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Choice of Law in Legal Ethics

Many issues in legal ethics are resolved by application of state specific Rules of Professional Conduct. While every state now uses the ABA Model Rules numbering scheme, the actual wording of each rule varies widely among the states. This can yield wildly inconsistent results when an issue is resolved differently because two states address the issue with differently worded rules.

In this article, we will examine the way in which these differences are supposedly reconciled, at least in part, when the rules of two states differ but the conduct in question may implicate two states' divergently worded rules. Choice of law in professional responsibility is governed by rule 8.5. It might be imagined by a naïve observer that this is one area where we might anticipate consistency among the states. Indeed, ABA Model Rule 8.5 is in fact more uniformly adopted among the states than many of the rules. To that extent, new ABA Formal Opinion 504 is a very useful discussion of how choice of law is supposed to operate.

ABA Model Rule 8.5 reads as follows:

> (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:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Opinion 504 begins by noting that lawyers are frequently authorized to practice in more than one jurisdiction, as a result of which the lawyer may have to determine which state's rules apply to the lawyer's conduct. The Opinion notes the different ways litigation matters and matters involving "other conduct" are addressed and discusses

the "predominant effect" provision in relation to those – presumptively transactional – matters. In that regard, the Opinion gives guidance: "This safe harbor from disciplinary action is not without limits. The lawyer's belief about the jurisdiction of the predominant effect of the lawyer's conduct must be a reasonable belief. Reasonable belief is a defined term and 'denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.'" More useful is the specific guidance as to the factors to be considered in establishing that belief:

The Opinion suggests that in determining the predominant effect, "lawyers should look to the following factors:

- the client's location, residence, and/or principal place of business;
- where the transaction may occur;
- which jurisdiction's substantive law applies to the transaction;
- the location of the lawyer's principal office;
- where the lawyer is admitted;
- the location of the opposing party and other relevant third parties (residence and/or principal place of business); and
- the jurisdiction with the greatest interest in the lawyer's conduct.

The Opinion makes specific reference to whose rules apply when there is a question of conflicts of interest and adopts the suggestion in Comment [5] to the rule that where possible lawyers should consider inserting a paragraph in the engagement letter "that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement."

The opinion addresses five scenarios where choice of law principles need to be applied: 1) fee agreements; 2) law firm ownership; 3) reporting professional misconduct; 4) confidentiality duties; and 5) screening lawyers who leave one firm to join another (referred to as "lateral" lawyers).

With respect to fee agreements, the Opinion determines that where litigation is contemplated to be filed in a state other than the state where the fee agreement is made, the rule to be followed is the rule of the state where the agreement is entered, because the rules of the litigating forum are not yet in play. While there are good client protection reasons supporting that conclusion, it is arguable that the rule regarding litigation (that the rules of the jurisdiction where the litigation is filed should govern) is actually preferred. First, the court managing the litigation will often have control of or influence over the fees; and, second, even though the predominant effect rule doesn't apply in litigation matters, consistency within the rule as a whole suggests that the predominant effect of the litigation is or will be the jurisdiction where the litigation takes place. Indeed, implicitly recognizing this argument, the Opinion states that "To avoid ambiguity, a lawyer may want to identify in the fee agreement the lawyer's belief as to which jurisdiction's rules of professional conduct will apply to the fee agreement. That fee agreement may list the factors considered by the lawyer in reasonably concluding where the lawyer's conduct will occur and where the predominant effect of the fee agreement will occur."

The Opinion next addresses the subject of law firm ownership and considers only one scenario – where a lawyer is admitted only in state A, which permits non-lawyer ownership, but the lawyer is then admitted pro hac vice in state B, which does not. The Opinion concludes that since the predominant effect of the lawyers' partnership structure is in State A, Rule 8.5(b)(2), and not (b)(1) governs, so that state B's prohibition should not prevent the conduct. But what if the situation is reversed? The lawyer's state of admission prohibits non-lawyer ownership and state B permits it? The Opinion is silent, but surely in that instance whichever sub-clause of 8.5(b) applies, the question arises whether the lawyer is prohibited from undertaking the arrangement, especially if the lawyer is acting in conjunction with a lawyer in state B who is in a firm with non-lawyer ownership? Here lies the first unresolved problem with the Opinion.

A similar problem arises with the Opinion's treatment of lawyers' duty to report another lawyer's misconduct under Rule 8.3. Some states expressly limit the reporting obligation unless the client in the matter provides informed consent to make the disclosure. The Opinion decides that the rule to be applied in litigation will be the rule in the state where the court sits, (Rule 8.5(b)(1)), which makes sense.

The Opinion's fourth scenario, dealing with the rules governing confidentiality, envisaged a transactional matter where the attorney's client threatens to do serious physical injury to the counter-party in another state. Under the Opinion this is easily answered by applying Model Rule 8.5(b)(2) – presumably whether or not there is an exception to Rule 1.6 duty of confidentiality in such a situation will depend on the wording of Rule 1.6 in the place where the threat will be carried out.

Finally, the Opinion addresses a frequent problem with respect to lateral hiring – which jurisdictions rule as to the permissibility of screening to avoid imputed conflicts, as provided in Model Rule 1.10, adopted in a number of states. The Opinion concludes that in litigation matters firms may utilize screening if permitted in the state where the court sits. However, as the Opinion points out, "In non-litigated matters with significant contacts to more than one state, it may be unclear where the predominant effect of [the laterally hired] lawyer's representation will occur."

Taken as a whole, Opinion 504 provides some helpful guidance, but most particularly in states where their version of Rule 8.5 approximates the Model Rule. In other jurisdictions, and in New York in particular, it will be prudent for lawyers to consider carefully the application of the version of the rule in effect in the state where they are admitted and principally practice.

Further information

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