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Choice of Law for Professional Responsibility Issues in Aggregate Litigation

Nancy J. Moore*

As the rest of the papers in this symposium issue demonstrate, aggregate litigation[1] raises difficult, often intractable choice-of-law issues for judges, as well as for litigants and their lawyers. Typically, judges must choose among rules governing not only substantive law, but also statutes of limitations, allocation of damages, and punitive damages.[2] What is less well-recognized is that aggregate litigation may also present difficult choice-of-law issues regarding the ethical conduct of the lawyers involved in these cases. So far, these issues have barely surfaced, not because professional responsibility questions have not been raised with respect to aggregate litigation, but rather because most courts apparently assume either that there are no significant differences among the relevant choices[3] or that

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1. For a definition of "aggregate litigation" *see infra* note 58 and accompanying text.

2. *See, e.g.*, AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 6 (1994).

3. *See, e.g.*, Daynard v. Ness, 178 F. Supp. 2d 9, 18-19 (D. Mass. 2001) (assuming that all five relevant jurisdictions followed ABA Model Rule 8.5 with respect to the treatment of lawyers licensed by only one state); *see also infra* note 89 and accompanying text (pointing out that the court's

it is obvious which jurisdiction's rules apply.[4] As for the former assumption, it may once have been true that the ethical landscape was similar no matter where a lawyer practiced; however, over the past few decades jurisdictions have developed increasingly divergent professional responsibility law, whether by adopting different rules of professional conduct or by interpreting the same rules differently.[5] As for the latter assumption, it may be true that representation in litigation raises fewer professional responsibility choice of law questions than other types of representation;[6] nevertheless, representation in litigation poses far more difficult choice of law questions than has generally been recognized. And, of course, any difficulties presented by ordinary two-party litigation are necessarily multiplied when the litigation is complex.

Until recently, professional responsibility choice of law issues were rarely raised even in two-party litigation. Most lawyers tried cases in the states where they were licensed, and the professional responsibility rules were often the same wherever a case was tried.[7] This is no longer the case. Recent decades have witnessed an "incredible growth in law firms with multistate branch offices and a growing need for litigation and transactional

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assumptions were incorrect as to three of the five jurisdictions); *see also infra* note 86 and accompanying text (recognizing, however, that the jurisdictions' rules on the ethical permissibility of fee-splitting agreements were different).

4. *See, e.g.*, *In re* Congoleum Corp., 426 F.3d 675, 687-688 (3d Cir. 2005) (citing the district court's adoption of the New Jersey rule regulating conflicts of interest for determining the propriety of the conduct of the proposed lawyer for debtor in bankruptcy, who also represented some of the claimants with asbestos claims against the debtor, including the validity of waivers under claimants' fee agreements with lawyer and co-counsel, even though the agreements were entered into prior to the bankruptcy filing, without any discussion of a potential choice-of-law problem).

5. *See, e.g.*, H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 91-97 (1997) (including disparate approaches taken by federal district courts). Aside from the disparity in the rules of professional conduct, there is disparity in a variety of "other" law that may be applicable to lawyer conduct, including malpractice law, contract law, criminal law, and the rules of civil and criminal procedure, torts, and criminal law). *See id.* at 98.

6. *See* Carla C. Ward, Comment, *The Law of Choice: Implementation of the ABA Model Rule 8.5*, 30 J. LEGAL PROF. 173, 178-79 (2006).

7. *See* Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice*, 36 S. TEX. L. REV. 715, 747 (1995).

legal services that cross state lines."[8] Moreover, although there was some variation in the versions of the ABA Model Code of Professional Responsibility adopted by almost all states shortly after its initial promulgation in 1969, the more halting acceptance of both the original 1983 ABA Model Rules of Professional Conduct and its subsequent amendments have led to increasing conflicts.[9] It is only a matter of time before the choice of law issues raised by these conflicts come to the surface.

The purpose of this brief essay is two-fold. First, I want to note the extent to which professional responsibility choice-of-law issues in litigation may be more complicated than is currently thought to be the case, even when the lawsuits are the typical two-party variety. Second, I want to briefly sketch the nature of the additional complexities posed by aggregate litigation, including both class actions and individual lawsuits that have been aggregated (whether formally or informally) for various purposes. It is not my intention to offer either a comprehensive examination of these difficult issues or a specific proposal to resolve them. Rather, my goal is more modestly to raise consciousness about the nature of the professional responsibility choice-of-law issues that judges, litigants and their lawyers will almost certainly be confronting in the near and distant future.

TWO-PARTY LITIGATION

Prior to 1993, the ABA model codes provided no special rule regarding choice-of-law for disciplinary proceedings.[10] The issue was first mentioned in the Comment to Rule 8.5 of the initial 1983 version of the ABA Model Rules, which merely stated that when lawyers practice law in jurisdictions other than the one in which

8. Moulton, *supra* note 5, at 82-83.

9. *See, e.g., id.* at 88-90. In addition to the differences in the professional conduct rules adopted by the states, there is considerable variation among the professional conduct rules adopted by federal district courts, including differences between some federal district courts and the states in which they sit. *See e.g.*, 30 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, §802.06 (3d ed. 2008); Edward A. Carr and Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street*, 36 S. TEX. L. REV. 859, 894-905 (1995); Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969 (1992)

10. *See* Daly *supra* note 7, at 742-756.

they are licensed, or when they are licensed to practice in more than one jurisdiction, the "principles of conflict of laws" or "applicable rules of choice of law may apply."[11] In 1993, Rule 8.5 was amended to provide, for the first time, an explicit choice-of-law rule for disciplinary actions. A new subsection (b) stated:

> Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
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> (1) for conduct in connection with a 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
>
> (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.[12]

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11. *See* Daly *supra* note 7, at 750-751 (citing MODEL RULES OF PROF'L CONDUCT R 8.5, cmt. 2-3 (1983)).

12. *Id.* at 757-58. This amendment was the subject of a 1995 symposium sponsored by the South Texas Law Review. *See* Theresa Stanton Collett, Foreward Symposium: Ethics and the Multijurisdictional Practice of Law, 36 S. TEX. L. REV. 657 (1995). Many of the articles cited in this essay, including Professor Daly's, are from that symposium.

The goal of the drafters in providing a separate choice-of-law rule for disciplinary proceedings was to establish "relatively simple, bright-line rules"[13] in this area, as opposed to general choice-of-law doctrine, which has been described as "an approach, a methodology, or a set of factors to consider in choosing the applicable laws".[14] According to subsequent commentators, "[w]ith the possible exception of subsection (b)(1), the provision relating to litigation, it is highly questionable whether the drafters accomplished their goal".[15] Thus, with respect to subsection (b)(2), commentators quickly recognized that there were serious ambiguities arising from the difficulty of determining where a lawyer admitted in more than one state "principally practices," as well as determining where the "predominant effect" of particular conduct occurred.[16]

With respect to (b)(1), however, it was often assumed that the rules dealing with a lawyer's conduct in a judicial setting were easily determined because the rule of the forum state exclusively applies.[17] Even here, there were several commentators who

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13. ABA COMM. ON ETHICS AND PROF'L RESP., RECOMMENDATION AND REPORT TO THE H.D. 4 (1993) [hereinafter ABA RECOMMENDATION AND REPORT]; *see also* Daly, *supra* note 7, at 757.

14. Jeffrey L. Rensberger, *Jurisdiction, Choice of Law, and the Multistate Attorney*, 36 S. TEX. L. REV. 799, 830 (1995); *see also* Daly, *supra* note 7, at 757.

15. Daly *supra* note 7, at 758.

16. *See, e.g., id.* at 760-761; Moulton, *supra* note 5, at 157; Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075, 1095-1100 (1995). Subsection (b)(2) was also criticized for limiting choice of law to a jurisdiction in which the lawyer was admitted, thus ignoring the possibility that either the lawyer's conduct or the predominant effect of that conduct might occur in jurisdiction in which the lawyer was practicing law without permission to do so. *See, e.g.*, Daly, *supra* note 7, at 761-764. Yet another criticism was that the rule is "lawyer-centered," meaning that it aims to benefit lawyers by giving them predictability and ignores the "just and predictable treatment of clients or the interests of competing jurisdictions in having their law applied in particular cases." Moulton, *supra* note 5, at 158.

17. *See,* Ward, *supra* note 6. ("[t]he [1993] amendment sought to provide clear solutions to choice-of-law problems resulting in various state ethics rules. It made clear that [in litigation] the ethical rules of the tribunal, and only those rules, would apply. The main ambiguity was which rule or rules should apply in non-judicial proceedings.") (footnotes omitted); *see also* ABA RECOMMENDATION AND REPORT *supra* note 13, at 4 (proposing that in litigation, the ethical rules of the tribunal, and only those rules, would apply).

recognized potential difficulties, principally involving the applicability of the litigation rule to conduct that occurs prior to the filing of any court proceeding, including ex parte interviews with employees of a potential opposing party,[18] as well as the negotiation and execution of agreements for contingent fees or fee divisions among lawyers, all of which involve rules that tend to differ from jurisdiction to jurisdiction.[19] Because there were so few decisions addressing professional responsibility choice-of-law issues, whether in judicial proceedings or otherwise, these potential difficulties were rarely addressed. Some courts apparently understood the subsection to apply broadly to include all activity even remotely "in connection with" a pending or potential judicial proceeding, such as legal fees,[20] while others applied it to post-filing conduct, typically conduct in the proceeding itself, such as filing a frivolous lawsuit[21] or disclosure of confidential information in a motion to withdraw.[22] In neither situation did the opinions explain the reasoning underlying the decision to apply the subsection either broadly or narrowly.

In 2002, Rule 8.5 was amended yet again, this time as part of a comprehensive effort to revise the rules in recognition of the increasingly multijurisdictional nature of law practice.[23] Subsection (b) now provides:

Choice of Law. In any exercise of the disciplinary authority of

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18. *See* Daly, *supra* note 7, at 759-760.

19. *See* Carr and Van Fleet, *supra* note 9, at 892- 894.

20. *See, e.g., In re* Bernstein, 774 A.2d 309, 315-16 (D.C. Cir. 2001) (assuming without deciding that D.C. should have applied Virginia rules to charges involving excessive fees, commingling, and dishonesty in connection with fees charged to client for representation in a Virginia proceeding).

21. *See, e.g., In re* Marks, 665 N.W.2d 836, 846 (Wis. 2003) (applying the 1993 version of Rule 8.5(b)(1), stating that filing a frivolous lawsuit in Michigan was governed by the Michigan rules because it was "alleged misconduct that occurred in a proceeding before a court in the state of Michigan"); *but cf.* Daynard v. Ness, 178 F.Supp.2d 9, 18-19 (D. Mass. 2001) (assuming without discussion that subsection (b)(2) of 1993 version of Rule 8.5 applied to determine the ethical propriety of a fee-splitting agreement among lawyers regarding pending litigation).

22. *See, e.g., In re* Gonzalez, 773 A.2d 1026, 1029 (D.C. Cir. 2001) (applying Virginia's disciplinary rules to a lawyer charged with misconduct in revealing a client's secrets in a motion to withdraw from a Virginia proceeding).

23. *See generally* Stephen Gillers, *Lessons From the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 715 (2002).

this jurisdiction, the rules of professional conduct to be applied shall be as follows:

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

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.[24]

There are four significant changes from the 1993 version of the rule. First, subsection (b)(1) has been expanded to include any matter pending before a "tribunal," which includes not only judicial proceedings, but also arbitrations (but not mediations).[25] Second, by providing that the subsection applies to conduct in connection with a matter "pending" before a tribunal, the drafters signaled that pre-litigation activity will be governed by (b)(2), a conclusion reinforced by explicit language in the Comment.[26] Third, for pre-filing and other conduct not "in connection with" a pending proceeding, the rule to be applied is no longer tied to a jurisdiction in which the lawyer is admitted to practice, but rather is determined either by the jurisdiction in which the conduct occurs or, if different, by the jurisdiction in which the predominant effect of the conduct occurs. Fourth, at least for purposes of subsection (b)(2), the rule provides a safe harbor for lawyers who make reasonable decisions about where the predominant effect of their conduct will occur and act accordingly.[27]

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24. MODEL RULES OF PROF'L CONDUCT R. 8.5(b) (2007).

25. *See id.* R. 1.0(m) (defining "[t]ribunal" to denote "a court, an arbitrator in a binding arbitration proceedings or a legislative body, administrative agency or other body acting in a judicial capacity").

26. *Id.* R. 8.5 cmt. n. 4 (paragraph (b)(2) applies to "all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal").

27. *See, e.g.*, Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-first Century*, 30 HOFSTRA L.REV. 923, 943 (2002) (commenting on the Ethics 2000 Commission proposal that led to the recommendations of the Multijurisdictional Practice Commission).

Thirty-seven states have already adopted amendments to Rule 8.5 that are either identical or similar to the ABA Model Rule, and an additional five states have study committees that have recommended either identical or similar amendments.[28] This leaves, however, a significant number of jurisdictions that may not adopt the amendments any time in the near future, including not only the remaining state courts,[29] but also federal courts that automatically follow the rule in the non-adopting states in which they sit,[30] as well as federal courts that follow some other set of rules.[31] In these non-adopting jurisdictions, questions will continue to arise concerning the applicability of subsection (b)(1) to pre-filing litigation activities, including ex parte interviews with employees of a potential opposing party and ethical issues arising out of contingent fees or fee divisions among lawyers.[32]

But what about the adopting jurisdictions? Have the most recent amendments to subsection (b)(1) eliminated the ambiguities that arise in applying that section?[33] Have new ambiguities been created? In my view, significant difficulties remain in interpreting and applying even the current ABA version of Rule 8.5 to the conduct of litigators, both before and after a matter has been filed.

For example, it is not clear to me that *all* post-filing conduct

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28. *See* ABA Center for Professional Responsibility, *Quick Guide Chart on State Adoption of Rule 8.5,* http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf (last visited Oct. 8, 2008).

29. Some states may adopt versions of Rule 8.5 that vary in significant parts from the current ABA Model Rule. For example, the Massachusetts Supreme Judicial Court has proposed adopting (b)(1) as is, but amending (b)(2) to provide that in transactional matters and in litigation before a lawsuit is filed, the default rule will be "the rules of the jurisdiction where the lawyer maintains his or her principal office." *See, e.g., Mass. Supreme Judicial Court invites comments on proposed change to professional conduct rule*, Mass. Law. Wkly, May 12, 2008, 1.

30. *See, e.g.*, Moulton, *supra* note 5, at 97-99 (discussing that the majority of federal district courts incorporate by local rules the conduct rules of the state in which they sit).

31. *See, e.g., id.* at 99 (discussing the variety of approaches taken by federal district courts, including adoption of the ABA Model Rules or the ABA Model Code, even when the ABA model differs from the local state version, as well as adoption of both an ABA model and local state standards); *see also* MOORE et. al. *supra* note 9 for a comprehensive chart setting forth the positions taken by each of the federal district courts.

32. *See supra* notes 17, 18, 19, and accompanying text.

33. *See supra* notes 25, 26 and accompanying text.

of a lawyer will be covered by subsection (b)(1). Consider a lawyer who requests or agrees to a modification of a fee agreement (contingent or otherwise) that was initially entered into prior to the filing of a lawsuit. According to current Rule 8.5, the rules of professional conduct governing the initial agreement are not (necessarily) those of the jurisdiction where the lawsuit will be filed, but rather those of the jurisdiction where the agreement was entered into or where its predominant effects will occur. Assume that the lawyer and client both reside in State A, but the lawsuit will be filed in State B, where the lawyer expects to be admitted pro hac vice. State A rules will probably govern the initial fee agreement, as that is where the fee agreement was most likely entered into and where its predominant effect will occur.[34] Can it possibly be the case that once the lawsuit is filed, any modification of that fee agreement is now governed by the rules of State B? State A may provide for contingent fee caps different from those, if any, of State B, or perhaps State A has a different provision for the permissibility of fee division among lawyers. The lawyer may argue for the continuing applicability of the rules of State A on the ground that her post-filing conduct is not sufficiently "in connection with" the pending lawsuit.[35] There is no apparent

34. *Cf.* Bernick v. Frost, 510 A.2d 56 (N.J. Super. Ct. App. Div. 1986) (using "most significant relationship" test, court applied law of New Jersey to contingent fee contract between New Jersey residents executed in New Jersey for lawsuit to be filed in New York); *In re* Marks, 665 N.W.2d 836, 846 (Wis. 2003) (applying the 1993 version of Rule 8.5(b)(1), stating that filing a frivolous lawsuit in Michigan was governed by the Michigan rules because it was "alleged misconduct that occurred in a proceeding before a court in the state of Michigan"); *but cf.* State Bar of Mich. Comm. on Prof'l and Judicial Ethics, Formal Op. RI-122 (1992) (stating that when personal injury case will be tried in Michigan state courts, lawyer will be governed by Michigan cap on contingent fee, even if client resides in a state where larger fees are permissible); Fla State Bar Assoc. Comm. on Prof'l Ethics, Op. 88-10 (1988) (stating that in applying choice-of-law principles to determine whether Florida contingent fee schedule and client statement of rights provisions apply to fee division agreements involving Florida Bar members practicing or residing out of state, committee gives weight not only to the client's state of residence, but also to the state where the cause of action arose and the state where suit may be filed). One reason why the rules of the state of both the client's and the lawyer's residence may apply is that at the time the fee agreement is executed, the parties may not know where the litigation will be filed.

35. *See, e.g.*, Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*,

reason why all aspects of the fee agreement should not be governed by the same rules, and so this argument has some plausibility. Moreover, the same argument can be made with respect to other ethical issues that span both pre- and post-filing conduct, such as a conflict of interest that arises pre-filing but worsens over the course of the litigation.[36]

In contrast to the ambiguity regarding the applicability of subsection (b)(1) to at least some post-filing activities of a lawyer, pre-filing activities are now clearly governed by subsection (b)(2).[37] But the revisions to (b)(2) may have made it even more difficult for courts to apply that subsection. Under the 1993 version of (b)(2), if a lawyer was admitted in only one jurisdiction, the rules of that jurisdiction applied in all cases. If the lawyer was admitted in more than one jurisdiction, the only choice was among those jurisdictions in which the lawyer was admitted, in which case the rules of the jurisdiction in which the lawyer principally practiced would apply, unless that conduct "clearly" had its predominant effect in another admitting jurisdiction.[38] Yes, there were ambiguities under the 1993 version of Rule 8.5,[39] but these ambiguities were fairly limited.[40]

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36 S. TEX. L. REV. 1075, 1094 (1995) (noting in regard to the 1993 version of Rule 8.5(b)(1) that "[s]ome clarification is...needed regarding...exactly how related the lawyer's conduct must be before it is deemed to undertaken 'in connection with' the litigated matter"). For example, assume the defendant causes the lawsuit to be removed from state to federal court or from one federal district to another. If the rules of these courts differ, does that mean that modifications to the fee agreement are governed by the rules of whatever court the lawsuit happens to be pending at the time of the fee modification?

36. *See, e.g.*, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 122 cmt. d (if there is a material change in the reasonable expectations of client giving informed consent to a conflict, client must be informed of new conditions and new informed consent obtained.). *See also, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7 cmt. 22 (advance waiver of a conflict will not be effective if the circumstances that materialize would make the conflict nonconsentable).

37. *See supra* note 26 and accompanying text.

38. *See* Daly, *supra* note 7 and accompanying text.

39. *See id.*

40. I do not mean to suggest that the 1993 version of Rule 8.5 was preferable because its ambiguities were more limited. As the Chief Reporter of the Ethics 2000 Commission, I was the principal drafter of the Ethics 2000 version of the amendment that was ultimately proposed in substantially the same form by the Multijurisdictional Practice Commission. Both the Ethics 2000 Commission and I agreed that the 1993 version of the rule was deficient

Under the 2002 version, however, the applicable choice of law under (b)(2) depends in each case on the court determining, first, where the conduct occurred and, second, whether the predominant effect occurred in a different jurisdiction. Given the ability of lawyers and clients to communicate with each other and with others by telephone, fax, email, and videoconferencing, difficult questions may arise concerning the site of the relevant conduct.[41] Even more difficult may be the determination of where the predominant effect of the lawyer's conduct occurred, as when a lawyer conducts an ex parte interview of a corporate employee at the branch office of a likely opponent, whose headquarters is located in another state, and the lawyer obtains statements from the employee that may be admissible in a lawsuit likely to be filed in yet a third state, where the plaintiff resides.

Anticipating this difficulty, the drafters included a provision in subsection (b)(2) that "[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."[42] Of course, reasonable minds might differ as to whether a lawyer's belief was "reasonable." In addition, this safe harbor provision (which exists only in (b)(1) and not in (b)(2)[43]) applies by its terms only in lawyer disciplinary actions[44] and not in other proceedings in

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because it ignored the legitimate interests of parties other than the lawyer themselves. *See supra* note 16; *infra* Conclusion.

41. *See, e.g.*, Birbrower v. Superior Court, 949 P.2d 1, 2-3, 5-6 (Cal. 1998) (invalidating fee agreement because New York lawyer engaged in unauthorized practice of law in California; reasoning that "one may practice law in the state although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means").

42. *See supra* note 24 and accompanying text.

43. I was the Chief Reporter for the Ethics 2000 Commission, which originally proposed this language. *See* Moore, *supra* note 27, at 943. As the principal drafter for this provision, I can attest that the Commission did not specifically address this discrepancy. In all likelihood, the Commission was unaware at the time of the ambiguities existing in subsection (b)(1) and thus did not see the need for a safe harbor with respect to that provision. In my view, bar counsel and committees or courts interpreting and applying this provision should exercise their discretion and give lawyers who make reasonable choices under subsection (b)(1) the same benefit of the doubt in disciplinary proceedings.

44. *See* MODEL RULES OF PROF'L CONDUCT Scope [20] (2007) ("The Rules

which the lawyer's conduct might be questioned, such as fee disputes or motions for disqualification.[45] Consider, for example, a fee dispute in which the jurisdictions in question have significantly different rules on applicable contingent fee caps.[46] Here the court will have no choice but to apply the law of one of the relevant jurisdictions in order to resolve the dispute, even if the lawyer conducted herself reasonably in choosing to follow the rules of a different jurisdiction, thereby avoiding discipline.

The existence of remedies other than lawyer discipline raises additional choice-of-law problems for even the ordinary two-party lawsuit. This is because, as noted above, rules of professional conduct, by their terms, apply only in disciplinary proceedings.[47] As a result, although violation of these rules may be considered as relevant evidence in other types of proceedings,[48] courts are free to apply "other" law,[49] including modifications of the disciplinary rules. A classic example involves lawyer disqualification for conflicts of interest. Many courts view disqualification not as a sanction for unethical conduct, but rather as a remedy reserved for the protection of clients, former clients or the integrity of the proceedings.[50] As such, some of these courts have developed standards for disqualification that are "less restrictive and less categorical"[51] than the otherwise applicable

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are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."). Nevertheless, it is generally acknowledged that "a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." *Id.*

45. *See supra* note 9; *infra* notes 50-53 and accompanying text. In some other proceedings, something like a safe harbor may be applicable; for example, in fee forfeiture proceedings, forfeiture is not appropriate unless the lawyer has committed a "clear and serious violation of a duty to a client." RESTATEMENT OF THE LAW GOVERNING LAWYERS § 37 (2000). Similarly, in negligence actions, the lawyer's conduct is measured by the standard of the skill and knowledge normally possessed by other lawyers, a standard that allows competent lawyers to "reasonably exercise professional judgment in different ways." *Id* at § 52 cmt. b.

46. *See, e.g.*, State Bar of Mich. Comm'n. on Prof'l and Judicial Ethics, Formal Op. RI-122 (1992).

47. *See supra* note 44 and accompanying text.

48. See MODEL RULES OF PROF'L CONDUCT Scope [20].

49. Moulton, *supra* note 5, at 98.

50. *See, e.g.*, Bd. of Educ. of N.Y. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979).

51. Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 73 (1996).

rules of professional conduct, which are prophylactic in nature.[52]

A court asked to disqualify a lawyer for one of the parties in a simple, two-party lawsuit is almost certain to apply the disqualification law of that court.[53] In other contexts, however, the question of which jurisdiction's law to apply may involve more difficult choice-of-law analysis. For example, consider a fee agreement that may be unethical, depending on which of several possible jurisdictions' rules are thought to apply.[54] Was the agreement unethical? If so, should the court nevertheless enforce the agreement? And if the court is unwilling to enforce the agreement, may the lawyer nevertheless recover in quantum meruit? In deciding whether the fee agreement was unethical, the court will probably look to Rule 8.5 or its equivalent for choice-of-law guidance. [55] But this is not a disciplinary proceeding, and as a result, it might be unclear which jurisdiction's version of Rule 8.5 should apply.[56] In making this choice-of-law decision, as well as deciding which jurisdiction's law to apply to both the enforceability of unethical fee agreements and the right to recover

52. *See id.* at 71-72.

53. I am unaware of any court opinion that directly addresses the "choice of law" issue raised as to whose law of disqualification applies. Rather, courts simply apply the common law body of jurisprudence on the appropriateness of disqualification that has been developed in that court. *See* 30 MOORE'S FEDERAL PRACTICE, *supra* note 9, at §807.02[6][b] (discussing how federal courts may look to state court rules to determine whether an ethical violation has occurred, but then consider the remedy for any such violation in the context of a body of jurisprudence focused on the particular remedy, such as disqualification).

54. *See, e.g.,* Daynard v. Ness, 178 F.Supp.2d 9 (D. Mass. 2001) This case is discussed more fully at *infra* notes 84-95 and accompanying text.

55. *See id.* at 14-19 (discussing the different requirements of the disciplinary rules of several jurisdictions in a lawsuit seeking to enforce an allegedly unethical oral fee-splitting agreement, as well as the applicability of Rule 8.5 to determine which jurisdiction's rules should apply); *see also infra* notes 84-95 and accompanying text (*Daynard* is it itself an example of aggregate litigation, since it involved a lawsuit brought by a single plaintiff against several defendants, thereby complicating the analysis. In addition, the underlying fee agreement was made in the context of highly complex aggregate litigation, i.e., multiple class actions brought in many different jurisdictions).

56. In *Daynard*, the court believed that each of the relevant jurisdictions had adopted the 1993 version of Rule 8.5 (and thus it didn't matter which jurisdiction's rule was applied), but this was not in fact the case. See *infra* notes 84-95 and accompanying text.

in quantum meruit, courts are unlikely to look to any version of Rule 8.5, but almost certainly will be forced to apply more traditional choice-of-law principles.[57]

AGGREGATE LITIGATION

As defined by the American Law Institute's current project on the Principles of the Law of Aggregate Litigation, aggregate proceedings include: single lawsuits encompassing claims or defenses of multiple parties; formal collections of related lawsuits (either individual or aggregate) proceeding in whole or in part under common judicial supervision or control; and informal collections of claims of multiple parties proceeding under common nonjudicial supervision or control.[58] This wide range of complex litigation complicates professional responsibility choice-of-law issues in a number of ways.

Consider first a lawsuit in which a lawyer represents multiple plaintiffs in a single lawsuit against a single defendant. The multiple plaintiffs may reside in different states, each of which has a different rule on contingent fee caps.[59] Prior to the filing of the lawsuit, Rule 8.5 directs that the ethical propriety of the contingent fee agreements should be determined by subsection (b)(2). Did the lawyer's conduct occur where the lawyer prepared and perhaps sent the agreements to the clients or did it occur where the agreements were executed?[60] Does it matter whether

57. *See Daynard*, *infra* note 91 (containing a wide-ranging discussion of the choice-of-law questions raised, as well as possible approaches to resolve those questions, in a lawsuit seeking to enforce the enforceability of an oral fee-splitting agreement).

58. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (Tentative Draft No. 1, 2008) [hereinafter "ALI PRINCIPLES"].

59. *See supra* note 46 and accompanying text.

60. With respect to determining the validity of contracts generally, choice-of-law principles often look to the "place of contracting" as one of several relevant facts. The place of contracting is the place where the last act necessary to give the contract binding effect occurred. This will typically be where the offer is accepted. *See* RESTATEMENT (SECOND) OF THE CONFLICTS OF LAWS § 188 cmt. e (1971). When the question is not the validity of the contract, but rather the ethical propriety of the lawyer's conduct, it may be more relevant to determine the place where the lawyer made an offer that was itself improper. Of course, general choice-of-law principles do not give place of contracting, standing alone, any particular importance, but rather treat it as one of several factors to consider in determining which state has the most significant contacts with the contract. *Id.*

the clients came to the lawyer's office to execute the agreement (in a state different than their place of residence) or whether the agreements were signed by the clients in their homes and then mailed back to the lawyer? Where is the predominant effect of any violation of the contingent fee rules? Based on prior case law, courts may find that the predominant effect of fee agreements (regardless of where they were executed) usually occurs in the multiple jurisdictions where the various clients reside, not in the single jurisdiction where the lawsuit is likely to be filed.[61] As a result, the lawyer may enter into different contingent fee arrangements with each plaintiff, thereby creating a potential conflict of interest, since the lawyer now has an incentive to favor those plaintiffs whose agreements provide for a larger contingent fee.[62] Similar conflicts may arise when the lawyer has agreements with some but not all of the clients to share legal fees with referring lawyers, thereby creating an incentive for the lawyer to favor those clients whose entire fee belongs to the lawyer.[63] Moreover, the question of the ethical propriety of these fee division agreements with referring lawyers (who may themselves practice in a variety of different states) is itself subject to choice-of-law analysis.[64] And whereas courts may find that the predominant effect of a lawyer-client fee agreement occurs where the client resides, once the litigation is completed, the client may have little or no interest in how the lawyers divide the fee.[65]

Class actions are another common form of aggregated litigation. Ethics issues may arise either pre- or post-filing (or

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61. *See supra* note 55 and accompanying text.

62. Under the ABA Model Rules of Professional Conduct, there is a concurrent conflict of interest if "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2007).

63. This may have occurred in a recent case alleging that a plaintiffs' firm misrepresented the manner in which an aggregate settlement had been negotiated in order to hide the fact that a major factor in determining each client's share was whether the client had retained the firm directly or been referred by another firm. *See* Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 409, n. 83 (2008) [hereinafter Moore, *ALI's Draft Proposal*].

64. *See* Carr and VanFleet, *supra* note 9, at 892, n. 162.

65. *Daynard*, 178 F. Supp. 2d at 14.

both), including the solicitation of potential class representatives, ex-parte interviews with employees of potential opponents, and conflicts of interest arising from the lawyer's representation of individuals either inside or outside the potential class.[66] In many class actions, there will be multiple defendants with principal places of business in different states, as well as both multiple class representatives and multiple lawyers hoping to represent the class, some of whom reside or practice in different states.[67] In addition, multiple plaintiffs' or defendants' lawyers may engage in coordinated activity that occurs simultaneously in different places, and much of this activity may occur pre-filing, thereby clearly invoking the application of subsection (b)(2). Where does such conduct occur? Will the lawyers' conduct be judged by different rules depending on where similar meetings take place or where the various parties reside? And where is the predominant effect of such disparate but coordinated activity? If the lawyers know in advance where the lawsuit will be filed, perhaps the site of such a lawsuit may be where the predominant effect of any pre-filing conduct will occur, but in a nationwide class action, the lawyers may not know in advance where the class action lawsuit will be filed, or it may be that several class actions will be filed simultaneously.[68] Further complicating the analysis of ethical issues in class actions is the difficulty of determining the identity of the class lawyer's client (or clients),[69] particularly during the time prior to the filing of a class action lawsuit, when the lawyer may be actively investigating the case or even negotiating a potential settlement with defense counsel.[70]

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66. *See, e.g.*, Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1477-1478 (2003) [hereinafter Moore, *Who Should Regulate?*].

67. *See, e.g., In re* School "Asbestos Litigation," 789 F.2d 996 (3d Cir. 1986).

68. And, of course, the defense lawyers will have even less information regarding the location of any class action that might be filed, even when they know or have reason to believe that one or more lawsuits is imminent. *See* Daly, *supra* note 7, at 759-760.

69. *See, e.g.*, Moore, *Who Should Regulate?*, *supra* note 66 at 1482-1489 (arguing that the class should be viewed as an entity client).

70. I have been retained as an expert witness several times in connection with situations in which lawyers representing a putative class engaged in negotiations with defense lawyers with a view toward filing a settlement class action. In these situations, there was confusion on the part of the

Once a lawsuit is filed, subsection (b)(1) comes into play, and much (if not necessarily all) of the lawyers' conduct will be governed by the rules of the forum jurisdiction. [71] In many cases, however, similar lawsuits (either individual or representative) will be pending in different jurisdictions. What if they are formally aggregated for various purposes in a single jurisdiction?[72] If they are aggregated for all purposes, then presumably the rules in the now-single forum will control (at least those issues as to which (b)(1) applies[73]). But what if the aggregation is only for limited purposes, such as discovery? Is it clear that the rules of the single forum control as to all conduct that occurs while the cases are pending in that forum? What if the lawyer's activities (or even more likely, their effects) span a time frame covering not only the initial filings, but also the transfer to a single forum and then the retransfer back to the courts where the proceedings were initially filed?

Aside from formal aggregation of multiple lawsuits, aggregation can occur informally; for example, when a single lawyer represents multiple clients with related claims against one or more defendants, which claims may be filed or unfiled.[74] The lawyer may proceed with these claims in a coordinated fashion, often working with one or more other lawyers pursuing similar claims, as in many mass tort lawsuits; the defendants may also proceed in a coordinated manner, creating networks or hierarchies of lawyers providing coordinated responses to separate claims.[75] Given that some of the cases may be filed while other are not, will the same conduct be subject simultaneously to both (b)(1) and (b)(2)?

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putative class action lawyers regarding the identity of their client or clients, as well as the nature and scope of their duties toward the putative class, the putative class representatives and the putative class members.

71. *See supra* notes 33-36 and accompanying text.

72. *See* ALI PRINCIPLES, *supra* note 58 § 1.02(b) cmt. b(2).

73. *See supra* notes 33-36 and accompanying text.

74. *See* ALI PRINCIPLES, *supra* note 58 § 1.02 cmt. b(3); *see generally* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519.

75. *See* ALI PRINCIPLES, *supra* note 58 § 1.02 cmt. b(3); *see also* Judith Resnick, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2126 (2000).

Consider a plaintiffs' lawyer who is asked to enter into an aggregate settlement with one of the defendants.[76] Currently, virtually all states have adopted the same or a similar text in their versions of Model Rule 1.8(g),[77] under which a lawyer may not enter into an aggregate settlement "unless each client gives informed consent, in a writing signed by the client...[which] shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement."[78] The Reporters of the ALI Principles of Aggregate Litigation are proposing to change this rule in order to facilitate advance waivers of the right to refuse to participate in an aggregate settlement.[79] If the Reporters' proposal is approved by the ALI, some jurisdictions may adopt these changes, but others may not. Which jurisdiction's aggregate settlement rule will apply? Will the outcome differ depending on whether the claims are filed or unfiled or whether the waiver occurred before or after any filing?[80] As to any unfiled claims, will the lawyer's conduct be found to occur in the various locales where the settlement was negotiated, where, for example, the lawyer may have agreed with the defendant's request that that claimants be given information only about their own individual settlement offers, in violation of the current Rule 1.8(g)?[81] Or will the conduct be found to occur in the jurisdiction (or jurisdictions) where the lawyer prepared and mailed arguably deficient notices of the settlement proposal, or

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76. For a proposed definition of a non-class aggregate settlement *see* ALI PRINCIPLES *supra* 58, § 3.16.

77. *Id.* § 3.15 cmt. b

78. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2007).

79. *See generally* Moore, *ALI's Draft Proposal*, *supra* note 63, at 395-402. At the May 2008 Annual Meeting of the American Law Institute, I co-authored a motion to delete those portions of the Reporters' proposals that would change the current aggregate settlement rule. After extensive debate, the Reporters agreed to reconsider their proposal, and the motion was tabled.

80. Under the Reporters' proposal, waivers could be executed at any time prior to the negotiation of an aggregate settlement, including at the time of the lawyer's retention. *See* ALI PRINCIPLES, *supra* note 58, § 3.17(b) (client may agree in advance to be bound by collective decisionmaking "whether proceedings have commenced or not"); § 3.17(c) (advance consent may be "part of the lawyer's or group of lawyers' retainer agreement or at any other point during the course of the litigation").

81. *See* ABA COMM'N. ON ETHICS AND PROF'L RESP., Formal Op. 438 (2006) (interpreting the rule to require disclosure of the details of every other client's participation in the aggregate settlement).

perhaps in the various jurisdictions where the individual claimants received and acted (or failed to act) on such notices? Moreover, the refusal of some claimants to agree to the proposal may have the effect of undoing the settlement as to a majority of claimants who approved the settlement.[82] So where is the predominant effect of the lawyer's conduct if the lawyer is alleged to have violated at least one jurisdiction's version of the rule in notifying both the approving claimants and the holdouts, who may reside in different states? And will defense counsel be bound by the same version of the rule as plaintiffs' counsel?[83]

As with the more ordinary two-party lawsuit, aggregate litigation poses even greater difficulties in choosing among different jurisdictions' professional responsibility laws when the issues are raised, as they often are, in proceedings other than lawyer discipline. For example, in *Daynard v. Ness*,[84] a law professor licensed in New York and teaching in Massachusetts brought an action in a federal district court in Massachusetts seeking to enforce an oral fee splitting agreement entered into in Illinois with lawyers from Mississippi and South Carolina, with respect to multiple lawsuits filed in different jurisdictions on behalf of certain state governments against the tobacco industry. As the court noted, the five relevant jurisdictions it identified[85] differed in their approaches to such issues as to whether the client must consent to a division of fees and whether the consent must be in writing.[86] In addition, the jurisdictions differed in their

82. *See* Moore, *ALI's Draft Proposal*, *supra* note 63, at 401-403 (explaining that the current aggregate settlement rule does not necessarily give each client a veto over the settlement of other claims, but the defendant may condition the effectiveness of any settlement on the approval of a certain number of claimants).

83. In the typical case, where it is the plaintiffs who are being asked to settle their claims in the aggregate, defense counsel is not governed directly by Rule 1.8(g). Nevertheless, under Rule 8.4(a), defense counsel may not knowingly "assist or induce" another lawyer to violate the rules of professional conduct. MODEL RULES OF PROF'L CONDUCT R. 8.4(a). I was retained as an expert witness in a case where a corporation that was the defendant in an aggregate products liability lawsuit was sued by the former plaintiffs on the basis of defense counsel's alleged misconduct in entering into an aggregate settlement with the former plaintiffs' counsel.

84. 178 F.Supp.2d at 9-11.

85. For reasons not explained the court did not consider any of the jurisdictions where the tobacco lawsuits were filed.

86. 178 F.Supp.2d at 14-16.

approaches to the enforceability of such an agreement.[87]

The court separately analyzed the choice of law issues for determining the ethical propriety of the lawyers' conduct and the enforceability of an unethical fee-splitting agreement.[88] As for the ethical propriety of the lawyers' conduct, the court concluded that although the laws of the relevant jurisdictions were different, "the *choice* of law rule for the *rules of professional conduct*" was the same.[89] According to the court, all five jurisdictions followed the approach of the 1993 version of Rule 8.5(b)(2), under which a lawyer licensed in only one state will be governed solely by the rules of that state.[90] Because all of the lawyers happened to be licensed in only one jurisdiction, the court quickly concluded that each lawyer was subject to the rules of his licensing jurisdiction.[91] Of course, if some of the lawyers had been licensed in multiple jurisdictions, the choice-of-law decision would not have been this easy. More important, the court failed to explain why it chose to follow subsection (b)(2) and not subsection (b)(1), given that the agreement appeared to have been made during a period in which all or some of the lawsuits were pending. Had it noted that lawsuits were pending, it would have been forced to decide, first, whether the conduct was "connected with" any or all of the various lawsuits, and second, whether the propriety of the lawyers' conduct in entering into the single fee-splitting agreement should

87. *Id.* at 16-18.

88. *Id.* at 12-13 (stating that all of the jurisdictions agreed that if the fee splitting agreement was unenforceable, the plaintiff was entitled to recover in quantum meruit).

89. *Id.* at 18.

90. *Id.* at 18-19. In my view, the court's conclusion that all five jurisdictions followed Model Rule 8.5 with respect to the treatment of lawyers licensed by only one state was incorrect. As the court itself noted, Massachusetts had adopted only subsection (a) of the 1993 Model Rule, not subsection (b), and both South Carolina and Mississippi were still using the original version of the rule. As a result, none of those three jurisdictions had an explicit choice of law rule, regardless of whether the lawyer was licensed in one or more than one jurisdiction. Absent an explicit choice of law rule, courts were most likely to apply general choice-of-law principles. *See supra* note 11 and accompanying text. *See also Mass. Supreme Judicial Court Invites Comments on Proposed Change to Professional Conduct Rule*," *supra* note 29 (stating that in the absence of explicit choice of law provision, "the general multi-factor 'significant interests' test of conflict of laws has presumably been the governing principles in Massachusetts professional responsibility matters").

91. 178 F.Supp.2d at 19.

differ according to the rules of each forum state.

As for the enforceability of unethical fee division agreements, the court discussed without deciding how traditional choice of law principles might apply in choosing the contract law of the relevant states.[92] In one sense, this discussion was easier than the first choice-of-law question, because federal courts are bound to follow the substantive law of the forum in which they sit, including the forum state's choice-of-law provisions; thus, there was no difficulty determining whose choice-of-law approach governed.[93] Nevertheless, applying the "functional choice of law approach" followed by Massachusetts entailed an extensive analysis of various factors set forth in the Second Restatement.[94] Moreover, the analysis was complicated by the fact that, unlike extensive choice-of-law treatment of traditional contracts, no court in either Massachusetts, Mississippi, or South Carolina had addressed the relationship between contract law and the ethical aspects of fee-splitting agreements.[95] As one of the few opinions to directly address the myriad of difficult choice-of-law issues that might be raised in aggregate litigation, *Daynard* should give pause to anyone who continues to think that litigation choice-of-law issues will be easily resolved, in either two-party or aggregate litigation.[96]

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92. *Id.* at 19-27.
93. *Id.* at 19-20.
94. *Id.* at 20.
95. *Id.* at 22.
96. After a lengthy preliminary discussion of the choice-of-law issues this case raised, the court concluded with the following:

> None of the preceding authorities has suggested what should happen if the plaintiff and defendant are subject to different rules of professional conduct, the plaintiff complied with his rules of professional conduct, the defendant did not comply with his rules of professional conduct, the state that licensed the plaintiff would not use public policy to defeat imperfect fee-splitting agreements, the state that licensed the defendant would use public policy to defeat imperfect fee-splitting agreements, the state with the most interest in the agreement is the state that licensed the defendant, and the plaintiff is suing in a state that did not license any of the lawyers in the dispute. This is the conundrum potentially facing this Court but completely ignored by the parties. Accordingly, the parties have been given an opportunity to rectify their silence with supplemental briefing.

Id. at 27.

CONCLUSION

Given the choice-of-law uncertainties that exist in both two-party and aggregate litigation, some might argue that the 1993 version of Rule 8.5 was preferable because its ambiguities were more limited. But predictability in application is not necessarily the most important goal of a choice-of-law provision. The 1993 version of Rule 8.5 was deficient because it ignored the legitimate interests not only of clients, but also of jurisdictions other than the ones where a lawyer is licensed,[97] and failed to recognize the extent to which lawyers now practice, if only temporarily, in jurisdictions where they are unlicensed. Whether the current version is a sufficient improvement remains to be seen, but at least it recognizes, far more than its predecessor, the increasing complexity of the choice-of-law issues arising in today's global environment. Moreover, at least in disciplinary proceedings, the current version takes into account the difficulty of prediction through the use of a safe harbor provision that protects lawyers making reasonable choices in the face of uncertainty.

What is not sufficiently acknowledged, even today, is the complexity of choice-of-law issues in at least some litigated matters. Yes, the current rule has eliminated the previous ambiguity regarding the application of subsection (b)(1) to pre-litigation conduct, but problems remain when a lawyer's conduct begins pre-filing and then continues while the litigation is pending, such as when a fee agreement is modified or a conflict of interest worsens as the litigation proceeds. Also, because professional responsibility issues so frequently arise in contexts other than disciplinary proceedings, such as fee disputes, disqualification and malpractice, courts cannot rely entirely on Rule 8.5, particularly its safe-harbor provisions, but rather must look to more traditional choice-of-law principles to resolve these disputes.

Of course, the difficulties facing judges, lawyers, and litigants in resolving these professional responsibility choice-of-law dilemmas will be magnified in aggregate litigation. This is not unexpected, given that aggregate litigation raises a host of complex substantive and procedural questions, including the

97. *See supra* note 11 and accompanying text.

choice-of-law questions addressed in the remainder of the papers in this symposium issue. It is disappointing that the professional responsibility aspects of aggregate litigation are so seldom addressed, but I believe that, too, will change. My hope is that this brief essay will encourage lawyers to confront these issues before they are raised in court, at a time when they can make reasoned choices regarding their conduct. And if there are changes in the professional responsibility rules that can enhance predictability without sacrificing the interests of clients or host jurisdictions, then the profession should remain open to exploring those changes.