

Restatement. Although Idaho's appellate courts have not yet addressed choice of law principles in a legal malpractice case, the Idaho Supreme Court in *Grover v. Isom*, 137 Idaho 770, 772-73, 53 P.3d 821 (2002), applied the Restatement to the analogous area of medical malpractice:

> "Idaho applies the 'most significant relation test' as set forth in the Restatement (Second) of Conflict of Laws § 145 in determining the applicable law. In a tort case the following considerations must be taken into account:
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> > "(a) the place where the injury occurred,
> > "(b) the place where the conduct causing the injury occurred,
> > "(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> > "(d) the place where the relationship, if any, between the parties is centered."[4]

Increasingly, legal malpractice claims are being paired with claims for breach of fiduciary duty—usually involving asserted conflicts.[5] Idaho's appellate courts have not yet determined the appropriate choice of law standard in this context. On a practical level, however, "predominate effect" under RPC 8.5(b)(2)

and "most significant relation" under the Restatement should generally produce the same result—but might be influenced by a choice of law selection if the decision turns heavily on competing conflicts analysis and the parties had designated controlling law on that point. Similarly, fee-related issues are generally treated as contract matters and, therefore, should ordinarily be subject to the Restatement's choice of law portions governing contracts—principally Sections 187 addressing contractual choice of law clauses and 188 outlining choice of law factors when the parties have not included a controlling provision.[6] Nonetheless, fee disputes are also increasingly intertwined with issues under the RPCs—most notably the "fee rule"—RPC 1.5—but also the conflict rules if disgorgement is sought as a remedy.[7] Again on a practical level, RPC 8.5(b)(2) and the Restatement will likely not produce disparate results unless a conflict issue looms large and the parties designated controlling law on that point in their fee agreement.

Practical Effects. Particularly when conflicts are involved, nuances can occasionally make for starkly different outcomes. Although the states surrounding Idaho generally use conflict rules patterned on the ABA Model Rules, subtle variations remain that can impact whether or not a given conflict has been effectively waived. Wyoming RPC 1.7(b)(4), for example, requires that a conflict waiver be *signed* by the clients concerned whereas Idaho's version simply requires that a waiver be "confirmed." Oregon RPC 1.0(g), in turn, defines

"informed consent" for conflict purposes to include a requirement that "the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given." Idaho does not include a similar requirement for most waivers.[8]

Just as the conflict rules are not uniform regionally, neither are other RPCs that litigators encounter relatively frequently. The "no contact" rule, for example, varies in important respects among Idaho, Oregon and Washington even though they share a common rule number—4.2—and are all based generally on the corresponding ABA Model Rule. In Idaho, the text of RPC 4.2 limits the prohibition on direct contact to a person represented in the matter in which the contact occurs. By contrast, the Oregon Supreme Court in *In re Newell*, 234 P.3d 967 (Or. 2010), extended the prohibition to factually related matters as well. In Idaho, Comment 7 to RPC 4.2 includes line-level corporate employees within the representation of corporate counsel if the opposing party is attempting to hold the corporate employer liable through the acts of the employee involved. By contrast, the Washington Supreme Court in *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984), held that such line-level employees do not automatically fall within corporate counsel's representation unless they are "speaking agents" of the corporation under Washington evidence law.

Beyond the RPCs, other variations in the law of lawyering can produce markedly different results depending on which state's law controls. Idaho, for

example, stands apart from other states regionally in permitting attorney fee recovery by the prevailing party in at least some legal malpractice claims involving "commercial transactions."[9] Idaho joins some other states regionally, like Washington, in allowing Consumer Protection Act claims against law firms while others, like Oregon, do not.[10] Idaho's limitation period for legal malpractice claims is two years while Utah's corresponding period is four.[11]

Risk Management

Two tools stand out in managing choice of law risk.

First, as noted earlier, Comment 5 to RPC 8.5 now permits firms to include choice of law provisions in their retention agreements with clients. Although Comment 5 is nominally limited to conflicts, it does not necessarily preclude broader choice of law provisions governing the contract-based elements of a representation.[12] Further, conflicts can be particular flashpoints for regulatory discipline, disqualification and civil claims. In a multi-state setting, specifying the controlling jurisdiction will at least clarify which law applies and guide decision-making accordingly. At the same time, firms need to assess the practical application of this tool. Although there is no "sophisticated user" prerequisite, the informed consent requirement means on a practical level that a choice of law provision is more likely to be enforced with a corporate client being advised by its legal department than against unsophisticated individuals.

Second, to borrow an adage from highway travel before GPS, "know before you go." When handling a matter that crosses state lines, a primary task of law firm risk management is to understand the nuances of the jurisdictions involved. *Taylor v. Bell*, 340 P.3d 951 (Wash. App. 2014), for example, involved a malpractice claim by an Idaho client against a Washington law firm asserting that the firm was negligent in advising him on a facet of Idaho law central to a business transaction in Idaho.[13]

Summing Up

Over the past quarter century, we have witnessed a sea change in cross-border practice for both individual lawyers and their firms. With that has come the need to weigh choice of law issues both more frequently and more carefully as a routine part of law firm risk management as those issues have assumed a larger role in law firm-related litigation.

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[1]Developments at the ABA are summarized in ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* (2013) (ABA Legislative History) at 865-79. For a summary of Idaho's consideration of the ABA Ethics 2000 amendments generally, *see* Hon. Michael J. Oths, *E2K Is on the Way*, 46 Idaho State Bar Advocate 17 (June 2003).

[2] *See* ABA Legislative History, *supra*, at 876-77. For a general discussion of Idaho's review of the ABA 20/20 amendments, *see* Larry C. Hunter and Bradley G. Andrews, *Idaho to Consider Following ABA on Electronic Communication, Outsourcing and Confidentiality*, 56 Idaho State Bar Advocate 26 (Sept. 2013).

[3] Notwithstanding the Oregon Supreme Court's finding, the lawyer was convicted for the same misconduct under Idaho law. *See State v. Summer*, 139 Idaho 219, 76 P.3d 963 (2003).

[4] For a comprehensive review of choice of law in Idaho generally, *see* Andrew S. Jorgensen, *Choice of Law in Idaho: A Survey and Critique of Idaho Cases*, 49 Idaho L. Rev. 547 (2013) (Jorgensen).

[5] *See, e.g., Blough v. Wellman*, 132 Idaho 424, 974 P.2d 70 (1999).

[6] *See generally* Jorgensen, *supra*, 49 Idaho L. Rev. at 568-77 (surveying Idaho choice of law decisions involving contracts).

[7] *See, e.g., In re Larson*, No. 03-04001, 2004 WL 307182 (Bankr. D. Idaho Jan. 30, 2004) (unpublished) (disqualifying lawyer for conflict and ordering disgorgement of fees).

[8] An exception is Idaho RPC 1.8(a) that governs lawyer-client business transactions and includes a requirement that the client be "advised in writing of the desirability of seeking . . . independent legal counsel[.]"

[9] *See generally H-D Transport v. Pogue*, 160 Idaho 428, 435-37, 374 P3d 591 (2016) (discussing attorney fee recovery in legal malpractice claims under Idaho Code § 12-120(3)).

[10] *See Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642 (2010); *Short v. Demopolis*, 691 P.2d 163, 165-71 (Wash. 1984); *Roach v. Mead*, 722 P.2d 1229, 1234-35 (Or. 1986).

[11] *See Parsons Packing, Inc. v. Masingill*, 140 Idaho 480, 482, 95 P.3d 631 (2004); *Jensen v. Young*, 245 P.3d 731, 735 (Utah 2010); *see also* Idaho Code § 5-239 ("borrowing" statutes of limitation).

[12] *See generally* Jorgensen, *supra*, 49 Idaho L. Rev. at 568-71 (compiling Idaho appellate decisions enforcing contractual choice of law clauses).

[13] *See also Taylor v. Riley*, 162 Idaho 692, 403 P3d 636 (2017) (summarizing the Idaho portion of this litigation).