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The Need for Federal Solutions to Interstate and International Ethics Conflicts: A Case Study in Confidentiality

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THE NEED FOR FEDERAL SOLUTIONS TO INTERSTATE AND INTERNATIONAL ETHICS CONFLICTS: A CASE STUDY IN CONFIDENTIALITY

Jonathan M. Weiss*

Because of the lack of uniformity in the ethics rules of different states and countries, lawyers involved in interstate or international representations often face uncertainty regarding with which state's or country's ethics rules to comply. For example, California's confidentiality rule is extremely broad, only permitting disclosure in rare situations, while New Jersey's contains numerous exceptions. A lawyer involved in a transcontinental transaction may thus face an ethical quandary when deciding whether to disclose confidential information due to the competing obligations imposed by the states involved. Despite decades of debate regarding this subject, the uncertainty for lawyers remains, and the resulting harm to lawyers and their clients continues to escalate.

This Article examines the Model Rules of Professional Conduct, as promulgated by the American Bar Association, and carefully scrutinizes the state variations in adoption of these Model Rules which has given rise to this ethical dilemma. It examines in particular Model Rule 1.6, which governs confidentiality, and Model Rule 8.5, a choice-of-laws provision, which itself was promulgated by the ABA in an unsuccessful attempt to resolve our problem. This Article also proposes two sets of solutions, and concludes that only a solution involving federal legislation will finally resolve the issue and create certainty and predictability for lawyers. Finally, the Article analyzes the problem in the international context, and concludes that an international code of ethics to govern international transactions will best provide ethical certainty to lawyers.

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INTRODUCTION

Lawyers today routinely practice across state and national borders.¹ The multitude of jurisdictions involved in interstate and international representations creates ethical uncertainties for lawyers, since the ethics rules governing lawyer conduct differ from jurisdiction to jurisdiction.² To which state's rules shall a lawyer's conduct conform? This question has plagued scholars and practitioners alike for decades.³ This Article evaluates the existing pro-

¹ See, e.g., Jamie Y. Whitaker, *Remedying Ethical Conflicts in a Global Legal Market*, 19 GEO. J. LEGAL ETHICS 1079, 1079 (2006) (stating that many lawyers enjoy a "thriving practice with clients both locally and abroad").

² Teresa Stanton Collett, *Foreward*, 36 S. TEX. L. REV. 657 (1995) (the "expansion in multijurisdictional practice is complicated by the multitude of local rules governing attorneys' conduct.").

³ See, e.g., Geoffrey J. Ritts, *Professional Responsibility and the Conflict of Laws*, 18 J. LEGAL PROF. 17 (1993); Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331; Nia Marie Monroe, *The Need For Uniformity: Fifty*

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posed solutions, and concludes that a workable solution will require federal, rather than state, legislation.

To illustrate the complexity and pressing nature of the problem, consider the following⁴: A Los Angeles lawyer, licensed to practice in California, accepts an engagement to represent a New Jersey client in negotiations for a secured loan with a New York bank. The negotiations take place in the lawyer's California office, as well as in New York and New Jersey. Additionally, on a plane stop-over in Chicago en route to Los Angeles, the lawyer spends three hours in a conference room engaged in phone conversations, and then responds to a related e-mail somewhere 38,000 feet over Arizona on the second leg of the trip. Eventually, the New York bank agrees to lend the client \$10,000,000, secured by liens on the client's assets. The documents are executed, and the loan is scheduled to be funded shortly. A week later, the client calls the lawyer, and informs him that the collateral securing the loan doesn't actually exist. As the lawyer mentally races to comprehend the implications, the client says "I trust that this conversation is 100-percent confidential—thanks for your help!" and hangs up.

Lest one think this problem is confined to corporate lawyers conducting trans-continental business, consider the plight of a lawyer based in Mobile, Alabama, located on the Alabama-Florida border, and practicing in both states.⁵ The lawyer is informed by her Florida client that he intends to commit murder in Alabama. Should the lawyer inform the authorities? May she? Must she?

Finally, ponder the dilemma of an international lawyer carefully advising clients regarding a host of foreign laws.⁶ One domestic client may want advice on Hong Kong's laws related to selling the company's subsidiaries.⁷ A British client may want counseling on American corporate governance laws.⁸ The advice that the attorney provides will have effects in both the United States and abroad. Even if the lawyer understands the ethics rule of his or her home state, "what is an attorney to do when advising clients that do not share the same values, or practicing law in jurisdictions with differing ideas of professionalism?"⁹

Separate Voices Lead to Disunion in Attorney Internet Advertising, 18 GEO. J. LEGAL ETHICS 1005 (2005); Note, J. Mark Little, *The Choice of Rules Clause: A Solution to the Choice of Law Problem in Ethics Proceedings*, 88 TEX. L. REV. 855 (2010). The most telling aspect of these articles, and the impetus for this Article, is that despite repeated attempts at a solution, scholars since the early 1990s have been asking the same questions, with no apparent remedy.

⁴ Thanks to Professors Daniel J. Bussel and Kenneth N. Klee of the UCLA School of Law for sharing with me a close variation of this example. A version of this also appears in Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 The Answer, An Answer, or No Answer At All?*, 36 S. TEX. L. REV. 715, 717 (1995). Daly also notes that "scant attention [has been] paid to resolving inconsistent and conflicting professional standards." *Id.* at 721. Finally, Professor Stephen Gillers uses the confidentiality context to illustrate the problems which arise from state variation in ethics rules. STEPHEN GILLERS, *ESSENTIALS: REGULATION OF THE LEGAL PROFESSION* 47 (2009).

⁵ Student Commentary, Carla C. Ward, *The Law of Choice: Implementation of ABA Model Rule 8.5*, 30 J. LEGAL PROF. 173, 175-76 (2006). For an analysis of the legality of practicing in both states (assuming the attorney is licensed in only one the two states), see *infra* Part II.A discussing the multi-jurisdictional practice of law.

⁶ Whitaker, *supra* note 1, at 1079.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1079-80. Whitaker concludes that "[s]uch an international environment is ripe for ethical conflicts that are not easily remedied," and that "[o]ne area where potential ethical conflicts can clearly arise is attorney-client confidentiality." *Id.* See *infra* Part V for a discussion of international issues.

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In all of these cases, the lawyers involved face uncertainties due to the potential applicability of several states' or countries' ethics rules for the same conduct.¹⁰ Ethics rules have been proposed by the American Bar Association (the "ABA") in the form of Model Rules.¹¹ The ethics rules cover a variety of topics such as confidentiality,¹² truthfulness,¹³ advertising,¹⁴ conflicts of interest,¹⁵ and jurisdiction.¹⁶ The problem with the Model Rules, however, is that they are simply suggestions. States are free to adopt the rules, or variations thereof, as they see fit—or to simply refuse adoption altogether.¹⁷ "The result [of this variation] is countless, important differences between the ethics rules of different jurisdictions."¹⁸ Consider our first example. California's confidentiality rule is among the strictest in the nation, mandating confidentiality except in the most dangerous of circumstances.¹⁹ New Jersey, on the other hand, not only allows, but mandates, broad exceptions to confidentiality.²⁰ Model Rule 1.6 lies in the middle, providing for permissive, but not mandatory disclosure, in a broader array of circumstances than does California.²¹ A lawyer facing these facts would face uncertainty regarding whether to disclose the financial fraud perpetrated by the client to authorities, and may even face discipline by one state if he or she chooses to follow the laws of another.²² This discrepancy in laws creates uncertainty for lawyers caught in ethical dilemmas.

To date, several solutions have been suggested. The ABA itself has frequently amended Rule 8.5, its choice-of-law provision, to try, unsuccessfully, to solve this problem

¹⁰ Jeffrey L. Rensberger, *Jurisdiction, Choice of Law, and the Multistate Attorney*, 36 S. TEX. L. REV. 799, 801 (1995). Rensberger notes that "[t]hese situations pose a classic problem in choice of law." *Id.* at 800.

¹¹ ABA MODEL RULES OF PROF'L CONDUCT. Hereinafter, these will be referred to as the "Model Rules" and each, individually, a "Model Rule."

¹² Model Rule 1.6.

¹³ Model Rule 4.1.

¹⁴ Model Rule 7.2.

¹⁵ Model Rule 1.7.

¹⁶ Model Rule 5.5.

¹⁷ H. Geoffrey Moulton, *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 84 (1997) (noting that the Model Rules are "increasing the extent to which individual states deviated from the ABA-expressed norms.").

¹⁸ Arvid E. Roach II, *The Virtues of Clarity: The ABA's New Choice of Law Rule For Legal Ethics*, 36 S. TEX. L. REV. 907, 910 (1995).

¹⁹ CALIFORNIA RULES OF PROF'L CONDUCT R. 3-100 [hereinafter the "California Rule"] ("A member may, but is not required to, reveal confidential information . . . to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.").

²⁰ NEW JERSEY DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.6 [hereinafter the "New Jersey Rule"] ("A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person: (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.").

²¹ Model Rule 1.6. See also GILLERS, *supra* note 4, at 47-52.

²² Model Rule 8.4 provides that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct." Model Rule 8.5 provides that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs."

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internally.²³ This Rule purports to dictate to states which state should have jurisdiction over a given representation or transaction. Some scholars have proposed a uniform federal code of ethics.²⁴ Others have suggested allowing firms and clients to choose which state's ethics laws should govern their transactions.²⁵ Yet others have proposed imposing a "minimum contacts" standard on each transaction or representation, and imposing the ethics laws of the state which is most closely related to a given transaction or client.²⁶ Despite a clear acknowledgement of this problem, several scholarly attempts at providing a solution, and numerous recent amendments by the ABA to the Model Rules, the uncertain status quo persists, and the very same 'hypotheticals' used back in 1995 are still being used and taught today.²⁷ Thus, this Article concludes that it is time to embrace federal legislation, whether through the creation of a uniform choice-of-law rule, or through a uniform ethics code, as a way to increase predictability and certainty in the legal profession.

Part I of this Article analyzes the disclosure requirements under the Model Rules.²⁸ It first discusses the history and origins of the Model Rules, and then analyzes Model Rule 4.1, which involves disclosures made in negotiations. It then takes a detailed look at Model Rule 1.6, which, through the duty of confidentiality, limits the disclosures required by Model Rule 4.1. Changes to the Model Rule in the 2000s will be analyzed, as will the policy behind the rule. Finally, and most importantly, substantive state-by-state differences will be closely scrutinized.

Part II will discuss jurisdictional elements of the Model Rules.²⁹ Because state variation in the law only becomes problematic if lawyers are permitted to practice across state lines, a brief explanation of Rule 5.5, which governs the multi-jurisdictional practice of law, will follow. Finally, Part II concludes by analyzing in greater detail Rule 8.5, which attempts, quite unsuccessfully, to solve our problem by mandating choice-of-law rules among state-by-state variations in the ethics rules.

Parts III and IV then discuss and analyze solutions.³⁰ Part III discusses solutions requiring state-by-state adoption, while Part IV details those solutions premised on federal legislation. These two Parts conclude that only federal legislation, whether procedural or substantive, can completely resolve the ethics problem that has existed for decades.³¹ Finally, Part V goes a step further, analyzing the problem in an international context, and attempting to apply the solutions from Parts III and IV globally.³²

²³ See, e.g., Daly, *supra* note 4; Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT'L L. 1035, 1037-40 (2009) ("In later versions, Rule 8.5's limitation to interstate practice was abandoned and it was expressly extended to transnational activities . . . [t]he problem, however, is that the current version of Rule 8.5 does not resolve these conflicts.").

²⁴ Note, *Uniform Federal Rules of Attorney Conduct: A Flawed Proposal*, 111 HARV. L. REV. 2063 (1998).

²⁵ Little, *supra* note 3; Daly, *supra* note 4.

²⁶ Colin Owyang, Note, *Professional Responsibility and Choice of Law: A Client-Based Alternative to the Model Rules of Professional Conduct*, 28 U. MICH. J.L. REF. 459 (1995).

²⁷ See *supra* notes 3-6. The year 1995 is used because in that year the South Texas College of Law devoted an issue of its Law Review to this topic. Several articles quoted in this Article come from that issue.

²⁸ *Infra* Part I.

²⁹ *Infra* Part II.

³⁰ *Infra* Part III and Part IV.

³¹ *Id.*

³² *Infra* Part V.

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Because confidentiality is one of the most varied and most important rules, this Article will use confidentiality in negotiation as a case study within which to analyze the problem.³³

I. DISCLOSURE AND CONFIDENTIALITY IN NEGOTIATIONS

A. Origins of the Model Rules

The first official codification of legal ethics in the United States was the ABA's Canons of Professional Ethics in 1908 (the "Canons").³⁴ As the Canons had no binding effect, they were simply ways to "memorialize the profession's long-standing ethical traditions."³⁵ The Canons "consisted of thirty-two hortatory statements that insisted that a lawyer pursue the high road in every endeavor."³⁶ The Canons, therefore, were simply "fraternal admonitions," and had no legal or binding effect, and were wholly unenforceable in court.³⁷ "[The Canons'] syntax was exhortatory as often as it was obligatory and they made no pretence at precision or completeness. They did not have the authority of law, for they were not legislatively adopted as such and were regarded by the courts as advisory at most."³⁸ The result of a Canon violation was generally only "fraternal disapprobation."³⁹ Due to this lack of bite,⁴⁰ the ABA, in 1969, promulgated the Model Code of Professional Responsibility (the "Model Code").⁴¹ The Model Code consisted of three sections: Canons, Ethical Considerations, and Disciplinary Rules.⁴² The first two sections served only as "interpretive guidance" and as "inspirations to ideals"—similar to the Canons.⁴³ The difference, though, was reflected in the Disciplinary Rules, which were intended to be used by the courts in order to discipline lawyers.⁴⁴ Most state and federal jurisdictions adopted portions of the Model Code,⁴⁵ although the adoption process was "selective,"⁴⁶ particularly in the amendments

³³ See Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 199 (1987) (noting that the idea for a "Restatement" originally began as an idea wholly devoted to confidentiality); Fred C. Zacharias, *A Nouveau Realist's View of Interjurisdictional Practice Rules*, 36 S. TEX. L. REV. 1037, 1049 (1995) ("The areas in which state codes conflict the most—and the areas in which states probably have the highest stake—are confidentiality and advertising.").

³⁴ Susanna Felleman, Note *Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice of Law Rule in the Model Rules of Professional Conduct*, 95 COLUM. L. REV. 1500, 1505 (1995).

³⁵ *Uniform Federal Rules*, *supra* note 24, at 2064; see also Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L. J. 1239, 1249 (1991).

³⁶ CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 54 (1986).

³⁷ Hazard, *supra* note 35, at 1250.

³⁸ Geoffrey C. Hazard, *Rules of Legal Ethics: The Drafting Task*, 36 REC. ASS'N B. CITY N.Y. 77 (1981).

³⁹ Felleman, *supra* note 34, at 1505 (quoting Hazard, *supra* note 35, at 1251).

⁴⁰ The Wright Committee, charged in 1964 with reviewing the Canons, concluded that they were "incomplete, ambiguous, impractical for enforcement, insufficient as a guiding and teaching tool, and not up to the challenges of a more complex legal community and society." Chris G. McDonough & Michael L. Epstein, *Regulating Attorney Conduct: Specific Statutory Schemes v. General Regulatory Guidelines*, 11 Touro L. REV. 609, 610 (1995).

⁴¹ William Freivogel, *ABA Model Rules and the Business Lawyer*, available at <http://www.abanet.org/buslaw/newsletter/0077/materials/ethics.pdf>.

⁴² Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 926 (2002).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

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thereto.⁴⁷ Even before its adoption, the Model Code was subject to several criticisms,⁴⁸ which ultimately led to the promulgation of the ABA's 1983 Model Rules of Professional Conduct (the "Model Rules"),⁴⁹ which are in place today, and which will be the focal point of this Article.

Because the form of the Model Rules was statutory, as opposed to the form of the Canons and the Model Code, which was primarily "expansive and strongly self-justifying," the Model Rules were intended to operate as "legally binding obligations," and not "merely as professional guidelines."⁵⁰ However, because in 1983, "many states had only recently adopted the Code, and there was substantial hesitance on the part of many jurisdictions to switch ethics codes again so rapidly,"⁵¹ the reaction to the Model Rules was lukewarm.⁵² Thus, many states did not immediately adopt the Model Rules, and even when they did, the substance of the Model Rules was often altered significantly by individual states.⁵³ At present, almost every state (California has never fully embraced the Model Rules⁵⁴) has adopted some form of the Model Rules, although substantive changes abound. The problem of the Model Rules, and of any "Model" law, is as follows:

The ABA is a private organization. It has no power to tell any lawyer how to behave. All it has is its . . . hope that its recommendations will be persuasive on the merits. . . . The ABA presents its work for the consideration of the nation's courts. Starting with the ABA's model, courts can make whatever changes they wish as they assess the policy choices. And they do make changes, sometimes small ones, occasionally large ones.⁵⁵

Differences are especially large in the realms of confidentiality, conflicts of interest, and lawyer advertising and solicitation.⁵⁶ The many state variations in the Model Rules present a major problem for lawyers, as state variation is a serious problem in a legal world dominated by interstate and international transactions. The remaining Parts of this Article will

⁴⁶ Felleman, *supra* note 34, at 1505-06 ("[T]he adoption process was selective, with many states completely ignoring some provisions and significantly altering others. The increased attention that the states paid to the substance of the rules was probably due to the Code's new emphasis on disciplinary action.").

⁴⁷ See also WOLFRAM, *supra* note 36, at 57 ("In contrast to the rather uniform reception of the text of the original code, some of the important Code amendments have been rejected by a large majority of states or many states adopted amendments that differed materially from the version recommended by the ABA.").

⁴⁸ *Id.* at 60. See *id.* for a variety to criticisms leveled at the Model Code.

⁴⁹ Felleman, *supra* note 34, at 1506 ("[T]he ABA appointed another committee to study the Code and . . . this process resulted in the Model Rules . . . promulgated in 1983."); Moore, *supra* note 42, at 926 ("In 1977 . . . the Kutak Commission was appointed to correct what were perceived as *serious defects* in the Code.") (emphasis added); GILLERS, *supra* note 4, at 7 ("Its short life attests to its many inadequacies.").

⁵⁰ Hazard, *supra* note 35, at 1253-54. Professor Hazard also notes that the process, not simply the substance, of the Model Rules promoted an aura of authority, as the drafting of the Model Rules was "quasi-legislative," complete with interim drafts made available to the public, a final draft, and two counter drafts. *Id.* at 1253. See also GILLERS, *supra* note 4, at 6-7 (noting that the use of the word "Rules" instead of "Ethics" implies that what may previously have been simply "soft and penumbral, akin to etiquette," is now "hard and real, the law").

⁵¹ Ritts, *supra* note 3, at 18.

⁵² Felleman, *supra* note 34, at 1506.

⁵³ *Id.* at 1506-07.

⁵⁴ GILLERS, *supra* note 4, at 8. "[N]or did it fully embrace the [Model] Code." *Id.*

⁵⁵ *Id.* at 7-8.

⁵⁶ *Id.* at 8.

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examine certain of the Model Rules in greater detail (as well as the amendments thereto, which are particularly enlightening as they sometimes shed light on how the ABA has tried to internally reconcile this problem) to portray the severity of this problem, and will attempt to discuss and propose solutions.

B. Disclosure of Information in Negotiations

1. Disclosure

Before discussing confidentiality, it is important first to look at a lawyer's general duty (or lack thereof) of disclosure and truthfulness outside of the courtroom—as, if no general obligation of truthfulness and disclosure existed, there would be no need for unique rules for confidential matters. When must a lawyer disclose a fact? When can a lawyer omit a fact? Can a lawyer misrepresent a fact? If not, then must a lawyer *always* be completely truthful?

“Lawyers repeatedly negotiate. . . . They interact with colleagues within their own firms, and they interact with prospective clients and current clients. . . . They also negotiate on behalf of clients with external parties.”⁵⁷ Scholars have offered countless opinions regarding the level of truthfulness required in negotiations. “The ethics of bargaining have long been recognized as morally complicated.”⁵⁸ On the one hand,

[T]he negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player . . . he must facilitate his opponent's inaccurate assessment To conceal one's true position, to mislead an opponent about one's true settling point is the essence of negotiation.⁵⁹

On the other hand, “[t]he lawyer must act honestly and in good faith. Another lawyer . . . should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar”⁶⁰ The Model Rules present guidance on these issues. Model Rule 4.1, entitled “Truthfulness in Statements to Others,” states:⁶¹

⁵⁷ Charles B. Craver, *Negotiation Ethics For Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299, 300 (2010).

⁵⁸ Art Hinshaw & Jess K. Alberts, *Attorney Negotiation Ethics: An Empirical Assessment*, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=art_hinshaw.

⁵⁹ James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927-28 (1980). See also Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1395 (1986) (“If lawyers were forbidden from engaging in these lies, they would be at a tremendous disadvantage when negotiating with any nonlawyer.”); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219, 1220 (1990) (“If it is true that lawyers succeed in the degree to which they are effective in negotiations, it is equally true that one's effectiveness in negotiations depends in part upon one's willingness to lie.”).

⁶⁰ Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1975).

⁶¹ Model Rule 4.1. Model Rule 3.3, which also deals with truthfulness, is only applicable in cases before a tribunal. Model Rule 3.3; Jay M. Levin & Alicia M. Schmitt, *Balancing the Model Rules and Zealous Advocacy: Don't Step Over That Line*, 39-SPG BRIEF 54, 56 (2010); Hinshaw & Alberts, *supra* note 58, at 13 (“[Rule 3.3 is] not specifically tailored to the negotiation process.”).

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In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.⁶²

The first prong appears to unequivocally prohibit lying.⁶³ Indeed, Charles Craver, a noted authority on negotiation, reads this prong to be “a paragon of clarity. A lawyer may not lie.”⁶⁴ However, this prong only prohibits lying with respect to “material” facts. While the Model Rules fail to define “material,” a court has attempted to clarify the matter. “A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the [deal].”⁶⁵ More frequently, though, materiality is defined not by what it is, but rather, by what it is not. Comment 2 to Model Rule 4.1 explains that “[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category.”⁶⁶ Thus, although Rule 4.1 at first glance appears to require complete truthfulness, Comment 2, in acquiescence to the “reality of bargaining interactions,” excludes puffery and embellishment.⁶⁷ Several cases where a lawyer was found to have materially misrepresented a fact can shed light on what can be considered “material.” In *Slotkin v. Citizens Casualty Co. of New York*⁶⁸, a lawyer was disciplined for affirmatively lying about the extent of coverage under an insurance policy.⁶⁹ In *Mississippi Bar v. Mathis*⁷⁰, a gruesome case involving death, autopsies, and exhumation, a lawyer was suspended for affirmatively stating that no autopsy had been done, when, in fact, he knew that one had been performed.⁷¹

2. Omissions

The second prong, Model Rule 4.1(b), deals with omissions. Comment 2 states that a lawyer “generally has no affirmative duty to inform an opposing party of relevant facts.”⁷² Comment 3, however, qualifies that, and states that “[i]f the lawyer can avoid assisting a client’s crime or fraud only by disclosing [] information, then under paragraph (b) the lawyer

⁶² Model Rule 1.6 is the confidentiality rule, and is a statutory limitation on the rule governing omissions.

⁶³ See Model Rule 4.1(a).

⁶⁴ Craver, *supra* note 57, at 306. See also Model Rule 4.1 cmt. 1 (“A lawyer is required to be truthful when dealing with others on a client’s behalf . . .”).

⁶⁵ *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 449 (D. Md. 2002). The attorney in this case promised, in the course of negotiations, that in return for a substantial cash payment, he would disclose the identity of a “mole” who had penetrated bank secrecy. When it became known that the “mole” did not exist, the court found an affirmative misrepresentation.

⁶⁶ Model Rule 4.1 cmt. 2.

⁶⁷ Craver, *supra* note 57, at 306.

⁶⁸ 614 F.2d 301 (2d Cir. 1979), *cert. denied* *Citizens Cas. Co. of N.Y.*, 449 U.S. 981 (1980).

⁶⁹ *Id.* at 311.

⁷⁰ 620 So.2d 1213 (Miss. 1993).

⁷¹ *Id.* at 1221.

⁷² Model Rule 4.1 cmt. 2.

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is required to do so, unless the disclosure is prohibited by Rule 1.6.⁷³ Many omissions, however, are governed by Model Rule 4.1(a), not Model Rule 4.1(b). Comment 1 states that “[m]isrepresentations can also occur by partially true but misleading statements or *omissions that are the equivalent of affirmative false statements*.”⁷⁴ Thus, “a lawyer may . . . violate Model Rule 4.1 without affirmatively stating a falsehood,” and even when not related to a crime or fraud perpetrated by a client.⁷⁵ Thus, these two statements “create ambiguity in the ethical standards . . . because on one hand they grant that there is no affirmative duty to disclose material facts, but then [state] that an omission of material facts can be unethical”⁷⁶ Several cases finding liability involve a lawyer accepting a settlement without disclosing the death of a client.⁷⁷ Another extremely broad finding of liability for omission involved a lawyer knowing that an insurance policy contained coverage of \$1 million, and sitting idly while his adversary stated his own, incorrect, assumption that the policy only carried coverage of \$150,000.⁷⁸ The court found that this was a material misrepresentation by omission, notwithstanding the lack of any affirmative factual misrepresentation of any kind.⁷⁹

In sum, Model Rule 4.1 creates a duty of truthfulness outside the context of the courtroom, which lawyers must adhere to during negotiations.⁸⁰ The rule is limited, though, by Model Rule 1.6’s confidentiality requirement.⁸¹ By way of clarification—Model Rule 4.1(b), as we have seen, purports to *require* any disclosure to prevent fraud or crime.⁸² What result if such information is confidential? May the lawyer disclose it? Must the lawyer disclose it? Moreover, Comment 1 seems to require many other disclosures, even without any crime or fraud.⁸³ Does Rule 1.6 allow that? Now that we understand that there is a truthfulness requirement in negotiations and we have analyzed the scope of that requirement, we can turn to the more restrictive rule of confidentiality, as Model Rule 4.1 and Model Rule 1.6 are best understood in tandem.⁸⁴ This Article will now examine the substance, policy, exceptions, and, most importantly, the many variations between states, of the confidentiality requirement.

⁷³ Model Rule 4.1 cmt. 3.

⁷⁴ Model Rule 4.1 cmt. 1 (emphasis added).

⁷⁵ E. Cliff Martin & T. Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 GEO. J. LEGAL ETHICS 777, 779 (2002).

⁷⁶ Patrick McDermott, *Lying By Omission? A Suggestion For the Model Rules*, 22 GEO. J. LEGAL ETHICS 1015, 1021 (2009). “It is unclear at what pint the choice to withhold certain facts becomes an omission equivalent to an affirmative false statement.” *Id.*

⁷⁷ See *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 511 (E.D. Mich. 1983) (holding that the non-disclosure of the client’s death was a material misrepresentation, despite the lawyer never affirmatively claiming that his client was alive, because the loss of the client’s testimony “would have had a significant bearing on defendants’ willingness to settle”); *Kentucky Bar Ass’n v. Geisler*, 938 S.W.2d 578, 580 (Ky. 1997).

⁷⁸ *Nebraska v. Addison*, 412 N.W.2d 855, 856 (Neb. 1987).

⁷⁹ *Id.*

⁸⁰ See *supra* note 61.

⁸¹ See Model Rule 4.1(b) (“[U]nless disclosure is prohibited by Rule 1.6.”).

⁸² Model Rule 4.1(b).

⁸³ Model Rule 4.1 cmt. 1.

⁸⁴ *Hinshaw & Alberts*, *supra* note 58, at 12 (“Reading Rule 4.1(b) with Rule 1.6 . . . negates [an erroneous] conclusion.”). See also GILLERS, *supra* note 4, at 278-81 (attempting to reconcile Model Rule 4.1 with Model Rule 1.6).

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C. Confidentiality

1. Overview and History

One of the most important duties⁸⁵ owed to clients by lawyers is to conceal confidential information; however, its practical application is among the most controversial.⁸⁶ The duty of confidentiality protects any information that the lawyer learns in the course of the representation of the client, regardless of the source of the information.⁸⁷ Thus, this requirement protects against voluntary disclosures, and overrides the disclosure requirements of Model Rule 4.1.⁸⁸ While the Model Rules, and each state's adopted version of the Model Rules, all agree that voluntary disclosure of confidential information is prohibited, there is much disagreement with respect to exceptions to confidentiality. Should a lawyer be permitted to disclose confidential information to prevent a death? Should a lawyer be required to do so? Should it make a difference if there will be only serious bodily harm, but not death? What about financial harm?

The first rule of confidentiality appeared in the Canons, and ordained that "it is the duty of a lawyer to preserve his client's confidences."⁸⁹ However, the duty did not apply when disclosure regarded the "intention of a client to commit a crime."⁹⁰ Thus, this original rule of confidentiality was not absolute, and contained an exception for criminal activity.⁹¹ The duty of confidentiality under the Model Code also contained exceptions. While the Model Code recognized "the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client,"⁹² it provided for exceptions in cases of (1) consensual disclosure, (2) disclosure "required by law or court order," (3) disclosure of the "intention . . . to commit a crime and the information necessary to prevent the crime," and (4) confidences necessary to collect a fee or defend against allegations of wrongful activity.⁹³ The exceptions to confidentiality were then changed in the 1983 promulgation of the Model Rules.⁹⁴

2. Model Rule 1.6

The original Model Rule 1.6, as proposed by the ABA in 1983, remained unchanged between 1983 and 2002.⁹⁵ The rule read:

⁸⁵ *Commonwealth v. Perkins*, 883 N.E.2d 230, 245 (Mass. 2008) (quoting *Commonwealth v. Downey*, 793 N.E.2d 227 (Mass. App. Ct. 2003)).

⁸⁶ Krysten Hicks, *Thresholds For Confidentiality: The Need For Articulate Guidance in Determining When to Breach Confidentiality to Prevent Third-Party Harm*, 17 *TRANSNAT'L LAW.* 295, 298 (2004).

⁸⁷ GILLERS, *supra* note 4, at 40 (distinguishing confidentiality from privilege).

⁸⁸ *Id.* at 42; Model Rule 4.1(b).

⁸⁹ CANONS OF PROF'L ETHICS Canon 37 (1928).

⁹⁰ *Id.*

⁹¹ David Lew, *Revised Model Rule 1.6: What Effect Will the New Rule Have on Practicing Attorneys?*, 18 *GEO. J. LEGAL ETHICS* 881, 882 (2005).

⁹² MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1980).

⁹³ MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101.

⁹⁴ See Lew, *supra* note 91, at 883 ("[T]he committee drafted a new set of ethical rules . . . [c]onfidentiality was addressed in Rule 1.6 . . .").

⁹⁵ Amanda Vance & Randi Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 *GEO. J. LEGAL ETHICS* 1003, 1004 (2004).

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(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

1. To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
2. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client⁹⁶

Importantly for our purposes, the Original Rule contained a very narrow exception to confidentiality; namely, confidentiality could be breached when the client would otherwise (i) commit a criminal act, (ii) that the lawyer reasonably believes is likely to result in (iii) imminent (iv) death or substantial bodily harm.⁹⁷ Thus, under the Original Rule, a disclosure required to prevent death was not permitted if the death would not result from a criminal act committed by a client.⁹⁸ The Original Rule was criticized for its restrictive nature, and failure to allow for broader exceptions to confidentiality.⁹⁹

The current version of Rule 1.6 is the result of two sets of revisions in the early 2000s based on proposals by the “Ethics 2000” commission, a group charged in 1997 to “undertake a comprehensive study and evaluation of the ABA [Model Rules] in light of developments in the law and in the legal profession since the Rules’ adoption in 1983.”¹⁰⁰ The first revision, in 2002, removed the requirement that the death or bodily harm be *imminent* and instead required only that it be *reasonably certain*, and also removed the significant constraint of requiring a criminal act.¹⁰¹ The second revision, in 2003, was triggered by the corporate financial scandals of the early 2000s,¹⁰² and allowed, but did not require, a lawyer to disclose confidential information to prevent, mitigate, or rectify serious financial harm.¹⁰³ This is significant, as the Original Rule was simply prospective, allowing disclosure to *prevent* future

⁹⁶ Model Rule 1.6 (1983) (hereinafter the “Original Rule”).

⁹⁷ *Id.*

⁹⁸ See Lew, *supra* note 91, at 881-82 (relating a story involving a lawyer with the potential to save a life by disclosing confidential information, even though it did not involve a criminal act by his client).

⁹⁹ *Id.* at 884.

¹⁰⁰ See generally Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 450-51 (2002) (discussing the changes to confidentiality and the other Model Rules proposed by the Ethics 2000 commission).

¹⁰¹ Vance & Wallach, *supra* note 95, at 1006-07 (“The Revised Rule replaces ‘imminent’ with ‘reasonably certain,’ in order to ‘include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic torts.’ . . . [s]ignificantly, the Revised Rule 1.6(b)(1) does not have the requirement of client criminality.”).

¹⁰² *Id.* at 1007.

¹⁰³ See Report of the ABA Task Force on Corporate Responsibility, available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf (“[T]he Task Force believes that the lawyer must be permitted, where the crime or fraud has resulted or is reasonably certain to result in substantial injury to the financial interests or property of third parties, to reveal information relating to the representation as reasonably believed necessary to prevent the commission of, or to prevent or rectify the consequences of, the crime or fraud.”).

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injury, whereas the revised rule contained a retrospective component, permitting disclosure to mitigate or rectify damages that had already occurred.¹⁰⁴ The resulting, and current, Model Rule 1.6, reads:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent *reasonably certain* death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result *in substantial injury to the financial interests or property* of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to *prevent, mitigate or rectify* substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; . . .¹⁰⁵

3. Competing Policies of Confidentiality

What underlies the debate surrounding, and the revisions to, the rule of confidentiality? "A basic conflict has emerged: some lawyers are worried that clients will no longer trust their attorneys if the strict confidentiality rules are relaxed, while others fear that maintaining the strict confidentiality rules will have irreparable effects on the public perception of the legal profession."¹⁰⁶ Proponents of confidentiality argue that a strong guarantee of confidentiality is essential to effective communication between lawyers and clients.¹⁰⁷ "If clients become aware of broad exceptions to their lawyer's confidentiality obligation, they may hold back information that they consider harmful to their interests because they are unsure whether the lawyer will be free to, or required to, reveal the information."¹⁰⁸ There were those who feared that the adoption of Model Rule 1.6 in 1983 would damage the pro-client approach supported by a broad duty of confidentiality.¹⁰⁹ Moreover, proponents of a broad duty of confidentiality, without exceptions, argue that broadening the confidentiality requirement will

¹⁰⁴ GILLERS, *supra* note 4, at 277.

¹⁰⁵ Model Rule 1.6 (emphasis added) (subsections (b)(4), (b)(5), and (b)(6) have been omitted).

¹⁰⁶ Vance & Wallach, *supra* note 95, at 1009.

¹⁰⁷ See GILLERS, *supra* note 4, at 45 ("Lawyers who strongly favor broad confidentiality duties and narrow exceptions stress the need for client trust and candor.").

¹⁰⁸ *Id.* at 45-46. See also Ellen E. Deason, *The Quest For Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability*, 85 MARQ. L. REV. 79, 80-81 (2001) ("[C]onfidentiality fosters communication between the parties . . . confidentiality enhances the freedom to communicate, enabling [the] trusted figure to gather the information necessary and to advise the party accordingly, without the client . . . fearing that those communications might be turned against him in a legal proceeding.").

¹⁰⁹ See Carolyn Crotty Gutilla, Note, *Caught Between a Rock and a Hard Place: When Can or Should an Attorney Disclose a Client's Confidence?*, 32 SUFFOLK U. L. REV. 707, 707-08 (1999).

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in turn reduce client misconduct, as clients will more regularly disclose potential criminal or fraudulent activity to lawyers, who will then caution the client against such action.¹¹⁰ Additionally, many proponents of a broad duty of confidentiality argue that lawyers are not public servants, and owe their only duty to their client, no matter the cost to society.¹¹¹ Lastly, some proponents of a broad duty of confidentiality argue that “the autonomy and personhood of clients demands that society afford them a safe place where they can confide in an expert in order to get advice about a legal terrain often much too complicated for nonlawyers to understand without help.”¹¹²

On the other hand, there are those who favor broad exceptions to confidentiality. Professor Gillers writes:

[T]he main reason that proponents of broader exceptions give for their position is that the effect on client candor is not as important as countervailing interests. From the perspective of wise social policy, they say, the exceptions they favor reach the correct balance between the value of client trust and candor and the valid interests of others.¹¹³

Supporters of broad exceptions believe that lawyers should not hide behind their protective wall of confidentiality and ignore potential ills to society. Rather, they should recognize the moral path, and work in the best interest of society to prevent third-party harm.¹¹⁴ The preamble to the Model Rules also supports the argument that lawyers should act in society’s best interest.¹¹⁵ Lastly, the revisions to Model Rule 1.6 in the early 2000s also reflected this growing belief that the need for attorney-client trust must be tempered by concern for the greater good.¹¹⁶

The foregoing arguments, and the resulting “debate over the appropriate balance between encouraging client trust, on the one hand, and the interests of other person and the courts, on the other” has led to the inability of the states to uniformly adopt Rule 1.6.¹¹⁷ Instead, different states have adopted profoundly different versions of Rule 1.6.

¹¹⁰ *Id.* at 709.

¹¹¹ Vance & Wallach, *supra* note 95, at 1010 (quoting Sarah Boxer, *Lawyers are Asking, How Secret is a Secret?*, N.Y. TIMES, Aug. 11, 2001, at B7 (“Academics have this lofty notion that lawyers should do good for society. But I’m not buying it. I don’t think we should put lawyers in a position where they have duties to the public, except in cases of death or bodily harm.”)).

¹¹² GILLERS, *supra* note 4, at 46.

¹¹³ *Id.* at 46-47.

¹¹⁴ Hicks, *supra* note 86, at 313-14 (“In addition, lawyers are members of society, and have a duty to their fellow members of the community. Accordingly, the exception does not permit lawyers to hide behind a wall of confidentiality and pretend that they are unaware of the potential harm the client poses.”).

¹¹⁵ Model Rules Preamble (describing the attorney as “an officer of the legal system and a public citizen having special responsibility for the quality of justice”).

¹¹⁶ The revision allowing for disclosure when death or bodily injury is “reasonably certain,” even without a criminal act, “recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.” Model Rule 1.6 cmt. 6. The revision allowing for disclosure in cases of financial injury results from “[e]vents like the September 11th attacks and the Enron crisis, [which] have made ‘people a little more mindful and sensitive about the role lawyers can and should play in providing a system of accountability.’” Vance & Wallach, *supra* note 95, at 1016 (quoting *ABA Task Force Revised Recommendations on Model Rule Changes Generally Welcomed*, Law. Man. On Prof. Conduct (ABA/BNA) (May 7, 2003)).

¹¹⁷ GILLERS, *supra* note 4, at 47.

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4. State Variations and Examples

California lawyers practice under the strictest confidentiality regime of any state.¹¹⁸ The California exceptions to confidentiality are:

(B) A member *may, but is not required to*, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary *to prevent a criminal act* that the member reasonably believes is likely to result in *death of, or substantial bodily harm to*, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.¹¹⁹

The California Rule thus mostly ignores the revisions to Model Rule 1.6, and, in order to warrant disclosure, requires a criminal act, and reasonably likely death or substantial bodily harm.¹²⁰ Amazingly, even these exceptions were only added recently, becoming operative on July 1, 2004!¹²¹ Moreover, mere financial injury is no grounds for disclosure in California—in fact, “[i]n 1983, the State Bar Board of Governors directed its representatives to the ABA House of Delegates not to vote for a proposal to amend the ABA Model Rules of Professional Conduct because that proposal included provisions that could result in revealing client information concerning fraud.”¹²² Clearly, the California legislature values client trust and candor more than it does preventing third-party harm.¹²³

¹¹⁸ Kevin E. Mohr, *California's Duty of Confidentiality: Is It Time for a Life-Threatening Criminal Act Exception?*, 39 SAN DIEGO L. REV. 307, 307 (2002).

¹¹⁹ California Rule (emphasis added).

¹²⁰ *Id.* at 3-100(B).

¹²¹ State Bar of California Standing Committee on Professional Responsibility and Conduct, E-mail to Sue Daly, Feb. 3, 2005, at 2, available at <http://www.abanet.org/buslaw/attorneyclient/publichearing20050211/testimony/coprac.pdf>.

¹²² *Id.* at 3.

¹²³ See California Rule cmt. 1:

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The New Jersey legislature has also varied from the ABA's Model Rule, but has done so to the other extreme.¹²⁴ "New Jersey retained its own language in many rules, and added unique wording to other rules."¹²⁵ New Jersey Disciplinary Rule of Professional Conduct 1.6 provides that exceptions to confidentiality include:

(b) A lawyer *shall* reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a *criminal, illegal or fraudulent act* that the lawyer reasonably believes is likely to result in death or substantial bodily harm *or substantial injury to the financial interest or property* of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also *may* reveal the information *to the person threatened* to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer *may* reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used; . . .¹²⁶

Significantly, unlike the Model Rule and the California Rule, the New Jersey Rule contains some provisions which are mandatory, as opposed to permissive.¹²⁷ Thus, the legislature has imposed "an affirmative duty on the lawyer to speak out in regard to the enumerated contemplated acts of the client."¹²⁸ By contrast, a "California lawyer who knows that his client, armed and dangerous, plans to commit an imminent violent crime *is not ethically obli-*

[I]t is a duty of a member: "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. . . . [A] fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation.

(internal citations omitted). See also E-mail to Sue Daly, *supra* note x, at 3 ("The State Bar of California has a long history of opposing the promulgation of exceptions to the ethical duty of confidentiality.").

¹²⁴ New Jersey Rule cmt. ("The rule adopted here differs significantly from . . . the ABA Model Rule 1.6.").

¹²⁵ *New Jersey Overhauls Ethics Rules, With Many Departures From ABA Models*, 19 Law. Man. On Prof. Conduct 545 (Sept. 24, 2003). "In all, only about a dozen of New Jersey's rules match the language of their Model Rule counterparts." *Id.* "On the subject of client confidentiality, New Jersey's Rule 1.6 differs substantially from the ABA model." *Id.*

¹²⁶ New Jersey Rule (emphasis added).

¹²⁷ See New Jersey Rule at 1.6(b) ("[A] lawyer *shall* . . .") (emphasis added).

¹²⁸ New Jersey Rule cmt. 1.

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gated to call the police or warn the intended victim.”¹²⁹ Moreover, New Jersey expands the scope of the exception by providing for permissive disclosure to the person threatened.¹³⁰ In sum, New Jersey’s version of Model Rule 1.6 “is one of the broadest exceptions in the nation not only because of the scope of the harm it aims to avoid (physical as well as financial) but also because lawyers have no discretion to remain silent. The verb phrase is ‘shall reveal.’”¹³¹ Between these two extremes lies Model Rule 1.6, which, similarly to California, does not require mandatory disclosure, but, similarly to New Jersey, does permit disclosure for financial harm.¹³²

Other states have varied from the Model Rules as well. The New York version allows for permissive disclosure to, *inter alia*, “prevent reasonably certain death or substantial bodily harm”¹³³ or a “crime.”¹³⁴ While it does not explicitly permit disclosure for financial injury, and the comments thereto plainly state that “an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph [Rule 1.6](b)(1),”¹³⁵ the comments also imply that subsection (b)(2), which permits disclosure for a crime, would apply in cases of fraud as well.¹³⁶ Texas *permits* disclosure “in order to prevent the client from committing a criminal or fraudulent act,”¹³⁷ but *mandates* disclosure when that “criminal or fraudulent act . . . is likely to result in death or substantial bodily harm to a person.”¹³⁸ Florida mandates disclosure both for the prevention of a crime and the prevention of death or substantial bodily harm.¹³⁹ Neighboring Alabama, by contrast, doesn’t mandate any disclosure, and only permits disclosure when needed to prevent death or bodily harm.¹⁴⁰ The result of this variation is a nightmare for multi-jurisdictional lawyers possessing client secrets which will likely result in harm to third parties.

The problem that this Article addresses now comes into focus, as we reconsider the opening examples of this Article. In the first example, involving the California-based lawyer advising the New Jersey client in negotiations with a New York bank, what should the lawyer do upon being informed that the collateral securing the soon-to-be-funded loan doesn’t actu-

¹²⁹ GILLERS, *supra* note 4, at 49 (emphasis added). See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 278-91 (2006) for a discussion of the intent behind permissive rules.

¹³⁰ New Jersey Rule 1.6(c); Vance & Wallach, *supra* note 95, at 1018.

¹³¹ GILLERS, *supra* note 4, at 50.

¹³² Model Rule 1.6.

¹³³ NEW YORK RULES OF PROF’L CONDUCT R. 1.6(b)(1) [hereinafter the “New York Rule”].

¹³⁴ *Id.* at 1.6(b)(2).

¹³⁵ *Id.* at cmt. 6B.

¹³⁶ *Id.* at cmt. 6D (“Some crimes, such as criminal fraud, may be ongoing in the sense that the client’s past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring.”).

¹³⁷ TEXAS DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05(c)(7).

¹³⁸ *Id.* at 1.05(e) (“[T]he lawyer *shall* . . .”) (emphasis added). The confidentiality rule of Illinois similarly distinguishes between physical and monetary harm, mandating disclosure for the former, while permitting disclosure for the latter. See Illinois Rules of Professional Conduct Rule 1.6(b), (c) (“A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm . . . [a] lawyer may use or reveal . . . the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b).”).

¹³⁹ FLORIDA RULES OF PROF’L CONDUCT R. 1.6(b), (c).

¹⁴⁰ ALABAMA RULES OF PROF’L CONDUCT R. 1.6(b).

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ally exist?¹⁴¹ The lawyer is likely most familiar with the laws of his home state, California. Under California's Rule 3-100, the lawyer would be strictly prohibited from disclosing this information, as only criminal matters likely to result in death or substantial harm are permitted to be disclosed in California.¹⁴² However, the client is based in New Jersey. Under New Jersey's Rule 1.6, the attorney would be *required* to disclose the information if the attorney reasonably believes that the information will substantially harm the financial interest of the loan counterparty, and is allowed to even tell the counterparty directly!¹⁴³ Perhaps, though, the rule of New York, where the counterparty is based, should govern—under that rule, the lawyer has no mandate to disclose, but has permission to do so.¹⁴⁴ Or, suppose the lawyer believes that a substantial portion of the deal was consummated on the stop-over in Chicago—the Illinois confidentiality rule also merely permits disclosure in this case.¹⁴⁵ How should the lawyer proceed? If he conceals the information, consistent with California law, he may be subject to discipline from New Jersey. If he discloses the information to the authorities, consistent with either the mandatory provisions of New Jersey or the permissive provisions of New York or Illinois, he may be disciplined by California. If he discloses the information to the counterparty, consistent with New Jersey law, he may be subject to discipline by any of the other states.¹⁴⁶

In the second example, involving the Alabama lawyer practicing in both Florida and Alabama, and informed by a Florida client of his intention to commit murder in Alabama, how should the lawyer proceed?¹⁴⁷ Should she inform the police? Florida mandates disclosure, while Alabama simply permits disclosure.¹⁴⁸ While it would appear that the lawyer is immune from discipline by simply disclosing, the lawyer may have several reasons¹⁴⁹ why she may wish to remain silent, in accordance with the Alabama statute. However, if the lawyer fails to disclose the information, relying on Alabama's permissive exception, Florida may discipline her for failing to satisfy the required disclosure mandated by its laws.

This issue is not confined to academic suppositions—indeed, there are real examples that reflect the murky waters of confidentiality. The O.P.M. case, in the 1970s and early 1980s, involved a law firm representing a company, O.P.M., which was discovered by its lawyers to be obtaining fraudulent loans.¹⁵⁰ Despite knowing of the fraud, the lawyers de-

¹⁴¹ See *supra* Introduction. See also GILLERS, *supra* note 4, at 270-71 (discussing the practical application of the multitude of different confidentiality rules).

¹⁴² See California Rule.

¹⁴³ See New Jersey Rule.

¹⁴⁴ See New York Rule.

¹⁴⁵ See ILLINOIS RULES OF PROF'L CONDUCT R. 1.6(b), (c).

¹⁴⁶ For a more detailed discussion of when states assert jurisdiction, see *infra* Part II.B (discussing Model Rule 8.5's choice-of-law provisions).

¹⁴⁷ See *supra* Introduction.

¹⁴⁸ See ALABAMA RULES OF PROF'L CONDUCT R. 1.6(b); FLORIDA RULES OF PROFESSIONAL CONDUCT R. 1.6(b), (c).

¹⁴⁹ For example, the attorney may want to retain this client, or not tarnish her reputation, or may simply fear for retaliation by a dangerous client.

¹⁵⁰ Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 511 (2002) ("From its formation in 1970 until February, 1981, the company obtained fraudulent loans in excess of \$200 million . . ."). See also Stuart Taylor, Jr., *Ethics and the Law: A Case History*, N.Y. TIMES, Jan. 9, 1983, (Magazine), at 31.

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cided to conceal the impropriety, and to safeguard O.P.M.'s confidences.¹⁵¹ The New York Code of Professional Responsibility in effect at the time allowed lawyers to disclose only a client's *future* crimes; thus, the law firm was advised by experts that it could not reveal the information.¹⁵² Ultimately, the fraud was discovered, and the law firm was sued by the defrauded banks and settled for \$10 million.¹⁵³ "While the O.P.M. case is history . . . the fallout has persisted for decades and remains influential today in professional debates about the proper way to frame the duty of lawyers who learn of a transactional client's illegal conduct."¹⁵⁴ *Spaulding v. Zimmerman*¹⁵⁵ also contained a confidentiality issue. In *Spaulding*, the "defendant insurance company's attorneys knew that the plaintiff had a life-threatening aortic aneurysm and failed to disclose that fact because the aneurysm likely arose from the accident giving rise to the lawsuit, and its disclosure would have increased the settlement value of the case."¹⁵⁶ The court found that the lawyer properly concealed the fact,¹⁵⁷ as there was no obligation to disclose the medical condition.¹⁵⁸ While *Spaulding* was decided in 1962, it would cause much havoc today as well.

Suppose the lawyer was based in California, but *Spaulding* was a resident of Florida. In California, the lawyer incredibly would be prohibited from disclosing this life-threatening aneurysm, because there was no "criminal act" involved!¹⁵⁹ However, the Florida rules mandate such disclosure, as it is necessary to "prevent a death or substantial bodily harm to another," with no requirement of crime or fraud.¹⁶⁰ The Model Rules permit, but do not mandate, disclosure, in the absence of crime, illegality or fraud, to "prevent reasonably certain death or substantial bodily harm."¹⁶¹ Amazingly, the New Jersey Rule, celebrated for its broad exceptions, would seemingly prohibit disclosure in this case, as the broad exceptions all require "a criminal, illegal or fraudulent act[!]"¹⁶²

5. Conclusion

Having examined the substantive confidentiality laws of several states, it is clear that the variations from the Model Rules can wreak havoc on the decision-making process of lawyers, especially when a lawyer either practices primarily across state lines, or is engaged in a representation involving parties based in different states. However, is this inter-state practice authorized if the lawyer is only licensed in one of the states in question? Before analyzing possible solutions, we must first discuss Model Rule 5.5, which provides for the multi-

¹⁵¹ ROBERT P. GANDOSSY, *BAD BUSINESS: THE OPM SCANDAL AND THE SEDUCTION OF THE ESTABLISHMENT* 7 (1985) ("[The lawyers] simply closed their eyes to the massive fraud going on around them.").

¹⁵² GILLERS, *supra* note 4, at 272; Snyder, *supra* note 150, at 512.

¹⁵³ GILLERS, *supra* note 4, at 273.

¹⁵⁴ *Id.*

¹⁵⁵ 116 N.W.2d 704 (Minn. 1962).

¹⁵⁶ Snyder, *supra* note 150, at 509 (citing *Spaulding v. Zimmerman*, 116 N.W.2d 704 (1962)).

¹⁵⁷ The case was ultimately re-opened due to *Spaulding*'s being a minor; had this not been the case, the court would not have re-opened the case. *Spaulding*, 116 N.W.2d at 709.

¹⁵⁸ *Id.*

¹⁵⁹ California Rule.

¹⁶⁰ FLORIDA RULES OF PROF'L CONDUCT R. 1.6(b)(2).

¹⁶¹ Model Rule 1.6(b)(1).

¹⁶² New Jersey Rule.

jurisdictional practice of law, and gives rise to the jurisdictional dilemmas that we are examining.

II. MULTI-JURISDICTIONAL PRACTICE OF LAW UNDER THE MODEL RULES

A. Model Rule 5.5—Allowing Multi-Jurisdictional Practice

1. Unauthorized Practice of Law

Modern legal practice often involves lawyers crossing state lines to provide legal services.¹⁶³ Done illegally, such provision of legal services constitutes the unauthorized practice of law.¹⁶⁴ One way to legally do this is to be licensed in two or more states. In the United States, each state controls its own bar.¹⁶⁵ “Each state administers its own bar exam . . . [and] require applicants to possess high principles, evidenced by ethical behavior.”¹⁶⁶ In addition, states reserve the power to discipline lawyers, and mandate on-going continuing legal education.¹⁶⁷ While there are methods of gaining admission to other states’ bars, those methods are either “unduly burdensome or too limited in scope.”¹⁶⁸ Such a system is “insufficient to provide clients with what they want and deserve—the most competent lawyer, not merely one licensed in a particular state.”¹⁶⁹

2. Temporary Multi-Jurisdictional Practice

The Model Rules thus provide for other means for lawyers to practice across state lines without the burden of gaining licensure in multiple jurisdictions.¹⁷⁰ The original Model Rule 5.5 had simply stated that “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.”¹⁷¹ Despite a culture of ignoring

¹⁶³ Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—An Interim Assessment*, 43 AKRON L. REV. 729, 729 (2010).

¹⁶⁴ Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665, 678 (2001). Several penalties can be imposed for the unauthorized practice of law, the most common of which are injunctions and punishment for contempt of court. Needham, *supra* note 3, at 1083.

¹⁶⁵ *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (“Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.”).

¹⁶⁶ Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 530 (2002).

¹⁶⁷ *Id.* at 532.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 534.

¹⁷⁰ See Needham, *supra* note 3, at 1332 (“If a lawyer primarily practiced in two states, for example, but became admitted in fifteen additional jurisdictions . . . in order to occasionally give legal advice to clients there, then the requirements for maintaining those admissions could prove to be quite burdensome. The annual registration fees to maintain active status alone easily total more than \$4000, while meeting each state’s continuing legal education requirements, accepting of court-appointed representations and similar issues would require a substantial investment of the attorney’s time . . .”).

¹⁷¹ Model Rule 5.5 (1983) (superseded by 2002 amendments).

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this law,¹⁷² the case law occasionally found a lawyer guilty of violating this rule.¹⁷³ Acknowledging the increasing global scope of legal practice, the revised Model Rule 5.5 contains provisions allowing for temporary representations in jurisdictions in which the lawyer is unlicensed. “[The revised] Model Rule 5.5 distinguishes between ‘systematic and continuous’ presence in the jurisdiction by out-of-state lawyers, which is generally prohibited, and the provision of legal services on a ‘temporary’ basis, which is allowed in defined settings.”¹⁷⁴ The Model Rule provides:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other *systematic and continuous presence* in this jurisdiction for the practice of law; or

(c) A lawyer admitted in another United States jurisdiction . . . *may provide legal services on a temporary basis in this jurisdiction* that:

. . . .

(4) are not within paragraphs (c)(2) or (c)(3) and *arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.*¹⁷⁵

¹⁷² This rule was “widely breached, and usually breached with impunity, because it and the underlying concept of unauthorized practice by a lawyer not locally licensed appear to lawyers to be irrelevant in today’s law practice.” John F. Sutton, Jr., *Unauthorized Practice of Law By Lawyers: A Post-Seminar Reflection on “Ethics and the Multijurisdictional Practice of Law”*, 36 S. TEX. L. REV. 1027, 1030 (1995). See also generally Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995).

¹⁷³ Sutton quotes the New York decision in *Spivak v. Sachs*, in which the court held that a California attorney advising a woman in New York regarding a divorce suit in Connecticut was guilty of the unauthorized practice of law, because the conduct was not a “single, isolated incident.” Sutton, *supra* note 172, at 1033 (quoting *Spivak v. Sachs*, 211 N.E.2d 329, 330-31 (1965)). Other, more recent cases have also occasionally found a lawyer guilty of the unauthorized practice of law. See *Ranta v. McCarney*, 391 N.W.2d 161, 162 (N.D. 1986) (denying fees to a Minnesota lawyer who had advised North Dakota clients, despite the lawyer’s assertion that he had represented clients in at least 25 states, and the question had never been raised); *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998) (finding New York lawyers who had practiced in California guilty of unauthorized practice of law under a strict reading of the statute, despite being “aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states.”).

¹⁷⁴ Greenbaum, *supra* note 163, at 737 (quoting Model Rule 5.5(b), (c)). “[T]he hope [of revising Model Rule 5.5] was that the new model would be widely adopted by the states, thus creating a uniform set of standards governing multijurisdictional practice. Given that many legal matters bring a lawyer in contact with a number of jurisdictions, having a common set of rules would greatly lighten the burden on the lawyer” *Id.* at 731. However, this was not the case, as “this uneven adoption of the comments to Rule 5.5 portends uneven application of the rules across the states.” *Id.* at 735-36.

¹⁷⁵ Model Rule 5.5 (emphasis added). Subsection (d) has been omitted.

Thus, under the Model Rule and under the adopted versions of most states,¹⁷⁶ there are permissible categories of conduct by out-of-state lawyers.¹⁷⁷ First, association with local counsel is permissible on a temporary basis, if the local counsel is “actively participat[ing]” in the matter.¹⁷⁸ The local lawyer must be involved in more than simply name;¹⁷⁹ the local lawyer must “share responsibility for the representation.”¹⁸⁰ Alternatively, temporary representation is permissible with respect to litigation in which the lawyer is or will be authorized to appear *pro hac vice*.¹⁸¹ There is little deviation among states in this provision.¹⁸² Furthermore, temporary representation is available when it involves an arbitration, mediation, or alternative dispute resolution “if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”¹⁸³ Finally, in a catch-all provision, Model Rule 5.5(c)(4) permits out-of-state representation when the services “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”¹⁸⁴ It is under this prong that most transactional lawyers practice temporarily across state lines. Subsection (c)(4) requires some nexus to the lawyer’s home jurisdiction, which nexus can arise from “certain characteristics of the client, the nature of the matter, or the lawyer’s expertise in certain fields of law.”¹⁸⁵ The Comment to Model Rule 5.5 provides that:

A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.¹⁸⁶

Thus, transactional lawyers can often find one or more ways to connect their representation to their home state. In our first example, the New Jersey client may have been a longstanding client of the California lawyer. Alternatively, the California lawyer may have recognized expertise in that area. In our second example, the Alabama lawyer representing a

¹⁷⁶ Greenbaum, *supra* note 163, at 735 (“Fourteen states have adopted the rule as it relates to temporary practice almost verbatim, and twenty-nine have adopted a rule that is somewhat similar.”).

¹⁷⁷ *Id.* at 742-52 (examining the prongs of Model Rule 5.5 allowing for temporary practice).

¹⁷⁸ Model Rule 5.5(c)(1). In some states, local affiliation is mandatory, rather than simply one of several options. See Greenbaum, *supra* note 163, at 743-44 (citing North Dakota and New Mexico as such states).

¹⁷⁹ Greenbaum, *supra* note 163, at 742.

¹⁸⁰ Model Rule 5.5 cmt. 8.

¹⁸¹ Model Rule 5.5(c)(2).

¹⁸² Greenbaum, *supra* note 163, at 745.

¹⁸³ Model Rule 5.5(c)(3).

¹⁸⁴ Model Rule 5.5(c)(4).

¹⁸⁵ Greenbaum, *supra* note 163, at 749.

¹⁸⁶ Model Rule 5.5 cmt. 14.

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Florida client will likely assert that many of her representations have a significant connection to Florida, or that significant aspects of her work are conducted in Florida. In sum, Model Rule 5.5, and many of the state adoptions thereof,¹⁸⁷ make it relatively simple for transactional lawyers to represent clients across state borders, and thus provide for the substantive conflict-of-laws problem which this Article attempts to resolve.

B. Model Rule 8.5—Choice-of-Law Provisions

1. Introduction

The ABA also took heed of our problem, and tried to solve it internally through Model Rule 8.5, the choice-of-law provision.¹⁸⁸ An examination of the original rule 8.5, the amendments thereto, and state variation in implementation will prove that Model Rule 8.5 has failed to provide clear guidelines to lawyers with respect to which state's ethics laws should govern a particular transaction or representation.

2. Original Rule 8.5

The original Model Rule 8.5, in force until 1993, "provided no guidance as to how to make choice-of-law decisions among potentially applicable ethics codes; nor had the Model Code or the Canons . . . done so."¹⁸⁹ The old rule was simply a disciplinary rule, stating that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere."¹⁹⁰ The rule did not attempt to govern a case involving different substantive ethics laws, and even the comment to the rule was ambiguous, stating 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."¹⁹¹ Professor Wolfram, in his 1986 treatise on ethics, simply noted that "[i]n instances of genuine and inescapable conflicts . . . courts should particularly avoid extravagant and chauvinistic attempts to apply local law regardless of the relevance of the law of other jurisdictions."¹⁹² Actual treatment of conflicts under this regime, mostly occurring in bar association ethics opinions, and less frequently in cases,¹⁹³ was extremely inconsistent.¹⁹⁴ For example, in *Yardis Corp. v. Levine*,¹⁹⁵ involving a disqualification motion to remove a New York lawyer from an arbitration hearing in Pennsylvania, the court strictly interpreted Old Rule 8.5 to require New York law to apply, without considering the client, the circumstances,

¹⁸⁷ See generally Greenbaum, *supra* note 163, at 749-751 for a discussion specific state variations to this prong.

¹⁸⁸ Model Rule 8.5.

¹⁸⁹ Roach, *supra* note 18, at 918.

¹⁹⁰ Model Rule 8.5 (1983) (superseded by 1993 amendments) [hereinafter Original Rule 8.5].

¹⁹¹ *Id.* at cmt.

¹⁹² WOLFRAM, *supra* note 36, at 50-51.

¹⁹³ Ritts, *supra* note 3, at 41, 56-57 ("Most treatments of conflict of laws questions under the regime of the original Rule 8.5 came in the form of bar association ethics opinions [O]nly a few actual cases arose in which courts were faced with a conflict of state ethics rules. . . . [S]ome courts dealt as clumsily with the jurisdictional aspects of the old Rule 8.5 as many of the bar ethics authorities did.").

¹⁹⁴ *Id.* at 41.

¹⁹⁵ 1991 U.S. Dist. LEXIS 357 (E.D. Pa. 1991).

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or any other policy interests.¹⁹⁶ By contrast, in *Rand v. Monsanto Co.*¹⁹⁷, Judge Easterbrook applied what was, in his view, the “better” rule.¹⁹⁸

Old Rule 8.5 left unanswered two important questions. First, if a lawyer practices in a jurisdiction other than the one in which he or she is admitted, can that lawyer be disciplined only by the admitting jurisdiction, or may the lawyer also be disciplined by the jurisdiction in which the transaction or representation occurs?¹⁹⁹ Second, if the lawyer is admitted in two or more jurisdictions, must the lawyer comply with the laws of both jurisdictions? If that is not possible, which jurisdiction’s laws should take precedence?²⁰⁰ The Old Rule 8.5 is “strikingly silent about a jurisdiction’s right to discipline a lawyer not admitted to the bar who nonetheless renders legal services within the jurisdiction,”²⁰¹ and, most importantly, “offered no direct guidance to lawyers who found themselves caught between or among inconsistent or conflicting standards.” These problems made clear the necessity for a revision to Model Rule 8.5, in order to “give more choice-of-law guidance,” and the ABA responded by revising rule 8.5 in 1993.²⁰²

3. The 1993 Revision

In 1993 the ABA amended Model Rule 8.5,²⁰³ with the stated purpose of establishing “relatively simple, bright-line rules.”²⁰⁴ Subsection (a) of the 1993 Rule 8.5 tracked the language of the Old Rule 8.5. Subsection (b) was added, and stated:

(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:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

¹⁹⁶ *Id.* at *5 (interpreting Old Rule 8.5’s disciplinary statement to require New York law to apply, because the lawyer was licensed in New York, regardless of where the conduct occurred).

¹⁹⁷ See *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991).

¹⁹⁸ *Id.* at 600-01; see Roach, *supra* note 18, at 919-20 (noting other results reached by the case law during this period).

¹⁹⁹ Roach, *supra* note 18, at 920-21.

²⁰⁰ *Id.* at 921.

²⁰¹ Daly, *supra* note 4, at 749.

²⁰² Ritts, *supra* note 3, at 56 (“Considering that the ethics authorities, with their expertise in the arcana of professional responsibility law, were unable to apply the rule in a coherent fashion, the rule was ripe for revision in the summer of 1993.”).

²⁰³ See Daly, *supra* note 4, at 756; see also MODEL RULES OF PROF’L CONDUCT R. 8.5 (amended 1993).

²⁰⁴ ABA Comm. on Ethics and Prof’l Responsibility, Recommendation & Report 4 (1993).

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(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.²⁰⁵

The 1993 Rule 8.5 seemed to answer the two aforementioned questions. All transactional lawyers' conduct can be categorized into either subsection (b)(2)(i) or (b)(2)(ii).²⁰⁶ First, subsection (b)(2)(i) of the 1993 Rule 8.5 requires the admitting jurisdiction to use only its law, and not the law of another jurisdiction, in disciplining a lawyer. Thus, if a lawyer admitted only in New York conducts a transaction in Connecticut, New York can apply only its own law²⁰⁷ in disciplining her.²⁰⁸ Second, if a lawyer is admitted in more than one jurisdiction, he need not comply with the rules of both states. Rather, pursuant to subsection (b)(2)(ii), he must adhere to the rules of the jurisdiction in which he "principally practices;" except that if the "predominant effect" of the representation occurs in another jurisdiction, that state's rules govern.²⁰⁹

At least one scholar praised this revision for "furnishing clear answers to choice of law questions" and "wisely reject[ing] applying more than one jurisdiction's rules to the same conduct."²¹⁰ Proponents of restricting the possible ethics rules to be applied to a lawyer's conduct to those of states in which the attorney is admitted argue that lawyers cannot be presumed or required to investigate and educate themselves on the rules of every state in which some aspect of their representation touches.²¹¹

However, despite this attempt at clarification, many scholars still criticized the ABA's attempt.²¹² The most blatant problem with, and most criticized aspect of, the 1993 Rule 8.5 is prong (b)(2)(ii), which, with respect to lawyers admitted in more than one jurisdiction, applies the law of the state in which the lawyer "principally practices," except that if the "predominant effect" of the representation occurs in another jurisdiction, that state's rules govern.²¹³ The Model Rules fail to define the operative terms.

Consider the earlier example of the lawyer practicing on the border of Alabama and Florida. If that lawyer is licensed in both states, what methodology should be used to determine where that lawyer principally practices? What time frame should be used? For exam-

²⁰⁵ See MODEL RULES OF PROF'L CONDUCT R. 8.5(b) (amended 1993).

²⁰⁶ See generally Needham, *supra* note 3.

²⁰⁷ See MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(1) (1993).

²⁰⁸ See MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2)(i) (1993) ("[I]f the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction").

²⁰⁹ See MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2)(ii) (1993).

²¹⁰ Roach, *supra* note 18, at 922-23 ("Attorneys should not have to 'bet their licenses' on such uncertain gambles.").

²¹¹ See *id.* at 923.

²¹² See, e.g., Gregory B. Adams, *Reflections on the Reaction to Proposed Rule 8.5: Consensus of Failure*, 36 S. TEX. L. REV. 1101, 1101 (1995) ("Proposed Model Rule 8.5 is not the right solution to the problem of choice of law in regulating the multijurisdictional practice of law, according to the consensus of thoughtful commentary . . ."); Kathleen Clark, *Is Discipline Different? An Essay on Choice of Law and Lawyer Conduct*, 36 S. TEX. L. REV. 1069, 1070 (1995).

²¹³ MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2)(ii) (1993).

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ple, if that lawyer principally practices in Alabama from January to March, and then in Florida from April to December, and the conduct in question occurs in February,²¹⁴ may Alabama discipline her, arguing that during that month, she principally practiced in Alabama? Or can Florida argue that because, for the year in question, she principally practiced in Florida, only the Florida rule should govern? Moreover, suppose the lawyer spends sixty five percent of her time practicing in Florida, but earns sixty five percent of her revenue from transactions in Alabama.²¹⁵ Where does she principally practice?

Similarly, there are interpretive problems with the “predominant effect” clause, despite the admonition of the comments that this exception is “narrow.”²¹⁶ In addition:

[n]owhere does the Rule inform a disciplinary authority what kind of effect to look for or upon whom or what this effect may be expected to be visited. Presumably the domicile of the client would be an important factor in determining the state of predominant effect, because a lawyer’s conduct will usually affect his client for better or worse. But one cannot conclude that the domicile of the client is the state of predominant effect in all cases, because that would make the reference to the lawyer’s principal place of practice surplusage.²¹⁷

Thus, it is clear that subsection (b)(2)(ii) of 1993 Rule 8.5 provided no clear guidance to lawyers on how to solve this problem.

Furthermore, even subsection (b)(2)(i), involving a lawyer practicing in a jurisdiction in which she is not admitted, is troublesome, despite appearing at first glance to provide clarity.²¹⁸ The rule only requires a jurisdiction in which the lawyer is admitted to apply its own law; however, it is “silent about the law to be applied by a jurisdiction in which the lawyer is not licensed.”²¹⁹

For example, consider a lawyer licensed only in California, and conducting a transaction in Nevada. If both states adopt the 1993 Rule 8.5, it is clear that California may only apply the law of California. However, if Nevada charges the attorney with unethical conduct, what law would it use? As 1993 Rule 8.5 is silent on the issue, it would appear that it would be entirely reasonable for Nevada to apply its own law.²²⁰ Thus, even in a case where a lawyer is licensed in only one jurisdiction, the 1993 Rule 8.5 failed to provide concrete guidance.

²¹⁴ See Daly, *supra* note 4, at 761 (stating that different conclusions of where an attorney principally practices can be reached in intervals of six, nine, or twelve months, depending on the attorney’s practice).

²¹⁵ See Rensberger, *supra* note 10, at 834-35 (stating that a lawyer who lives in one state but who bills a majority of her income in another state may be deemed to practice where her client resides).

²¹⁶ MODEL RULES OF PROF’L CONDUCT R. 8.5 cmt. 4 (1993) (“The intention is for the latter exception to be a narrow one.”).

²¹⁷ Rensberger, *supra* note 10, at 835 (employing the comments to the 1993 Rule 8.5 to demonstrate the lack of clarity of the provision). See also Roach, *supra* note 18, at 927 (stating that some argue that the “predominant effects” provisions renders the “principally practices” provision ambiguous).

²¹⁸ See Roach, *supra* note 18, at 922 (“The rule answers the [question regarding a lawyer admitted in only one jurisdiction but practicing in another] by *restricting the universe of ethics rules that may be applied to a lawyer’s conduct to rules of jurisdictions in which the lawyer is admitted.*”) (emphasis added); but see Adams, *supra* note 212, at 1102 (questioning whether the new rule did, in fact, provide certainty).

²¹⁹ Adams, *supra* note 212, at 1102.

²²⁰ *Id.* at 1102-03.

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dance to lawyers regarding which state's ethics laws to follow.²²¹ The "uncertainty created by ambiguity in the rule and a lack of clarification"²²² led to the creation of the ABA Commission on Multijurisdictional Practice, which attempted to solve the problem.²²³

4. Current Model Rule 8.5

In 2002, the recommendations of the Commission were adopted. The revised, and current, Model Rule 8.5 states:

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

(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:

(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.*²²⁴

First, subsection (a) clearly acknowledges that a lawyer could theoretically be subject to the discipline of another jurisdiction, regardless of admission, if the lawyer practices in that jurisdiction, and that a lawyer could be subject to discipline by two different jurisdictions.²²⁵ However, according to the comments, subsection (b) "seeks to resolve such potential conflicts . . ."²²⁶ In subsection (b), the "principally practices" prong has been deleted in favor of a provision choosing the law of the jurisdiction in which the conduct in question occurred.²²⁷ This change was intended to make "application of the rule less ambiguous" and

²²¹ There are other, policy-based criticisms of the 1993 revision. See Roach, *supra* note 18, at 924-27; Daly, *supra* note 4, at 761-64.

²²² Ward, *supra* note 5, at 181.

²²³ See generally ABA Comm'n on Multijurisdictional Practice, Report (2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_6-5.pdf.

²²⁴ MODEL RULES OF PROF'L CONDUCT R. 8.5 (2007) (changes emphasized).

²²⁵ *Id.*

²²⁶ MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 3 ("It takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.").

²²⁷ *Id.* The exception for conduct whose "predominant effect" is elsewhere has been retained. *Id.*

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to give more authority to “‘host’ states who allow foreign lawyers to temporarily perform services.”²²⁸ Finally, in a catch-all provision designed to protect a lawyer’s good faith decision regarding with which law to comply, Model Rule 8.5 states that as long as a lawyer complies with the law of state in which the lawyer “reasonably believes” the predominant effect will occur there will be no discipline.²²⁹ Thus, whereas before 2002, a lawyer had to decide, *ex ante*, where the predominant effect would be,²³⁰ the current rule is much more deferential to lawyers.²³¹

When a lawyer’s conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer’s conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.²³²

In theory, Model Rule 8.5 can solve our dilemma.²³³ Consider our earlier examples, using the lens of Model Rule 8.5. If the California lawyer conceals the New Jersey client’s fraudulent loans, reasonably believing²³⁴ that the predominant effect of the transaction will be in California, then whichever state—California, New Jersey, or New York—ultimately chooses to discipline him will be unable to impose discipline, as he is in compliance with California law. Similarly, if he reveals the information, reasonably believing that New Jersey is the proper law to abide by, then even if California, his admitting jurisdiction, desires to discipline him, it will be compelled to find innocence, in compliance with New Jersey law. Thus, in theory, no lawyer should ever be subject to competing ethics laws, so long as that lawyer acts with a reasonable belief of which state his or her conduct will predominantly affect.²³⁵

5. State Implementation

The major problem of the ABA’s attempt to remedy our problem lies not with the substance of Model Rule 8.5, but rather with the fundamental nature of the rules—they are simply a “model” law, with adoption and implementation dependant on individual states.²³⁶

²²⁸ Ward, *supra* note 5, at 182.

²²⁹ MODEL RULE OF PROF’L CONDUCT R. 8.5(b)(2).

²³⁰ “[A] slippery determination at best.” Ward, *supra* note 5, at 183.

²³¹ *Id.* at 183 (“The 2002 Rule defers to the judgment of a reasonable and competent lawyer.”).

²³² MODEL RULES OF PROF’L CONDUCT R. 8.5 cmt. 5.

²³³ See Ward, *supra* note 5, at 183 (“[I]n theory [subsection (b)(2)] is a good provision.”).

²³⁴ The definition of “‘reasonable’ belief” is beyond the scope of this Article.

²³⁵ The comment to this provision is instructive, and evidences the fact that the ABA, in 2002, was trying to remedy the precise problem discussed by this Article. “If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.” MODEL RULE OF PROF’L CONDUCT R. 8.5 cmt. 6 (emphasis added).

²³⁶ See Ward, *supra* note 5, at 183 (The ABA-recommended solutions only work, however, if every jurisdiction adopts the choice of law rules uniformly.”); Little, *supra* note 3, at 865 (“Even if one were to overlook the flaws in ABA Model Rule 8.5, the states must uniformly adopt this rule for it to have any chance of success.”).

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One state's adoption of Model Rule 8.5, and subsequent agreement not to discipline a lawyer due to his "reasonable belief," does not remedy the lawyer's dilemma if another jurisdiction declines to adopt Model Rule 8.5, and proceeds to discipline the lawyer on the basis of two inconsistent rules, despite reasonable belief.²³⁷

Consider again our initial example.²³⁸ Suppose that the California lawyer discloses the fraud, reasonably relying on New York's permissive disclosure law. Suppose further instead of the client being domiciled in New Jersey, it is domiciled in Alabama, which, like California, does not permit any disclosure for prevention of financial harm. Now, if California wants to discipline the lawyer, and has adopted Model Rule 8.5, it will not be permitted to discipline the lawyer, so long as it finds the reliance on New York law to be reasonable. However, if Alabama has not adopted Model Rule 8.5, and also wants to discipline the lawyer, it will be free to impose its own discipline based on its own, strict, confidentiality law, without regard for either the reasonable belief of the lawyer or the laws of the other states.

Adoption of Model Rule 8.5, unfortunately, has not been uniform.²³⁹ The ABA conveniently tracks state implementation of Model Rule 8.5.²⁴⁰ Alabama and Kansas still employ the Old Rule 8.5 from 1983, without either the 1993 revision or the 2002 revision.²⁴¹ California allows out-of-state non-litigating lawyers to practice temporarily in California "subject to . . . [t]he jurisdiction of the State Bar of California; the jurisdiction of the courts of this state . . . and the laws of the State of California relating to the practice of law, the State Bar Rules of Professional Conduct . . ."²⁴² Florida, Indiana, and New Jersey, among others, omit the "reasonable belief" provision.²⁴³ Montana's rule omits the entire choice-of-law provision from Model Rule 8.5(b), and states only that a temporarily practicing lawyer "will be bound by [Montana's] Rules of Professional Conduct in his or her practice of law in this State and will be subject to the disciplinary authority of this State."²⁴⁴ Thus, it is evident that in disciplining a lawyer for interstate conduct, not every state will defer to the reasonable belief of the lawyer, and "states applying different choice-of-law rules could very well apply conflicting ethics rules to the same conduct."²⁴⁵ This inconsistency in adoption and application of jurisdictional rules will render Model Rule 8.5 impotent and will leave lawyers with the same ethical dilemma that they have faced since the advent of multijurisdictional practice.²⁴⁶

²³⁷ Ward, *supra* note 5, at 183.

²³⁸ See *supra* Introduction.

²³⁹ Little, *supra* note 3, at 866 ("State adoption of ABA Model Rule 8.5 has been well short of uniform. Only twenty-three states have adopted the ABA Model Rule. Twenty-seven states have chosen a different choice of law rule for ethics proceedings.").

²⁴⁰ The most recent update, and the update used in this Article to verify the timeliness of the statutes contained herein, is on October 27, 2010. ABA, *State Implementation of ABA MJP Policies* (Oct. 27, 2010), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/recommendations.authcheckdam.pdf>.

²⁴¹ ALA. RULES OF PROF'L CONDUCT R. 8.5 (2011) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, although engaged in practice elsewhere."); KAN. RULES OF PROF'L CONDUCT R. 8.5 (2011) (same).

²⁴² CAL. RULES OF COURT R. 9.48(e) (2011), available at <http://www.courts.ca.vjgov/rules.htm>.

²⁴³ FLA. RULES OF PROF'L CONDUCT R. 3-4.6; IND. RULES OF PROF'L CONDUCT R. 8.5; N. J. RULES OF PROF'L CONDUCT R. 8.5.

²⁴⁴ MONT. RULES OF PROFESSIONAL CONDUCT R. 8.5.

²⁴⁵ Little, *supra* note 3, at 866.

²⁴⁶ *Id.*

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6. Summary of Problem and Introduction to Solutions

To review, Model Rule 4.1 creates a requirement of disclosure. Model Rule 1.6 limits this disclosure, but still requires it in certain circumstances. Model Rule 5.5 permits temporary interstate practice. Model Rule 8.5 then attempts, unsuccessfully, to reconcile the different substantive requirements between the various states. In sum, it is obvious that transactional lawyers involved in interstate representations face a very real ethical dilemma when faced with competing ethics laws. It is also obvious that Model Rule 8.5, or another amendment thereto, is no longer the answer—it has been revised twice, yet scholars continue to discuss and analyze this problem.²⁴⁷

The adverse consequences of the current system are numerous. First, the lack of clear guidance as to which law applies creates uncertainty and unpredictability for lawyers attempting to determine with which state's ethics laws to comply.²⁴⁸ Critics also claim that inconsistent ethics rules will harm the attorney-client relationship.²⁴⁹ Educated clients, aware of potential conflicts, may be hesitant to share crucial information with lawyers.²⁵⁰ Some lawyers may decide to completely forgo a multi-state practice altogether.²⁵¹ Clearly, a solution, other than continued revision of Model Rule 8.5, is required.

Two factors contribute to every choice-of-law problem.²⁵² First, there must be at least two different states or regimes, each with its own, distinct, code of law.²⁵³ We will call this the "substantive element." Second, each of the states must have the power to assert jurisdiction over the same matter.²⁵⁴ We will call this the "jurisdictional element." Without both of these factors, our problem does not exist. Even if two states have different laws, if only one state can assert jurisdiction over a particular representation, the lawyer will know, *ex ante*, with which code of laws to comply. Similarly, even if more than one state can assert jurisdiction, there will be no choice-of-law problem if each state's laws are uniform. Therefore this Article will present solutions, each attempting to solve the problem by "eliminating one of the two preconditions."²⁵⁵ In addition, each solution can be either "state-based," meaning that implementation will be left to individual states, or "federal," meaning that the federal government will enact a uniform law for all fifty states. Part III of this Article will examine both jurisdictional and substantive state-based solutions. Part IV of this Article will discuss both jurisdictional and substantive federal solutions. It is this author's contention that a federal law, either substantive or merely jurisdictional, is necessary to finally resolve the ethics quandary facing multijurisdictional lawyers.

²⁴⁷ See *supra* note 3.

²⁴⁸ See Moulton, *supra* note 17, at 99 ("Lawyers' inability to determine in advance which of several inconsistent rules might later be applied to their conduct 'undermines compliance with legal ethics codes.'").

²⁴⁹ Felleman, *supra* note 34, at 1509 ("Such conflicts decrease the efficacy of the lawyer's representation of her client by, for example, discouraging the risk-taking behavior that is arguably essential to zealous representation of a client."); Little, *supra* note 3, at 867.

²⁵⁰ Felleman, *supra* note 34, at 1509.

²⁵¹ *Id.*

²⁵² Rensberger, *supra* note 10, at 803.

²⁵³ *Id.* ("First, one must have two distinct legal regimes, each with its own law-making power.").

²⁵⁴ *Id.* ("Second, each of these sovereigns must have the power to adjudicate the same matter. When two such law-makers exist in relatively close proximity to each other, the people of the two jurisdictions may be expected to interact. . . . When a transaction overlaps the boundaries of these jurisdictions and an adjudication may be sought in either, a conflict of laws problem arises.").

²⁵⁵ *Id.* at 813.

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III. SOLUTIONS REQUIRING STATE-BY-STATE ADOPTION

A. Uniform Adoption of Current Model Rule 8.5

The most obvious state-based jurisdictional solution is to convince each state to adopt the current Model Rule 8.5.²⁵⁶ Arvid Roach, in 1995, argued that “the more widely it is adopted the more order will be brought to a chaotic area of law.”²⁵⁷ Another author, also in 1995, similarly argued for uniform adoption of a slight variant to Model Rule 8.5, contending that it “will not be effective unless it is uniformly adopted by the states. Otherwise conflicting ethics obligations will be left unresolved”²⁵⁸ That author professes that “[t]he possibility of uniform adoption of the proposed rule is more likely than it may seem,” as states would supposedly have less difficulty creating uniformity in procedural law than they would in substantive law.²⁵⁹ This Article, however, utilizes the benefit of hindsight. Fifteen years have passed since those suggestions, and uniform adoption is still wishful thinking.²⁶⁰ “[E]ven a few states’ rejection of the ABA Model Rule would likely result in conflicting ethics standards”²⁶¹ In sum, any solution premised on uniform state adoption of a choice-of-law rule—either the current Model Rule 8.5 or any variation thereof—is unworkable due to:

[T]he likelihood that neither the rule as currently formulated, nor any reworked version of it, will ever be adopted by a sufficient number of jurisdictions to materially increase predictability. First, interstate variations on ABA themes created the problem in the first place, sending the ABA scrambling to find a choice-of-law solution. No one has offered any reason to believe that the same diversifying pressures will not apply to state consideration of a new choice-of-law rule.²⁶²

B. Choice-of-Rules Provisions

Another state-based jurisdictional approach makes paramount the interests of clients, as clients have a material interest in determining which state’s ethics laws will govern a representation.²⁶³ This solution would provide for an amendment to Model Rule 8.5 that allows “a [lawyer] and a client to include in their letter of engagement a provision identifying the jurisdiction whose professional standards will govern the conduct of the . . . lawyers.”²⁶⁴ This

²⁵⁶ Roach, *supra* note 18, at 929 (“[A] first important consideration [in the effectiveness of Model Rule 8.5] is that the new Model Rule 8.5 actually be widely—and ideally universally—adopted by the states and other relevant jurisdictions.”). Roach’s article discussed the 1993 version of the rule, but it can easily be applied to the current, 2002, version as well.

²⁵⁷ *Id.*

²⁵⁸ Felleman, *supra* note 34, at 1529.

²⁵⁹ *Id.*

²⁶⁰ See ABA, *State Implementation of ABA MJP Policies*, available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/recommendationsauthcheckdam.pdf> (showing state-by-state variations of Model Rule 8.5, and demonstrating that the states have yet to adopt a uniform rule).

²⁶¹ Little, *supra* note 3, at 866.

²⁶² Moulton, *supra* note 17, at 159. Professor Moulton uses game theory principles to conclude that “[t]he obstacles to reaching agreement . . . are close to insurmountable.” *Id.*

²⁶³ See Daly, *supra* note 4, at 793-94 (“In all the discussions of multijurisdictional conflicts no mention is ever made of clients’ interests.”).

²⁶⁴ *Id.* at 793-94; see Little, *supra* note 3, at 871-72.

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agreement would be constrained in two aspects. First, lawyers and clients could not simply choose any jurisdiction among the fifty states. The rules chosen would be required to be from the jurisdiction “most significantly related” to the representation, and not from a jurisdiction “unrelated or tangentially related” to the engagement.²⁶⁵ This restriction would ostensibly prevent a “race-to-the-bottom” to identify the state with the lowest standards. Second, the parties would agree on an “all or nothing basis,” meaning that lawyers and clients would not be allowed to choose, suppose, the confidentiality rule of one jurisdiction, and the advertising rule of another.²⁶⁶

Proponents of such a regime argue that, first and foremost, it would best protect clients’ interest. By way of example, consider our earlier examples. The Floridian client of the Alabama lawyer, who intends to commit murder in Alabama, would certainly contract to have the representation governed by Alabama law, which only provides for permissive, rather than mandatory disclosure. Proponents of this solution also argue that it would provide *ex ante* predictability and certainty to lawyers, who would thus be able to zealously represent the client without being concerned about discipline from a foreign jurisdiction.²⁶⁷ Moreover, this certainty will ameliorate the need for lawyers to hire ethics experts to advise them on the proper course of action, and will greatly reduce costs involved in *ex post* litigation of ethics matters.²⁶⁸

Despite these palpable benefits, they are outweighed by the detriments of this system. First, the “significant relationship” required between the agreeing parties and the agreed-upon state is subject to interpretation.²⁶⁹ Construed too narrowly, this solution essentially becomes a “client domicile” approach, a lawyer’s “principal place of practice approach,” or a “predominant effects” approach,²⁷⁰ all of which present problems of their own.²⁷¹ On the other hand, construed too broadly, this solution will permit lawyers and clients to shop for the state with the friendliest ethics rules, and only a tangential role in the transaction.²⁷² Furthermore, this approach will incentivize states to adopt more lenient rules, often to the detriment of innocent third-parties. Second, practically, what should be considered the duration of a “representation” for the purpose of choosing ethics rules?²⁷³ Should an agreement of jurisdiction at the outset of a relationship govern the entire representation even if key details and parties change, possibly coming to involve different jurisdictions?²⁷⁴ If it should, this is quite unfair and arbitrary; if it should not, there would need to be rules mandating when a change of jurisdiction is allowed.²⁷⁵ Third, this approach ignores the political reality of the states’ “substantive interests in enforcing the values their regulation embodies.”²⁷⁶ While asking states to

²⁶⁵ Daly, *supra* note 4, at 794 (“Their choice of jurisdiction would not be unfettered, however.”).

²⁶⁶ *Id.* at 794.

²⁶⁷ Little, *supra* note 3, at 871.

²⁶⁸ *Id.* at 872. Little further argues that these reductions in costs will provide two primary benefits. First, reducing “deadweight losses” will result in greater economic efficiency. Second, lower costs will allow lawyers to reduce the fees to clients, making “legal representation more accessible for everyone.” *Id.*

²⁶⁹ Roach, *supra* note 18, at 928.

²⁷⁰ *Id.*

²⁷¹ See *infra* Part III.C.

²⁷² Roach, *supra* note 18, at 928.

²⁷³ *Id.*

²⁷⁴ *Id.* at 928-29.

²⁷⁵ *Id.* at 929.

²⁷⁶ Zacharias, *supra* note 33, at 1047.

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uniformly adopt the current Model Rule 8.5 would require them to simply defer to other jurisdictions, asking states to adopt a Rule 8.5 allowing for a “choice-of-rules” provision would now require states to defer to individuals who “do not like the state regulation.”²⁷⁷ Fourth, the enforceability of such *ex ante* agreements has been questioned.²⁷⁸ Lastly, and most importantly, why would this amendment to Model Rule 8.5 be adopted with any greater uniformity than the previous attempts? As discussed earlier,²⁷⁹ even if only a handful of states decline adoption, the rule will be severely weakened. Suppose that, in our opening example, California and New Jersey have both adopted an amended Rule 8.5 that purports to allow lawyers and clients to insert “choice-of-rules” provisions in engagement letters. If the California lawyer in question agrees with his New Jersey client to be governed by New Jersey laws, then California will certainly have no problem enforcing New Jersey’s laws. However, if New York has not adopted this amendment, it will be free to apply its own ethics rules. Thus, this solution should fail for the same reason that every prior amendment to Model Rule 8.5 has failed; namely, without uniform adoption, the non-adopting states are not bound by the system, and uncertainty remains for transactional lawyers engaged in interstate representations.²⁸⁰

C. Attorney, Client, or Transaction-Oriented Approaches

Other potential state-based jurisdictional approaches focus either on the lawyer, on the client, or on the effects of the transaction. The lawyer-centered approach would be based solely on the principal location of the lawyer. A client-centered approach would mandate that “[w]here a multistate practitioner acts outside of a court proceeding, and where a true conflict of law arises . . . [courts should apply] the law of the state in which the client is domiciled.”²⁸¹ Proponents of this rule claim the following advantages: (i) a greater degree of certainty and uniformity;²⁸² (ii) protection of the reasonable expectations of the client,²⁸³ who is ostensibly most familiar with the laws of his or her own state; and (iii) a prevention of forum shopping by lawyers and clients.²⁸⁴ A “predominant effect” approach would apply the law of the jurisdiction which is most affected by the transaction. At the outset, all three are doomed to failure, since, as we have noted,²⁸⁵ any solution proposing an amendment to Model Rule 8.5,

²⁷⁷ *Id.* at 1044 (“The political realities . . . apply in spades to Professor Daly’s proposal.”).

²⁷⁸ See Edward A. Carr & Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street*, 36 S. TEX. L. REV. 859, 904-05 (1995) (“Even [with respect to choice-of-rules provisions] uncertainty remains. A recent ABA Formal Ethics Opinion questions the enforceability of prospective conflict of interest consents that do not specifically identify the particular potential conflicts in question. . . . [W]ill courts readily enforce choice of law provisions in engagement agreements?”).

²⁷⁹ See *supra* Part III.A.

²⁸⁰ Moulton, *supra* note 17, at 159 (“[N]either the rule as currently formulated, nor any reworked version of it, will ever be adopted by a sufficient number of jurisdictions to materially increase predictability.”).

²⁸¹ Owyang, *supra* note 26, at 465.

²⁸² *Id.*

²⁸³ *Id.* at 468-69 (“The preamble to the Model Rules establishes that . . . the ethical guidelines exist as a means of protecting the public interest. . . . the law of the client’s domicile should apply because it best protects the reasonable expectations of the client. . . . [i]t is the law with which the client will most likely be familiar.”).

²⁸⁴ *Id.* at 471-72 (“Commentators often have manifested a concern that manipulative efforts of legally sophisticated parties could frustrate an imprudent choice-of-law standard . . .”).

²⁸⁵ See *supra* Part III.A.

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without proposing a way to ensure uniform adoption, will fail.²⁸⁶ In addition, even supposing that each state did adopt a given amendment, each of these proposals is intrinsically flawed. As we have noted earlier, a lawyer-centric rule would contain several ambiguities.²⁸⁷ Suppose a firm has a home office and multiple branches, with some branches having more lawyers than the home office. Alternatively, suppose that a lawyer spends most of her time in one state, and generates most of her revenue in another. Clearly, such an approach will expand the uncertainty, rather than remove it. A client-centered rule would similarly fail. Even one of the authors promoting this solution admits that such an approach “is threatened by the dependence of the client-based rule on the potentially difficult-to-apply concept of ‘domicile,’ which may itself be a problematic factor”²⁸⁸ Finally, an effects-based approach would fail for the same reason, as complex transactions can affect several different states.²⁸⁹ The primary, or predominant, effect of a transaction may also change during the representation, which can complicate such a regime.²⁹⁰ Thus, even in the unlikely event that the states uniformly adopt any of the preceding solutions, unworkable ambiguities in interpretation would still leave lawyers with uncertainty with respect to with which state’s ethics laws to comply.

D. Uniform Adoption of Substantive Rules

A final state-based option, which attempts to remove the substantive element from the conflict-of-laws problem, would require each state to adopt the substantive provisions of the Model Rules in full. The remote chances of such a solution make it laughable. Our earlier discussion of the history and origins of the Model Rules emphasize that at each stage in the evolution of professional ethics regulations, the rules were plagued by a lack of uniformity.²⁹¹ Even an author who argued that “uniform adoption of [a jurisdictional] rule is more likely than it may seem” has conceded that, with respect to substantive rules, uniform adoption “threatens states’ independence . . . [and] limits their policy choices.”²⁹² Thus, states will be strongly opposed to this solution, rendering it unimplementable.

²⁸⁶ Moulton, *supra* note 17, at 159-60 (“[N]either the rule as currently formulated, nor any reworked version of it, will ever be adopted by a sufficient number of jurisdictions to materially increase predictability.”); Felleman, *supra* note 34, at 1529 (“This [predominant effects] proposal . . . will not be effective unless it is uniformly adopted by the states. Otherwise, conflicting ethical obligations will be left unresolved by conflicting choice-of-law rules.”).

²⁸⁷ See *supra* Part III.B.

²⁸⁸ Owyang, *supra* note 26, at 466. Owyang responds that this difficulty should not be cause to discard this approach, as “[t]he continued use of the domicile concept suggests that courts and scholars have become sufficiently comfortable with its operation so that its future application will not prove unduly burdensome or problematic.” *Id.*

²⁸⁹ Roach, *supra* note 18, at 929 (“Ethics rules have multiple beneficiaries, and those beneficiaries will often have multiple domiciles.”).

²⁹⁰ *Id.*

²⁹¹ Regarding the Model Code, see Felleman, *supra* note 34, at 1505-06 (“[T]he adoption process was selective, with many states completely ignoring some provisions and significantly altering others. The increased attention that the states paid to the substance of the rules was probably due to the Code’s new emphasis on disciplinary action.”). With respect to the Model Rules, see GILLERS, *supra* note 4, at 8. See also Roach, *supra* note 18, at 910 (“The ABA has of course tried to foster uniformity in ethics rules with the Canons . . . the Model Code . . . [and] the Model [Rules] But notwithstanding those efforts, there is much nonuniformity.”).

²⁹² Felleman, *supra* note 34, at 1530.

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Because each proposed state-based solution, whether jurisdictional or substantive, contains serious flaws, we will now analyze federal solutions which negate the largest impediment to these solutions; namely, the need for uniform adoption by individual states.

IV. SOLUTIONS REQUIRING FEDERAL LEGISLATION

A. Federal Choice-of-Law Rule

The first federal solution, removing the jurisdictional element, proposes a federal choice-of-law rule.²⁹³ While this solution is also premised on removing the jurisdictional element from the choice-of-law problem, much like the solutions above recommending uniform adoption of Model Rule 8.5, it does not rely on the states to uniformly adopt a given rule. Instead, it calls for the federal government to “create a choice-of-law rule governing interstate conflicts” of lawyer ethics standards.²⁹⁴ Whereas Model Rule 8.5, or any variation thereof, would require adoption by fifty different jurisdictions, a federal choice-of-law rule would need only to be enacted by one jurisdiction, and would not be subject to maddening variations which have so often existed with respect to Model Rule 8.5.²⁹⁵

Consider again our initial examples. The California lawyer representing the New Jersey client would simply need to glance at the federal choice-of-law statute to determine the appropriate forum. Once the lawyer has identified the proper state, the lawyer could be certain that compliance with that state’s statute could under no circumstances result in discipline from any state, as each state would be bound by the choice-of-law identified by the federal statute. Unlike with adoption of Model Rule 8.5 (or variations thereof), there would be no possibility of hold-out states under this regime. The Alabama lawyer, as well, in her dilemma of whether to disclose the intended murder to be committed by her client, could rely on a federal choice-of-law rule. She could use this rule to determine whether Alabama or Florida would be the proper jurisdiction for the matter, and proceed accordingly, confident that she will not be subject to discipline. Thus, these examples demonstrate that a federal choice-of-law rule will increase, *ex ante*, certainty and predictability for lawyers in representations of interstate clients.

The benefits of this solution are numerous. First, although diversity in substantive ethics rules may be worthwhile, proponents of a federal choice-of-law rule argue that diversity and variation in choice-of-law rules is not worthwhile, and should not be preserved. The substantive rules, which embody each state’s policy choices, are fundamentally different from the choice-of-law rule, which takes an “umpireal role”²⁹⁶ with respect to the other rules. Experimentation and diversity with respect to the choice-of-law rule is thus inappropriate, as

²⁹³ See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 16 (describing some areas of law as amenable to a federal choice-of-law rule).

²⁹⁴ Moulton, *supra* note 17, at 164-65. This solution is in contrast to complete substantive uniformity, under which the federal government would mandate not only a choice-of-law rule, but the actual underlying law as well. See *infra* Part IV.B. For a discussion of congressional authority to enact such a law, see Moulton, *supra* note 17, at 166-67 (relying on both the Commerce Clause and the Full Faith and Credit Clause to prove congressional authority to regulate in this area).

²⁹⁵ Moulton, *supra* note 17, at 166 (“A federal rule would have obvious advantages over even an ideal version of Model Rule 8.5—it would need to be enacted by only a single jurisdiction and it would not be subject to varying state amendments or interpretations.”).

²⁹⁶ *Id.* at 168.

any situation involving fifty separate actors and fifty separate umpires will invariably end in chaos. The federal government, as, in the words of James Madison, a “disinterested and dispassionate umpire,”²⁹⁷ should therefore enact a uniform choice-of-law rule to serve as an impartial and unquestioned referee in cases of interstate ethics conflicts.

Second, this solution is proper because federalism “enabl[es] the federal government to act where national action is warranted.”²⁹⁸ “To resolve squabbling between states over primacy of their laws is a uniquely appropriate federal role, and . . . one that the framers envisioned Congress would fill.”²⁹⁹ The Supreme Court has noted that “[a] State cannot be its own ultimate judge in a controversy with a sister State.”³⁰⁰ Thus, it is obvious that if interstate ethics conflicts arise because of stark contrasts in policy and substantive law between states, no one state should be permitted to judge whether its policy, or that of its neighbor, should prevail. Instead, federalism requires that the federal government, being in the “best position to deliver,” intervene and enact a uniform choice of law rule, which would provide a “consistent and predictable method of resolving those disputes.”³⁰¹ Third, this solution is ideal because abrogation of state authority is minimal.³⁰² Whereas creating a federal substantive ethics code would pre-empt the states from controlling the law to be applied to matters internal to that state, simply creating a federal choice-of-law rule would leave internal affairs intact, and would affect only interstate conflicts.³⁰³

Critics of this solution have argued that because “neither judges nor scholars have yet identified the ‘best’ choice-of-law rule . . . [w]e ought to let state experimentation continue rather than prematurely freeze the law’s development with a single national rule.”³⁰⁴ The proponents’ response is three-fold. First, there have been countless amendments and proposed amendments to Model Law 8.5, none getting closer to the “best” rule.³⁰⁵ Second, “consensus in this lifetime appears inconceivable.”³⁰⁶ Finally, “the benefits of having one adequate rule . . . are likely to outweigh the cost of suboptimal results in occasional cases.”³⁰⁷

In conclusion, the federal choice-of-law rule is clearly the strongest “jurisdictional” solution. The federal government, with its ability to regulate all fifty states at once, can finally end the uncertainty fostered by a “model” law premised on state adoption. Of course, the substance of this federal choice-of-law rule will require scrutiny and analysis by congress during its drafting, as we have pointed out serious pitfalls in many proposed choice-of-law

²⁹⁷ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 473 (1969).

²⁹⁸ Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994) (explaining that federalism embodies both the preservation of state authority and the allowance of the federal government to operate nationally when needed).

²⁹⁹ Moulton, Jr., *supra* note 17, at 168 (quoting Gottesman, *supra* note 293, at 32).

³⁰⁰ *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

³⁰¹ Moulton, *supra* note 17, at 168-69 (concluding that “[i]f the problems of uncertainty caused by inconsistent state choice-of-law rules are serious enough, then the adoption of national choice-of-law rules makes perfect sense”).

³⁰² See Gottesman, *supra* note 293, at 31-32.

³⁰³ See Moulton, *supra* note 17, at 169. Although this would intrude on states’ control over interstate matters, in those cases, “the current system of state-based choice-of-law rules already deprives states of control over application of their law.” *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* Moulton wrote this in 1997. It holds true even more so today, after the failed 2002 amendment to Model Rule 8.5.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

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rules.³⁰⁸ However, presuming that Congress can craft an effective choice-of-law rule, this federal intervention will finally create the certainty and predictability for lawyers that Model Rule 8.5 has long striven to provide.

B. Creation of a Federal Ethics Code

1. Introduction

As opposed to the state-based substantive solution proposed in Part III, calling for states to adopt the Model Rules uniformly, this solution calls upon the federal government to mandate a federal code of ethics.³⁰⁹ The entire spectrum of ethics laws would be limited to a “single uniform body of law,”³¹⁰ enacted by the federal government in its role as umpire and decider of conflicts between states. Without the need for uniform adoption, states would no longer be able to resist uniformity.

2. Arguments for a Federal Code of Ethics

The benefits of such a system are obvious. Lawyers would have the greatest possible certainty and predictability, as there would be but one “potentially applicable law.”³¹¹ Even under a federal choice-of-law approach, although attorneys would be able to investigate, *ex ante*, which state’s law would apply, it would still require time and effort on the part of the lawyer to do this investigation, and to become educated as to the ethics laws of the governing state, which can be difficult.³¹² By contrast, under a federally-enacted substantive ethics code, lawyers will need only study and heed one ethics code. Second, while some scholars worry about state-by-state variation in interpretation of a federal statute,³¹³ the “uncertainty in interpretation would decline as a body of case law develops around the common statute. While not binding, decisions from courts in other states could provide some guidance for parties and courts in jurisdictions that have yet to decide issues under the [new uniform code].”³¹⁴ Third, Professor Zacharias notes that a uniform body of ethics laws will make lawyers who work in different branches of the same firm better able to operate within the

³⁰⁸ See *supra* Part III.A-C (finding that rules purporting to grant jurisdiction to the state of the lawyer’s principal place of practice, or the state of the client’s domicile, or the state predominantly affected by the transaction, or the state chosen by contract by the attorney and the client all create serious uncertainties). Perhaps the most foolproof version (actual or proposed) of Model Rule 8.5 to date is the current version, which defers to the reasonable belief of the attorney, thus ending uncertainty for any competent and honest lawyer. See MODEL RULES OF PROF’L CONDUCT R. 8.5.

³⁰⁹ See Ritts, *supra* note 3, at 84 (“Until a uniform standard of attorney conduct emerges, state courts will be faced with occasional conflicts of states’ ethical rules.”); see generally Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) (presenting arguments for and against federalization of legal ethics).

³¹⁰ Rensberger, *supra* note 10, at 813.

³¹¹ *Id.*

³¹² See Zacharias, *supra* note 309, at 346 (“First, the lawyer faces the practical problem of knowing all the relevant professional rules. Before engaging in any aspect of legal practice in a foreign jurisdiction, a lawyer must, in theory, study that jurisdiction’s professional rules to avoid running afoul of them. Understanding multiple codes can be difficult and confusing.”).

³¹³ See Moulton, *supra* note 17, 166 n.426 (noting that any federal law is open to variations in interpretation by lower courts).

³¹⁴ Deason, *supra* note 108, at 101.

firm.³¹⁵ For example, many states differ in laws regarding advertising or solicitation.³¹⁶ If a firm centered in New York, for example, sets a firm-wide policy with respect to advertising, that policy may run afoul of the law of another state which contains a branch office of the firm.³¹⁷ Clearly, the creation of a uniform federal substantive code of ethics would solve that problem.

Consider once again our initial examples. Under a uniform code of ethics, the California lawyer representing the New Jersey client would have no dilemma regarding whether or not to disclose the client's fraud. Moreover, the lawyer would not even need to investigate a potential federal choice-of-law rule to determine the proper forum, and would not need to then become educated as to the substantive law of that forum. Rather, the lawyer, already presumably aware of the federal rule of confidentiality, would simply follow that rule, confident that his behavior will be protected by his compliance with the federal code of ethics. The same result would occur with the Alabama lawyer mulling whether to disclose the intended murder by her client. Rather than pondering whether Florida's mandatory statute would apply or Alabama's permissive statute would apply, the lawyer would be aware of the national law, and would proceed accordingly. Thus, this solution would achieve the highest possible degree of certainty and predictability for lawyers.³¹⁸

3. Precedent for a Federal Ethics Code

Proponents of a federal code of ethics argue that there is precedent for the federal government regulating in ethics codes.

Although the regulation of attorneys has typically existed within the power of the states, some federally mandated ethics rules do exist. For example, specialized ethics codes exist for attorneys who practice federal tax law and maritime law. Another example is the 2002 Sarbanes-Oxley Act, which gave the Securities and Exchange Commission ("SEC") the ability to regulate attorney confidentiality.³¹⁹

Federal prosecutors have enacted specialized federal laws regulating the "no-contact" rule, "which prohibited attorneys from communicating directly with represented persons absent the consent of the represented person's attorney."³²⁰ The Attorney General, in 1994, "decided to override state ethics rules in the area of pre-charge contacts with potential defend-

³¹⁵ See Zacharias, *supra* note 309, at 346 ("The existence of differing state codes results in other idiosyncrasies as well. For example, members of the same law firm who belong to different bars or who practice through offices in different states are covered by distinct rules.").

³¹⁶ See *id.* at 347 n.55.

³¹⁷ See *id.* at 349.

³¹⁸ See Carr & Van Fleet, *supra* note 278, at 901 ("It is no doubt true that a uniform set of national rules could provide the benefit of greater predictability.").

³¹⁹ See Megan A. Taylor, *Gag Me With a Rule of Ethics: BAPCPA's Gag Rule and the Debtor Attorney's Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 241 (2008) (arguing for a specialized bankruptcy code of ethics).

³²⁰ Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 57-58 (1998); see generally Neals-Eric William Delker, Comment, *Ethics and the Federal Prosecutor: The Continuing Conflict Over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U. L. REV. 855 (1995).

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ants.”³²¹ Moreover, the Judge Advocate General of the Army has enacted specialized ethics rules for members of the armed forces.³²² The need for a federal code of military ethics arose due to a familiar dilemma: military lawyers were instructed to follow the rules of the Model Code; however, many of them also attempted to follow the rules of their home state. This uncertainty created a “damned if you do, damned if you don’t” dilemma.³²³ Tax lawyers have federal “duties and restrictions related to practice before the internal revenue service.”³²⁴ There have been calls for bankruptcy lawyers to be subject to a specialized federal code of bankruptcy ethics.³²⁵ Thus, there is certainly precedent for the federal government to regulate in the ethics arena, and the creation of a uniform substantive code of ethics would merely be a natural evolution of these more specialized federal ethics codes.

4. Constitutional Concerns

A federal code of ethics would not run afoul of constitutional requirements, as it would be firmly within Congress’ Commerce Clause powers.³²⁶ For much of the twentieth century, Congress routinely upheld laws under the Commerce Clause, requiring only that federal legislation “affect” interstate commerce.³²⁷ Moreover, each individual transaction need not have a substantial effect on interstate commerce; rather, so long as a “general regulatory statute bears a substantial relation to commerce, the de minimis character of the individual instances arising under the statute is of no consequence.” Thus, under this standard, the activity of lawyers, much of which involves several jurisdictions, would certainly be found to affect, in the aggregate, interstate commerce.³²⁸ Additionally, although the Supreme Court has recently slightly narrowed the scope of the Commerce Clause,³²⁹ there appears to be no “serious question[s] of Congress’s power to set national standards of attorney conduct.”³³⁰ Professor Moulton argues that both potential “doctrinal innovations” in these cases do not affect the ability of Congress to regulate in the field of lawyer ethics.³³¹

³²¹ Rapoport, *supra* note 320, at 58. The federal memorandum stated that “[t]he Department [of Justice] will resist, on Supremacy Clause grounds, local attempts to curb legitimate federal law enforcement techniques.” *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993).

³²² Major Bernard P. Ingold, *An Overview and Analysis of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1, 1 (1989).

³²³ Rapoport, *supra* note 320, at 60 (citing Ingold, *supra* note 322, at 7-10; Eileen M. Albertson, *Rules of Professional Conduct for the Naval Judge Advocate*, 35 FED. BAR NEWS & J. 334, 335 (1988)).

³²⁴ 31 C.F.R. § 10.20 (2010).

³²⁵ Rapoport, *supra* note 320 at 62-63; Taylor, *supra* note 319, at 241.

³²⁶ U.S. CONST. art I, § 8, cl. 3 (congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

³²⁷ See *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (upholding regulation of wheat harvested for home consumption because of the aggregate effect of wheat on interstate commerce); *Perez v. United States*, 402 U.S. 146, 154 (1971) (holding that a purely local activity subject to congressional regulation because its “class of activities” affects interstate commerce).

³²⁸ Moulton, *supra* note 17, at 118 (“[T]he activities of lawyers, individually and collectively, would surely be within Congress’s reach.”).

³²⁹ *United States v. Lopez*, 514 U.S. 549 (1995) (holding that federal regulation of possession of firearms near schools is outside the scope of the Commerce Clause, as it is a non-commercial activity); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that parts of the Violence Against Women Act were outside the scope of the Commerce Clause).

³³⁰ Moulton, *supra* note 17, at 119.

³³¹ *Id.* at 119-20.

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The first of . . . doctrinal innovations—the requirement that the regulated activity “substantially affects” interstate commerce—appears to be little more than “repackaging a test that [the Court] has recited in virtually every Commerce Clause case decided since 1937.” . . . [A]ny reasonable assessment of the interstate effects of attorney conduct would find the test met. The other new twist . . . lies in [the] distinction between “commercial” and “noncommercial” activities, and its suggestion that Congress lacks (or possesses diminished) authority to regulate the latter. Whatever the merits, or workability, of this distinction, *the conduct of lawyers would appear to fall comfortably on the “commercial” side of the line.*³³²

Thus, Congress would have authority to regulate in this field, even under a more restrictive reading of the Commerce Clause, and, due to the benefits described above, would be wise to do so.

5. Arguments Against a Federal Code of Ethics

The chief arguments against this federal substantive solution are the abrogation of state sovereignty and the loss of experimentation and diversity in the substantive ethics rules. First, preemption of states’ ethics codes with a federal version would remove the “meaningful existence” of states in the federal system.³³³ “The entire field has long been left almost entirely to state regulation, and the discipline of lawyers cuts close to the core of a state’s sovereignty,”³³⁴ as states have an “extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses.”³³⁵

The numerous differences in rules across jurisdictions are not entirely random. Rather, these variations often reflect different judgments reached by different states after weighing the policy considerations underlying the particular issue at hand. Such variations cannot uniformly be deemed capricious or otherwise unworthy of any regard . . . a single, monolithic “national” rule cannot be uniformly imposed without seriously impairing or destroying a given state’s reasoned and significant policy judgments.³³⁶

Thus, opponents of the creation of a federal code of ethics conclude that the overruling of states’ ethics codes comes “at the cost of undermining individual states’ rational exercises in autonomous decision-making.”³³⁷ Second, despite acknowledged drawbacks to variations in states’ ethics codes, some scholars argue that the “multiplicity has . . . benefits . . . [as] states serve as laboratories of social experimentation.” By preserving these laborato-

³³² *Id.* (emphasis added).

³³³ Rensberger, *supra* note 10, at 813.

³³⁴ *Id.* at 817.

³³⁵ *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 434 (1982).

³³⁶ Carr & Van Fleet, *supra* note 278, at 901-02. The example provided is from the laws of lawyer advertising, where “[p]olicy concerns about the importance of providing information to consumers are often pitted against concerns about the dangers of lawyer overreaching in the solicitation context, and conscientious authorities can rationally differ in their value judgments on these issues.” *Id.* at 902.

³³⁷ *Id.* at 903; see also Zacharias, *supra* note 309, at 375 (“In theory, the states can tailor their codes to meet their particular needs.”).

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ries, one approach will ultimately emerge as superior.³³⁸ However, because of flaws in both of these arguments,³³⁹ and because of the overriding need for predictability and certainty in the regulation of lawyers' conduct, a federal code of legal ethics would be a successful method of solving our problem.

C. Conclusion

This Article has presented several solutions to the problem of conflicting ethics rules in multijurisdictional practice. Part III discussed solutions requiring action on the part of states. Among these solutions were both procedural options, which called for uniform state adoption of a choice-of-law rule, and a substantive option, which called for uniform state adoption of a code of ethics. As explained above, the ABA has, for decades, attempted to foster uniformity and harmony in ethics laws through the promulgation of the Canons, the Model Code, and the Model Rules, and through numerous revisions of the Model Rules' choice-of-law provision. Each and every attempt has ended in failure. Thus, Part IV, taking a wholly different approach, analyzed two options calling for federal legislation, either in the form of a procedural choice-of-law rule, which would remove the "jurisdictional element" from our conflict-of-laws problem, or a substantive code of ethics, which would remove the "substantive element" from our conflict-of-laws problem.³⁴⁰ Based on the foregoing Parts, it is this author's conclusion that, in the national context, predictability and certainty for multijurisdictional lawyers can be achieved only by either of the two federal solutions.

V. INTERNATIONAL SOLUTIONS

A. The Problem

"[L]awyers are increasingly confronting novel issues arising from the globalization of their clients' activities."³⁴¹ While legislation, whether procedural or substantive, by the United States federal government is an attractive solution to solve the ethics dilemma of a lawyer practicing in the United States, it does little to assuage the concerns of a California lawyer negotiating a deal in Beijing. Scholars have noted that "[o]ne of the consequences of [a global business world] is the emergence of occasions on which lawyers operating across national borders will be puzzled as to which rules they should be following."³⁴² Confidentiality, which has been discussed at length in this Article, is a "universally acknowledged" feature of ethics codes.³⁴³ However, "[international] systems . . . diverge in how they demarcate the

³³⁸ Zacharias, *supra* note 309, at 373 ("[R]especting state autonomy enables the states to serve as laboratories for novel approaches, some of which ultimately will come to the fore as superior.").

³³⁹ *Id.* at 373-76.

³⁴⁰ See *supra* Parts IV.A-B.

³⁴¹ Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 267 (2006).

³⁴² Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 677 (2000); see also Malini Majumdar, Note, *Ethics in the International Arena: The Need For Clarification*, 8 GEO. J. LEGAL ETHICS 439, 444 (1995) ("The very same conflicts which may arise between New Jersey and the District of Columbia may also arise between New Jersey and India.").

³⁴³ Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct For International Arbitration*, 23 MICH. J. INT'L L. 341, 371 (2002).

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obligation of confidentiality when client wrongdoing or potential wrongdoing is involved.”³⁴⁴ In fact, the conflicting confidentiality rules have been described as the greatest threat to international practice.³⁴⁵ Examples of diverging requirements include those of Italy, France, and Portugal, where communications between lawyers, including opposing counsel, can be regarded as confidential.³⁴⁶ A package marked “confidential” in France may not even be shared with the attorney’s client.³⁴⁷ England’s Code of Conduct for solicitors mandates that confidentiality may be breached “to the extent that you believe necessary to prevent the client or a third party committing a criminal act that you reasonably believe is likely to result in serious bodily harm.”³⁴⁸ This appears strikingly similar to California’s restrictive statute. What, then, of a New Jersey lawyer negotiating with a British client, who is unsure whether to disclose confidential information which will harm the financial interests of a third party? New Jersey law mandates disclosure; British law prohibits it. Japan’s rule states only that “[a]n attorney shall not disclose or utilize, without due reason, confidential information of a client which is obtained in the course of his or her practice.”³⁴⁹ Hong Kong’s code of conduct states that:

A barrister employed as Counsel is under a duty not to communicate to any third person information which has been entrusted to him in confidence, and not to use such information to his client’s detriment or to his own or another client’s advantage. This duty continues after the relation of Counsel and client has ceased. A barrister’s duty not to divulge confidential information without the consent of his client, express or implied, subsists unless he is compelled or permitted to do so by law.³⁵⁰

Hong Kong’s law is based on its policy that “[a] barrister has a duty to uphold the interests of his client without regard to his own interests *or to any consequences* to himself or *to any other person*.”³⁵¹ Canadian law, by contrast, allows disclosure when there is a “clear, serious and imminent threat to the public safety.”³⁵² For disclosure to be warranted under this standard, there must be a threat that can cause serious bodily injury or death.³⁵³ Foreign

³⁴⁴ *Id.*; see also Darya V. Pollak, “I’m Calling My Lawyer . . . In India!”: Ethical Issues in International Legal Outsourcing, 11 UCLA J. INT’L L. & FOREIGN AFF. 99, 124 (2006) (“[C]onfidentiality issues are also of concern in an outsourcing model because of potential disparities in the scope of these doctrines between the United States and the outsourced lawyer’s home country.”).

³⁴⁵ IVO G. CAYTAS, TRANSNATIONAL LEGAL PRACTICE: CONFLICTS IN PROFESSIONAL RESPONSIBILITY 4 (1992).

³⁴⁶ Laurel S. Terry, *An Introduction to the European Community’s Legal Ethics Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 85 (1993).

³⁴⁷ *Id.*

³⁴⁸ : CODE OF CONDUCT R. 4 cmt. 12 (Solicitors Reg’n Auth., U.K. 2007) (superseded Oct. 6, 2011), available at <http://www.sra.org.uk/solicitors/code-of-conduct/rule4.page> (select version in force from Aug. 3, 2010–Oct. 5, 2011) (“You may reveal confidential information to the extent that you believe necessary to prevent the client or a third party committing a criminal act that you reasonably believe is likely to result in serious bodily harm.”).

³⁴⁹ BASIC RULES ON THE DUTIES OF PRACTICING ATTORNEYS art. 23 (Jap. Fed’n of Bar Ass’ns 2004), available at http://www.nichibenren.or.jp/library/en/about/data/basic_rules.pdf.

³⁵⁰ CODE OF CONDUCT FOR H.K. ¶ 116 (H.K. Bar Ass’n 2011) (entitled Duty of Counsel to the Lay Client), available at http://www.hkba.org/the-bar/code-of-conduct/code_of_conduct11.htm.

³⁵¹ *Id.* ¶ 110 (emphasis added).

³⁵² Smith v. Jones, No. 26500, 1999 A.C.W.S.J. LEXIS 46382, at *42 (S.C.R. Mar. 25, 1999).

³⁵³ Hicks, *supra* note 86, at 308.

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governments may require the disclosure of information “usually considered confidential by American lawyers.”³⁵⁴

We see, then, a major difference in substantive ethics laws, which can pose a dilemma to international lawyers, and which cannot be solved by the United States’ government mandating procedural or substantive uniformity. Consider the international lawyer from the third example in the Introduction.³⁵⁵ He must, in the course of his representations, conduct business under American, British, and Hong Kong law. If a client reveals incriminating, or fraudulent, information, what is the lawyer to do? If the lawyer refuses to reveal the information, relying on the foreign, more restrictive statute, he may be disciplined by his home state. If the lawyer complies with his home state’s law, can he then be disciplined by the courts in Hong Kong? It is clear that “there is a need for a more universal and definite statement of what ethical guidelines apply to attorneys when practicing law in a foreign jurisdiction.”³⁵⁶ While the comment to Model Rule 8.5 appears to govern international transactions,³⁵⁷ we have seen that the utter lack in uniformity in the adoption of this Model Rule renders it relatively meaningless.³⁵⁸

B. The CCBE—A Good Start

Currently, the bars of many European countries have joined an international organization, the Council of Bars and Law Societies in Europe (the “CCBE”), which “is recognised as the voice of the European legal profession by the national bars and law societies on the one hand, and by the EU institutions on the other.”³⁵⁹ The CCBE presently has thirty-one full members, two associate members, and nine observer members.³⁶⁰ “The hope is to . . . develop a code of professional conduct that will apply to the cross-border activities of lawyers from all the countries which are signatories . . . [t]hereafter, if a Belgian lawyer wishes to instruct a lawyer from [Poland], each would know that there is a common set of professional principles that would apply.”³⁶¹ With regards to confidentiality, section 2.3 of the CCBE Code of Conduct states that:

³⁵⁴ See Mark I. Harrison & Mary Gray Davidson, *The Ethical Implications of Partnerships and Other Associations Involving American and Foreign Lawyers*, 22 PENN ST. INT’L L. REV. 639, 651 (2004).

³⁵⁵ See *supra* Introduction.

³⁵⁶ Whitaker, *supra* note 1, at 1086-87.

³⁵⁷ MODEL RULES OF PROF’L CONDUCT R. 8.5 cmt. 7 (2011) (“The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.”). This was a change from the 1993 version of Model Rule 8.5, which specifically stated, in comment 6, that “[t]he choice of law provision is not intended to apply to transnational practice.” MODEL RULES OF PROF’L CONDUCT R. 8.5 cmt. 6 (1993).

³⁵⁸ See generally Rogers, *supra* note 343, for other problems with using Model Rule 8.5 to govern international representations.

³⁵⁹ THE COUNCIL OF BARS AND LAW SOCIETIES IN EUROPE, *THE RIGHT KIND OF JUSTICE FOR EUROPE*, at 2, available at http://www.ccbe.eu/fileadmin/user_upload/document/Manifesto/manifesto_EN_web.pdf.

³⁶⁰ *Members by Countries*, CCBE, <http://www.ccbe.eu/index.php?id=22&L=0> (last visited November 21, 2010).

³⁶¹ John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT’L L.J. 673, 674-75 (1992); see also Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century From Now?*, 1 J. INST. STUD. LEGAL ETHICS 297, 313 (1996) (“[W]ithin each member state the two codes of conduct exist side by side, one for cross-border transactions and the other for purely domestic transactions.”).

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It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.³⁶²

No exception to confidentiality is allowed. While the CCBE acknowledges that some European countries have created exceptions to confidentiality, it concludes that absolute secrecy is paramount, and, in international representations involving its member states, confidentiality will be absolute.³⁶³

C. Solutions

1. Introduction

In proposing solutions to this problem in the international context, there can be no split between "state-based" solutions and "federal" solutions, as each country is, for these purposes, a "state," with no higher body possessing the authority to serve as a referee. Indeed, the CCBE, despite its success, is only a promulgator of model rules, with no inherent power to govern its member states.³⁶⁴

2. Bilateral Treaties

One solution involves the negotiation of bilateral ethics treaties—either substantive or procedural—between countries.³⁶⁵ The principal advantage to this solution is that reciprocity is guaranteed³⁶⁶—meaning, if the United States and Canada enter into an ethics treaty, stipulating either a choice-of-law rule for international representations, or a set of substantive rules for such engagements, both countries will be assured that the other country will provide its citizens with the same treatment that it affords to citizens of the other. There are, however, two arguments against using treaties to solve international ethics conflicts. First, the method "is complicated and relatively time-consuming because it requires a separate set of negotiations with every country."³⁶⁷

Experience has shown that despite the potential for international treaties to bring widespread harmonization, the effort to negotiate such agreements is generally substantial and . . . "the greater the degree of practical utility that is pursued by means of a treaty, the greater the difficulty in bringing it to fruition, and hence the greater the risk of ultimate failure."³⁶⁸

³⁶² CCBE CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROF'N & CODE OF CONDUCT FOR EUROPEAN LAWYERS, § 2.3.1 (2008).

³⁶³ Hicks, *supra* note 86, at 311.

³⁶⁴ The CCBE Code is not "binding law" and was "intended . . . to be adopted by the Member States." Lauren R. Frank, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957, 963.

³⁶⁵ See Majumdar, *supra* note 342, at 450-51.

³⁶⁶ *Id.* at 451

³⁶⁷ *Id.*

³⁶⁸ Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 312 (2004).

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In addition, such a method would most likely create different rules for each partner country, which will prove to be quite confusing and onerous for attorneys, and, despite *ex ante* predictability, will fail to provide clear, easy-to-grasp ethics rules.³⁶⁹

3. International Code of Ethics

The ideal solution would build on the success of the CCBE, and would develop a code of professional rules which would apply to the cross-border legal representations of all signatory nations. Unlike the CCBE, it would not be limited to Europe. "The object would be to draw from and synthesize the best aspects of the participating countries individual codes and to develop conflicts rules in the areas in which synthesis could not be reached."³⁷⁰ This is, in theory, the best solution, as it would provide clear, *ex ante* predictability for lawyers engaged in international practice.³⁷¹ While it may create a small degree of confusion, as different ethics rules would apply to national and international practice, the confusion would be far less than if countries negotiated separate bilateral treaties with countless counterparty countries. There are two primary arguments against this solution. First, as adoption of this code of ethics would be voluntary, there is no guarantee that a sufficient number of countries would adopt it to render it worthwhile. After all, if only a handful of countries implement this code, and the other states continue applying local law to international transactions, no certainty or predictability will come of it. However, proponents of an international code of ethics point out that the CCBE "has been voluntarily adopted throughout [Europe] by jurisdictions no less independent than the states of the United States,"³⁷² and therefore international adoption and implementation is a realistic solution. However, in the United States, adoption cannot be left to the states, as history has proven uniform adoption by all fifty states to be unattainable; rather, the federal government must adopt any international ethics code on behalf of all fifty states, and mandate its implementation nationwide.³⁷³ Second, such a task would be a monumental undertaking, as the CCBE, for example, took over six years of work.³⁷⁴ The project would require "a significant amount of time and negotiation to achieve," but "the benefits which a clear and comprehensive cross-border code of ethics would provide to both lawyers and clients certainly make the effort worthwhile."³⁷⁵ Thus,

³⁶⁹ Majumdar, *supra* note 342, at 451 ("While bilateral agreements would present bright-line rules with regard to certain countries, they would not provide clarity because the lawyer would be faced with a multitude of rules with which to be familiar.").

³⁷⁰ *Id.*

³⁷¹ *Id.* at 451-52 ("The result would be that if a French lawyer wishes to practice in Mexico, or a lawyer from New Jersey attempts to practice in India, each would know in advance exactly what rules of professional responsibility would apply.").

³⁷² Toulmin, *supra* note 361, at 685.

³⁷³ The two primary articles presenting this idea both assume that, within the United States, it will be the individual states, rather than the federal government, adopting such a uniform code of ethics. See Majumdar, *supra* note 342, at 452 ("With the United States, there is a significant problem in that the individual states adopt their own rules of conduct . . ."); Toulmin, *supra* note 361, at 685 ("I know that the U.S. federal system of government poses a particular problem for the United States to adopt such a code."). However, it is this author's contention that the federal government, rather than the states, should uniformly adopt this international code of ethics, for reasons elaborated upon *supra* in Parts III-IV.

³⁷⁴ Majumdar, *supra* note 342, at 452.

³⁷⁵ *Id.* at 452.

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should such a task be attempted, it could provide the greatest degree of clarity, uniformity, and *ex ante* predictability and certainty to cross-border lawyers.

4. International Legal Education

A final approach, taking into account the monumental effort required to accomplish either of the two aforementioned solutions, would be to educate young lawyers in international ethics rules in order to make cross-border lawyers “aware of the international implications of their matters.”³⁷⁶ One author suggests that “[e]thics should be integrated into substantive areas of the law during law school, particularly in courses dealing with areas of law likely to have international complexities”³⁷⁷ Another suggests “more courses, seminars and ‘study abroad’ programs [to] . . . reflect the current move towards globalization.”³⁷⁸ Yet another proposes the following curriculum:

Students intending to practice transnationally should subscribe to a core curriculum of international courses designed to, first, introduce them to general concepts of international law and culture and the workings of different legal systems and, second, create a sophisticated understanding of the differences among countries and how they impact an American’s international practice. . . . These courses could include studies of specific legal systems, such as civil law, socialist law, and Islamic law, international business law, public international law, and courses uniquely tailored to particular interests, such as international copyright law, international tax law, and international sales.³⁷⁹

The education in foreign culture and ethics would continue after licensure.³⁸⁰ International lawyers would have “on-going training in the area of legal ethics” to best prepare them for real-world ethical dilemmas.³⁸¹ “Those engaged in an international practice will have to spot a legal matter having implications for the ethical practice of law, both under the rules of their own jurisdictions,” and in other jurisdictions in which the lawyer, or the lawyer’s firm, practices.³⁸²

D. Conclusion

In conclusion, whereas in the strictly national context, a federal solution can fully solve the problem of conflicting ethics laws, in the international arena, the lack of an impartial

³⁷⁶ Burger & Langford, *supra* note 341, at 280. While this wouldn’t create certainty or predictability, it would at least make lawyers aware of potential conflicts and allow them to prepare accordingly.

³⁷⁷ *Id.*

³⁷⁸ Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Services*, 19 Hous. J. Int’l L. 95, 135 (1996).

³⁷⁹ Frank, *supra* note 364, at 985-86.

³⁸⁰ See *id.* at 985 (recommending mandatory post-certification refresher courses for international lawyers); see also generally Daly, *supra* note 361 (envisioning an international-focused curriculum for law schools a century in the future).

³⁸¹ Burger & Langford, *supra* note 341, at 281.

³⁸² *Id.*

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umpire to govern autonomous countries precludes “federal” solutions. Thus, countries hoping to provide greater certainty to their lawyers can either enter into bilateral treaties, or can work together to promulgate and adopt a uniform code of legal ethics. Because the odds of either of these solutions occurring in the near future are slim, law schools, law firms, and bar associations should endeavor to provide the proper education and training to international lawyers to allow them to recognize and properly plan for international conflicts of ethics laws.

CONCLUSION

Many lawyers are involved in transactions which cross state and national boundaries. Often, questions of legal ethics arise from these representations. Currently, each of the fifty states, as well as each foreign country,³⁸³ has enacted its own, often quite different, code of legal ethics. The disparities in and, in some cases, conflicts between state and national laws have created obstacles to lawyer effectiveness, as lawyers often are unsure with which state’s ethics rules to comply.

This Article began by examining the statutory framework, in the United States, which allows for such a conflict to occur. First, we examined Model Rule 4.1, which governs transactional representations, and requires certain disclosures.³⁸⁴ Second, we analyzed Model Rule 1.6 and many state variations thereto, which limits the required disclosures of Model Rule 4.1 when confidential information is involved, but provides for certain exceptions.³⁸⁵ Third, this Article studied Model Rule 5.5, which allows for the temporary multijurisdictional practice of law, and without which our problem would not exist.³⁸⁶ Fourth, we discussed Model Rule 8.5, which attempted to internally solve the conflict-of-laws by providing a choice-of-laws rule, but, mainly due to lack of uniform adoption, has not succeeded.³⁸⁷ Next, this Article presented two sets of solutions. The first set focused on approaches requiring individual states to uniformly adopt Model Rule 8.5, a variation thereof, or uniform substantive ethics rules.³⁸⁸ These approaches will likely fail, as the history of the Model Rules, and specifically Model Rule 8.5, has proven that uniform voluntary adoption among the fifty states is highly unlikely. The second set of approaches focused on the federal government, and called for the enactment of either a federal choice-of-laws rule, or a federal substantive code of ethics.³⁸⁹ These solutions, by *mandating* the states to implement rules, instead of allowing for *voluntary* adoption, are best suited to finally give multijurisdictional lawyers *ex ante* certainty and predictability when faced with an ethical dilemma. Lastly, this Article examined the problem in the international context, and advocated an international code of ethics, much like the CCBE, to govern all international representations involving its signatory states.³⁹⁰

In sum, although no solution to this problem is perfect, it is this author’s contention that by involving the federal government on the national level, and promulgating an interna-

³⁸³ The CCBE, as described above, is a code of conduct solely for international representations. It does not replace the substantive law of the enacting state for purely domestic representations.

³⁸⁴ See *supra* Part I.B.

³⁸⁵ See *supra* Part I.C.

³⁸⁶ See *supra* Part II.A.

³⁸⁷ See *supra* Part II.B.

³⁸⁸ See *supra* Part III.

³⁸⁹ See *supra* Part IV.

³⁹⁰ See *supra* Part V.

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tional code of ethics on the international level, lawyers can best practice across the state, across the country, and across the world, without the fear of unwittingly committing an ethics violation. These solutions provide an optimal result to both lawyers and their clients.