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PROFESSIONAL RESPONSIBILITY AND CHOICE OF LAW: A CLIENT-BASED ALTERNATIVE TO THE MODEL RULES OF PROFESSIONAL CONDUCT

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Because of the increasingly interstate nature of legal practice during the past few decades, practitioners licensed in multiple jurisdictions have been forced more frequently to confront choice-of-law dilemmas in the area of professional responsibility. Although most states have adopted fairly uniform regulations on professional ethics, only the recently amended American Bar Association's Model Rules of Professional Conduct contain a specific provision that addresses the choice-of-law problem in the professional responsibility context. This Note outlines certain ethical considerations facing the multistate practitioner and argues that the choice-of-law provision in the Model Rules of Professional Conduct provides insufficient clarity and predictability where a lawyer must determine ex ante which state's professional responsibility regulations will apply to his actions. Specifically, this Note focuses on the future crime exception to the attorney-client privilege, discussing how the historical motivations for the privilege overlap with the prophylactic goals of the professional responsibility regulations—both purport to protect the legally unsophisticated client from the intricacies of the adversarial system and its agents. This Note accordingly proposes a client-based alternative to the choice-of-law provision in the Model Rules of Professional Conduct, holding multistate practitioners accountable to the professional responsibility regulations of the state in which the client is domiciled. The proposed solution admittedly involves certain sacrifices and potential complications. In comparison to the current choice-of-law provision, however, the client-based rule provides a more certain and rational means of resolving choice-of-law dilemmas for the multistate practitioner in the area of professional responsibility.

INTRODUCTION

Since the 1970s, the multistate, or interstate, practice of law has become significantly more common.¹ With the increasing

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1. Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678, 678 (1986) (citing Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 699 (1975)).

sophistication of corporate entities, the greater complexity of commercial transactions, the pervasive application of federal law, and the varied state adoption of model codes and acts, attorneys who practice in multiple jurisdictions have found their clients and themselves subject to numerous and occasionally conflicting legal obligations.² For an attorney licensed to practice in multiple jurisdictions, performing services for clients with multistate legal interests requires ensuring not only that the clients' actions conform to all applicable legal conventions but also that the attorney's own behavior meets the professional ethical standards of each state in which he holds a license to practice.

Occasionally, however, an attorney licensed in more than one state will find it impossible to conform her behavior to the ethical requirements of each of the states in which she holds a license.³ Where an attorney's ethical obligations directly conflict, the courts, legislatures, and commentators have provided little help in supplying a meaningful standard by which to resolve these ethical dilemmas.⁴ At present, a majority of states have adopted some form of the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules), and a significant minority of states have adopted some version of the ABA's Model Code of Professional Responsibility (Model Code).⁵ The Model Code contains no provision that deals explicitly with choice of law,⁶ and the Model Rules did not contain such a provision until the amendment of Model Rule 8.5 in August 1993.⁷ As this Note will show, however, the recent amendment to the Model Rules offers little predictive clarity for the multistate practitioner whose ethical obligations conflict.

2. See Committee on Counsel Responsibility, *Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States*, 45 BUS. LAW. 1229, 1229-30 (1990); O'Brien, *supra* note 1, at 678 & n.2; see also *Leis v. Flynt*, 439 U.S. 438, 449-50 (1979) (Stevens, J., dissenting) (discussing the changing nature of legal practice); cf. William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 1 (1963) (citing increased personal and business activities conducted without regard to the existence of state boundaries, as well as changes in the rules governing in personam jurisdiction, as creating a growing strain on the choice-of-law system).

3. E.g., *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1585 (1994) [hereinafter *Developments*].

4. O'Brien, *supra* note 1, at 681.

5. *Developments, supra* note 3, at 1582.

6. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

7. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b) (1994) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1983).

This Note proposes a client-based approach to resolving choice-of-law problems in the area of professional responsibility for attorneys licensed to practice in multiple jurisdictions. Specifically, this Note addresses conflict-of-law issues that arise outside of proceedings before a court (nonproceedings) in the context of the future crime exception⁸ to the attorney-client privilege. Part I discusses amended Model Rule 8.5(b)(2) as it applies to situations in which multistate practitioners participate in nonproceedings. Part II proposes a client-based choice-of-law rule and demonstrates how that rule would provide a clearer standard than the Model Rule. Part II also outlines how the proposed client-based rule advances one of the underlying policies of the rules of professional responsibility with respect to the attorney-client privilege, focusing on the types of interests and contacts emphasized by certain modern choice-of-law approaches. In Part III, this Note outlines a hypothetical situation that presents a true conflict—a factual scenario that continues to challenge modern choice-of-law scholars. Part IV first discusses how Model Rule 8.5 would apply to the hypothetical situation and how that application would prove highly problematic. Part IV then applies the proposed client-based rule to the same hypothetical situation and demonstrates how that application proves clear and straightforward. Finally, this Note concludes that the proposed client-based rule, while not without its limitations, offers a significant improvement to Model Rule 8.5 and provides a viable and coherent way of resolving true conflicts of law in the area of professional responsibility.

I. THE CURRENT CHOICE-OF-LAW PROVISION: MODEL RULE 8.5(B)(2)

The 1993 amendments to the Model Rules added subsection (b) to Rule 8.5 to deal with choice-of-law issues in the area of

8. Depending on the state, this exception either allows or requires the attorney to disclose her client's intent to commit certain types of crimes in the future. *See, e.g.*, DEL. LAWYERS' R. PROFESSIONAL CONDUCT Rule 1.6 (1995) (*allowing* attorneys to exercise judgment in deciding whether to disclose client's intentions, even if likely to result in "imminent death or substantial bodily harm"); N.J. R. PROFESSIONAL CONDUCT Rule 1.6 (1994) (*requiring* attorneys to disclose client's intentions that might result in damage to life, limb, or property).

professional responsibility.⁹ Where attorneys act outside of court proceedings, Model Rule 8.5(b)(2)(ii) provides:

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.¹⁰

Neither the correct interpretation nor application of this Model Rule proves to be instantly clear. First, the Model Rule provides no guidelines to interpret the “principally practices” standard. One reasonably could define this phrase by the percentage of an attorney’s clients domiciled in a given jurisdiction, the amount of the attorney’s work performed in relation to the laws of a given jurisdiction, or the portion of an attorney’s time devoted to projects involving the laws or clients of a given jurisdiction. Furthermore, an attorney could conceivably spend precisely equal amounts of time in more than one jurisdiction. Given these competing, yet reasonable, interpretations of the phrase “principally practices,” Model Rule 8.5(b) appears susceptible to significant manipulation.

Second, one would face additional difficulty in understanding the “predominant effect” exception. An initial reading could suggest that Model Rule 8.5(b) focuses exclusively on the “predominant effect” of the *attorney’s* “particular conduct,”¹¹ yet the comments to the rule suggest otherwise:

The intention is for the [predominant effect] exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose

9. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b) & cmts. 2–4 (1994).

10. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b)(2)(ii) (1994) (emphasis added).

11. Since the Model Rules are aimed at influencing attorneys’ behavior, the drafters probably intended the rule’s language to refer to actions by attorneys. One commentary seems to have assumed as much since it fails to mention this source of potential ambiguity. See *Developments*, *supra* note 3, at 1588–90.

headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.¹²

Despite somewhat confusing language, the commentary clearly would apply the "predominant effect" exception to the following instance: the lawyer is admitted to practice in both States A and B; she principally practices in State A; she is retained by a company that operates and has its headquarters in State B; and that company wishes to acquire another company that also operates and has its headquarters in State B. The commentary would not apply the predominant effect exception, however, to the same scenario if both companies operated and had headquarters in State A with only minor operations in State B. Yet the commentary offers no further explanation for its application of the "predominant effect" exception to only the first situation. The commentary gives no indication whether it applies in the former instance because the *attorney's* "particular conduct" occurs with respect to the laws of State B or because the *client's* "particular conduct" takes place in that state. One could reasonably read Model Rule 8.5 and its accompanying comments either way.

The "predominant effect" language poses additional confusion. Imagine a situation involving the future crime exception to the attorney-client privilege.¹³ The attorney holds licenses from both state X, which recognizes the future crime exception, and state Z, which does not recognize any exceptions to the attorney-client privilege. Suppose also that the attorney learns that a client, a resident of state X, intends to defraud a partnership that operates under the laws of state X but whose partners are all domiciliaries of state Z. In this case, it is unclear whether the attorney's conduct would have its predominant effect in state X, where the partnership operates, or in state Z, where the impact of the financial injury would be felt by the individual partners.

12. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 cmt. 4 (1994).

13. Compare DEL. LAWYERS' R. PROFESSIONAL CONDUCT Rule 1.6 (1995) with N.J. R. OF PROFESSIONAL CONDUCT Rule 1.6 (1994).

The interpretation of the “predominant effect” exception will have profound impacts on the attorney’s conduct. If the attorney’s conduct were deemed to have its predominant effect in state X because state X had licensed the attorney, provided the legal residence of the partnership, and was the domicile of the client, then the ethical rules of state X would *require* the attorney to disclose his client’s criminal intent. If, on the other hand, the attorney’s conduct were determined to have its predominant effect in state Z because state Z also had licensed the attorney and because the actual economic harm would be suffered by partners who are domiciliaries of state Z, then the professional responsibility regulations of state Z would *prohibit* the attorney’s disclosure of his client’s intent. Thus, while interpretation of the “predominant effect” exception has obvious ramifications for the multistate practitioner, Model Rule 8.5 lacks sufficient clarity to guide its application.

One commentary has proposed elimination of the “predominant effect” exception as a partial solution to the ambiguity in Model Rule 8.5(b).¹⁴ That commentary focuses on the referential ambiguity of the “predominant effect” exception, noting that Model Rule 8.5 does not clarify whether the exception clause applies to the effect of the attorney’s conduct on the client or on the public.¹⁵ In the context of the future crime exception to the attorney-client privilege, the referential ambiguity may prove determinative.

Consider the following situation. A client, domiciled in state X, intends to commit a crime in state Z, and he discloses that intention to his attorney, who is licensed to practice in both states. If state X would forbid disclosure while state Z would require it, in which state would the predominant effect of the attorney’s conduct occur? This determination will be important to the attorney who seeks to avoid being disciplined for violating the attorney-client privilege in state X. Without further specificity, applying the Model Rule’s exception proves difficult. Although subsequent case law may eventually eliminate the ambiguity, the Model Rule at present lacks sufficient clarity to guide the conduct of multistate practitioners.¹⁶

Although the cited commentary makes an important observation, it accurately notes that its own proposed test “also

14. *Developments, supra* note 3, at 1588–90.

15. *Id.* at 1588.

16. *See id.*

presents some ambiguity” and does little to further the goal of establishing a clear choice-of-law rule.¹⁷ Elimination of the “predominant effect” exception would still leave the equally ambiguous and problematic “principally practices” standard of general application. The justification for the elimination of the “predominant effect” exception is that it would provide increased *ex ante* certainty¹⁸ but this reasoning is circular. The adoption of any coherent choice-of-law rule will yield the same *ex ante* certainty as any other such rule, provided that the rule subsequently is applied with uniformity.¹⁹ Model Rule 8.5(b) fails as a satisfactory rule because its intrinsic ambiguities preclude consistent interpretation and, consequently, uniform application. Although certainty might evolve during the adjudication of cases brought under Model Rule 8.5(b), relying on case-by-case analysis to clarify the rule would defeat the purpose of adopting any bright-line rule at all.²⁰

II. A CLIENT-BASED APPROACH TO THE CHOICE-OF-LAW PROBLEM

In light of the ambiguities contained in Model Rule 8.5 and the lack of any choice-of-law provision in the Model Code, this Note proposes a client-based rule for the nonproceeding situation contemplated by Model Rule 8.5(b)(2)(ii). Where a multistate practitioner acts outside of a court proceeding, and where a true conflict of law arises as to the scope of the attorney-client privilege, this Note advocates applying the law of the state in which the client is domiciled at the time the potentially disclosable communication occurs.

The proposed client-based rule offers several advantages. First, it provides a clearer standard than amended Model Rule 8.5(b)(2)(ii). The clarity of the client-based rule likely will result in a degree of certainty and uniformity that will give meaning and substance to the attorney-client privilege.²¹

17. *Id.* at 1589.

18. *See id.*

19. *See Baxter, supra* note 2, at 2–4 (distinguishing between primary and secondary certainty).

20. *See, e.g., Developments, supra* note 3, at 1588–89.

21. *See generally* Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 943–51 (1991) (discussing

This certainty arguably 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, given its technical nature.²² Although one rightfully may attack the intricacies that sometimes impede a clear determination of a person's domicile, our legal system tolerates the concept and relies upon it in many areas of law.²³ The 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. To use the attack on domicile, without more, to reject the client-based rule would be to call into question many areas of the law that similarly rely on a determination of domicile for their effective enforcement.

Second, the client-based rule advances one of the primary objectives of the attorney-client privilege—protection of the client.²⁴ Despite mixed historical rationales, modern commentators justify the attorney-client privilege as the *sine qua non* of the adversarial system.²⁵ One commentator has written:

The attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions. It is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good. The privilege is

the need for a rule that promotes greater certainty and predictability than case-by-case adjudication in the area of attorney-client privilege); O'Brien, *supra* note 1, at 714, 720–21 (discussing the goals of certainty and predictability advanced by modern choice-of-law theory).

22. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICTS OF LAW 5 (2d ed. 1993) ("Determining domicile can be a subtle and elusive task, and the result may easily be one about which reasonable persons—and judges—might disagree."); *id.* at 12 ("The flexibility of the concept [of domicile] permits its manipulation . . ."). See generally *id.* at 5–12 (presenting a summary of the requirements of domicile).

23. See *id.* at 5 (noting that domicile is the basis for jurisdiction in divorce and ordinary civil actions; for taxing incomes and estates; and for determining applicable law in interstate successions).

24. See generally MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 2 (1975) (discussing the need for confidentiality as a procedural safeguard against error in the search for truth that theoretically underlies the adversary system); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1096 (1985) (suggesting that the absence of confidentiality would sacrifice the client's rights and his individual autonomy).

25. *E.g.*, Bradford, *supra* note 21, at 913–14.

also considered necessary to the lawyer's function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.²⁶

The protection afforded by the confidentiality of the attorney-client privilege allows the client to communicate with his legal counselor in a manner that will allow the attorney to best represent her client's interest. The privilege prevents the client from incriminating himself in front of a court or an adversary, while allowing his attorney to prepare the best possible representation of the client with the benefit of complete disclosure of relevant information. In sum, the attorney-client privilege exists to further the client's interests as a participant in a system of justice that involves adversarial ethics.

To serve the prophylactic goal of the attorney-client privilege, certainty and predictability prove essential.²⁷ According to the Supreme Court,

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.²⁸

A bright-line rule promotes greater certainty than case-by-case adjudication because it provides the parties with predict-

26. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978).

27. See, e.g., *Developments, supra* note 3, at 1588-89 (noting that "confidentiality requires certainty to further its goals and purposes"). Departures from a clear rule that defines the attorney-client privilege in individual cases might seem necessary or even proper, but the resultant lack of uniformity of the rule's application and enforcement would produce an uncertainty that would undermine the purposes of the privilege altogether. See *id.* Although the clarity of a bright-line rule offers advantages outside of the privilege context, *id.* (citing Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464, 468-69 (1977)), the benefits of a bright-line rule in the privilege context prove especially significant. Bradford, *supra* note 21, at 912, 937, 945.

28. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). See also Bradford, *supra* note 21, at 943 (arguing that the attorney-client privilege will only foster communications between the attorney and client if both parties know at the time of their communications whether and to what extent the privilege will apply).

ability regarding the future ramifications and treatment of their present actions.²⁹

While the client-based rule may protect the client, it sacrifices an important function of the future crime exception—protecting the public interest in deterring intended crimes. This tension between the interests of the individual and society at large often exists in the search for a workable and just legal principle. Without a universally acceptable normative standard, however, attempting to justify a choice-of-law rule that favors either the client or the public would produce interminable debate on the merits of the appropriate public policy. This Note declines to invite that discussion and instead recognizes that the current choice-of-law provision embodied in Model Rule 8.5 presents serious pragmatic difficulties.³⁰ A domicile-centered rule at least focuses on the client, which is consistent with the policies underlying the attorney-client privilege and the professional responsibility regulations. By applying the law of the client's domicile, the proposed client-based rule provides a more certain, predictable, and rational approach than the existing rule. These improvements sufficiently justify consideration of the merits of the proposed client-based rule.

The client-based rule also advances another purpose underlying the rules of professional responsibility: the protection of the reasonable expectations of the client as a layperson.³¹ The preamble to the Model Rules establishes that the legal profession serves a quasi-governmental function by self-regulation and that the ethical guidelines exist as a means of protecting the public interest.³² In the absence of the judiciary—as when a lawyer acts in nonproceedings—the lawyer has a responsibil-

29. This so-called "primary predictability" constitutes "a [choice-of-law] goal worthy of pursuit [that] few would deny." Baxter, *supra* note 2, at 3. Yet primary predictability alone "is an inadequate *normative* basis for traditional choice-of-law rules." *Id.* (emphasis added). For a more thorough discussion of the merits of predictability and uniformity as justifications for choice-of-law rules, see *id.* at 2–4. See also Bradford, *supra* note 21, at 943–51 (discussing the need for a rule that promotes greater certainty and predictability than case-by-case adjudication in the area of attorney-client privilege); O'Brien, *supra* note 1, at 714, 720–21 (discussing the goals of certainty and predictability advanced by modern choice-of-law theory).

30. See *supra* Part I.

31. See, e.g., FREEDMAN, *supra* note 24, at 3 (discussing the obligations of a criminal defense attorney to protect her legally unsophisticated client from the potential harm of the truth-finding process embodied in criminal trials).

32. MODEL RULES OF PROFESSIONAL CONDUCT Preamble §§ 8–12 (1994); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1–2 (1981).

ity to the public to provide a certain quality of justice.³³ In such situations outside the purview of the court, the law of the client's domicile should apply because it best protects the reasonable expectations of the client. It is the law with which the client will most likely be familiar³⁴ and, accordingly, the law to which the client will expect to be held accountable.³⁵

Third, focusing on the client and his domicile is consistent with the theoretical emphases in certain modern choice-of-law approaches. Three modern theories prove illustrative. The first is Professor Currie's governmental interest analysis.³⁶

Currie based his system upon the observation that law is purposive in nature—that those who made the law sought to serve various social goals [He] argued, in choice-of-law decision-making, the governmental interests of each jurisdiction in having its law applied should be considered. That procedure helps insure that a law will not be applied to the problem *unless applying the law would achieve a policy goal sought by the sovereign which promulgated the law.*³⁷

The rationale behind the client-based rule follows Professor Currie's theoretical instruction. Although, as noted, a consideration of the "governmental interests of each jurisdiction" reveals a tension between the purpose of the attorney-client privilege and the policy concerns motivating the future crime exception, application of the client-based rule clearly does "achieve a policy goal sought by the sovereign which promulgated the law." Applying the law of the client's domicile furthers the policy of the client's state, allowing that state's laws to serve their intended "social goals."

33. MODEL RULES OF PROFESSIONAL CONDUCT Preamble § 1 (1994) (providing that a "lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice"); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1981) (stating that "[b]ecause of [a lawyer's] position in society . . . respect for the law should be more than a platitude").

34. *See, e.g.,* Bernkrant v. Fowler, 360 P.2d 906, 910 (Cal. 1961) ("Unless [the parties] could rely on their own law, they would have to look to the laws of all of the jurisdictions to which [the other party] might move regardless of where he was domiciled . . .").

35. *See* HERBERT F. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 261-62 (3d ed. 1949).

36. For a complete introduction to Professor Currie's governmental interest analysis, see Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

37. RICHMAN & REYNOLDS, *supra* note 22, at 212.

The client-based rule also applies the type of tie-breaking analysis advanced in Professor Baxter's comparative impairment approach.³⁸ Professor Baxter recognizes two types of governmental objectives: internal and external.³⁹ Where a choice-of-law problem arises, "the external objective of one state must be subordinated [to that of the other]."⁴⁰ Essentially, "[t]he principle is to subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand."⁴¹

The client-based rule contemplates the type of comparative impairment approach suggested by Professor Baxter by properly considering the conflicting state objectives with respect to the attorney-client privilege and the future crime exception. A comparison of governmental objectives, however, merely uncovers the conflicting policies of the attorney-client privilege and the future crime exception. The client-based rule advances the underlying, client-protective purpose of the attorney-client privilege and of the professional responsibility regulations. In other words, the client-based rule reflects the conclusion that the objectives of both the attorney-client privilege and the professional responsibility regulations would be impaired more than the policy goals of the future crime exception if the client-based rule were not applied. While one may dispute the merits of this conclusion on normative grounds, the proposed client-based rule does incorporate the type of comparative impairment analysis that Professor Baxter recommended to resolve conflicts of law.

The client-based rule also contemplates the analytical focus of the Restatement (Second) of Conflict of Laws. The Second Restatement's approach involves a two-step process.⁴² First, a

38. For a detailed introduction to comparative impairment, see Baxter, *supra* note 2.

39. Internal objectives represent those governmental goals that motivate a state's approach to resolving conflicts among private interests. *Id.* at 17. These interests exist even in wholly domestic disputes. *Id.* External governmental objectives arise when a transaction affects persons of different states. *Id.* "They are the objectives of each state to make effective, in all situations involving persons as to whom it has responsibility for legal ordering, that resolution of contending private interests the state has made for local purposes." *Id.*

40. *Id.*

41. *Id.* at 18. Another commentary has restated Professor Baxter's proposition: "true conflicts [of law] could be resolved by comparing the extent of impairment of each state's policy and applying the law whose policy would be most impaired if it were not applied." RICHMAN & REYNOLDS, *supra* note 22, at 221.

42. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1988).

court, subject to constitutional restrictions, should apply a statutory choice-of-law rule, if one exists.⁴³ In the absence of such a statutory directive, the Second Restatement in effect prescribes application of the law of the state that has "the most significant relationship" with the situation presented.⁴⁴ The determination of the most significant relationship involves consideration of seven factors,⁴⁵ which "can be organized into three basic topics: governmental interests, party interests, and interests involving the administration of justice."⁴⁶

Application of the client-based rule entails consideration of the types of interests examined under the framework of the Second Restatement. Analyzing the governmental and party interests in a conflicts situation, one finds the previously described dilemma posed by the competing purposes of the attorney-client privilege and the future crime exception; the former protects the client, a party interest, but the latter protects the public, a governmental interest. Although applying the law of the client's domicile sacrifices the concern of the future crime exception in order to advance the purposes of the attorney-client privilege and the professional responsibility regulations, the client-based rule furthers the goals of certainty and predictability and is relatively easy to administer. The justification for the rule thus reflects proper attention to the types of interests emphasized by the Second Restatement.

Finally, the client-based rule offers an additional advantage in that the rule prevents the legally sophisticated client from manipulating applicable ethical regulations to the client's advantage by forum shopping. Commentators often have manifested a concern that manipulative efforts of legally

43. *Id.* § 6(1).

44. RICHMAN & REYNOLDS, *supra* note 22, at 195.

45. The factors are:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1988).

46. RICHMAN & REYNOLDS, *supra* note 22, at 196.

sophisticated parties could frustrate an imprudent choice-of-law standard because these parties simply would bring suit in a jurisdiction whose laws would favor the desired outcome.⁴⁷

In the context of nonproceedings, forum shopping continues to present a concern. Consider, for example, an alternative to the client-based rule, application of the law of the state that licenses the attorney. For a multistate practitioner, the lawyer could simply designate a "home-base" state from among the states in which she is licensed. So long as the attorney made adequate *ex ante* disclosure, the parties could rely on application of the laws of the home-base state to their interactions, and legally sophisticated clients could choose lawyers based on the applicable state ethical codes. A client could choose a lawyer whose home-base state has a narrow future crime exception in order to avoid the burden of the broader future crime exception imposed by the state in which the client is domiciled,⁴⁸ thus escaping the laws that the legislature of his state has enacted. The client-based rule would not encourage such manipulative behavior, because the client would properly remain subject to the laws of the state in which he was domiciled.

III. WHERE THE PROPOSED STANDARD MIGHT APPLY: A NOT-SO-HYPOTHETICAL CONFLICT OF LAW

This Part outlines a hypothetical situation, analyzing the application of the statutes of two states, Delaware and New Jersey, in which the client's disclosure implicates the future

47. See, e.g., *id.* at 219 (noting that pure interest analysis as a choice-of-law method would encourage forum-shopping) (citing Michael Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CAL. L. REV. 845 (1961)). But see Bradford, *supra* note 21, at 951 (arguing that state ethical obligations are unlikely to influence a client's choice of attorney).

48. This option becomes especially threatening in light of states like Maryland, whose ethics committee has declared that an attorney's conduct in a foreign jurisdiction will be considered "ethical per se" if the attorney conforms to the Code of Professional Responsibility of that foreign jurisdiction. See *Developments, supra* note 3, at 1587 (citing Md. Comm. on Ethics, Informal Op. 86-28, at 3 (1985)). In other words, if an attorney chose Maryland as her "home-base," she could avoid sanctions by the Maryland Committee on Ethics simply by conforming her conduct to the ethical regulations of any foreign jurisdiction in which she practiced, regardless of whether she was licensed by that foreign jurisdiction. A client could not, therefore, rely on the application of Maryland's professional responsibility regulations to the attorney's conduct. This uncertainty could undermine the client's ability to predict and plan around the attorney's future conduct.

crime exception to the attorney-client privilege. In the Delaware-New Jersey hypothetical, the attorney is licensed to practice in both states.⁴⁹ The client is domiciled in Delaware and reveals his intention to defraud a corporate secured creditor in New Jersey.⁵⁰ Both Delaware and New Jersey have substantially identical statutes that designate such fraud as a crime.⁵¹ In addition, Delaware and New Jersey both have adopted some version of the Model Rules,⁵² though the adopted versions differ as to the scope and terms of the future crime exception.

In Delaware, Model Rule 1.6 generally prohibits attorneys from disclosing client confidences without client consent.⁵³ The future crime exception is limited and discretionary, providing that "[a] lawyer *may* reveal such information to the extent the lawyer *reasonably believes necessary* . . . to prevent the client from committing a criminal act that the lawyer *believes is likely to result* in imminent death or substantial bodily harm."⁵⁴ Delaware's rule implicitly endorses a state policy that favors client confidences over threats to public safety that do not involve life or limb.

One should note two characteristics of Delaware's future crime exception. First, the lawyer may only disclose her client's criminal intent where the contemplated criminal act, in the lawyer's opinion, would likely result in "imminent death or substantial bodily harm." Delaware thus absolutely prohibits its lawyers from disclosing their client's criminal intentions

49. The hypothetical intentionally involves an attorney who is admitted to practice, either regularly or *pro hac vice*, in both jurisdictions to avoid the important, but distinct, jurisdictional difficulties in determining which state would have proper jurisdiction to discipline the attorney. By licensing the attorney in both Delaware and New Jersey, the jurisdictional question is properly avoided, as it is beyond the scope of this Note.

50. One might challenge the general relevance of the client-based rule, because this Note only tests its application to a specific hypothetical scenario. The client-based rule would likely encounter significant difficulty in resolving a conflicts situation in which a multistate practitioner has several clients from numerous domiciles who together intend to commit a conspiratorial crime or fraud. Although this situation would pose a significant challenge to the viability of the client-based rule, such a scenario seems sufficiently unlikely so as to justify postponement of its consideration.

51. Compare DEL. CODE ANN. tit. 11, § 891 (Supp. 1994) with N.J. STAT. ANN. § 2C:21-12 (West 1982).

52. Compare DEL. LAWYERS' R. PROFESSIONAL CONDUCT with N.J. R. PROFESSIONAL CONDUCT.

53. DEL. LAWYERS' R. PROFESSIONAL CONDUCT Rule 1.6(a) (1995).

54. DEL. LAWYERS' R. PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1995) (emphasis added).

if those intentions would not result in damage to a person's life or limb.⁵⁵ Second, even if the client's intended acts would endanger life or limb, the rule is discretionary and allows the attorney licensed to practice in Delaware to exercise her judgment in deciding whether to disclose her client's intentions.

Like Delaware, New Jersey imposes a general prohibition on attorneys' disclosure of client confidences.⁵⁶ New Jersey's future crime exception, however, is mandatory and broader in scope, providing that

[a] lawyer *shall* reveal such information . . . as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client . . . 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.⁵⁷

Compared to the Delaware rule, New Jersey's rule favors the state's interest in protecting public safety and private property over client confidentiality. Consequently, New Jersey *requires* its licensed attorneys to disclose client confidences in a broader range of circumstances which pose a threat to life, limb, or property.

Comparing this rule to Delaware's, one should make two observations. First, this rule is mandatory. While the New Jersey rule still allows the lawyer to exercise his judgment in determining what he "reasonably believes [to be] necessary, to prevent the client" from committing the enumerated acts, once the lawyer has made such a determination, he then *shall* reveal that information.⁵⁸ Unlike the Delaware provision, the New Jersey rule leaves the lawyer no discretion in deciding whether to disclose his client's criminal, illegal, or fraudulent intentions. Second, the scope of the New Jersey future crime exception is much broader than that of Delaware. The New Jersey rule requires the lawyer to disclose information that

55. For example, the Delaware Model Rules of Professional Conduct would not sanction even discretionary disclosure by an attorney of a client's criminal intentions where the intended act only threatened property interests. Compare DEL. LAWYERS' R. PROFESSIONAL CONDUCT Rule 1.6(a) (1995) with DEL. LAWYERS' R. PROFESSIONAL CONDUCT Rule 1.6(b) (1995).

56. N.J. R. PROFESSIONAL CONDUCT Rule 1.6(a) (1994).

57. N.J. R. PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1994) (emphasis added).

58. N.J. R. PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1994).

would prevent criminal, illegal, and fraudulent acts that might result in damage to life, limb, financial interest, or property of another. In other words, where the Delaware rule would *allow* its lawyer to disclose her client's criminal intentions that might result in injury to life or limb, the New Jersey rule would *require* its attorney to disclose his client's intent to commit a criminal, illegal, or fraudulent act that would result in damage to life, limb, or property.⁵⁹

The Delaware-New Jersey hypothetical consequently presents an apparent true conflict.⁶⁰ The relevant interests are illustrated by the following diagram:

	Delaware	New Jersey
Contacts	Attorney's license Client's domicile	Attorney's license Future fraud location
Law	Attorney cannot disclose client's intent	Attorney must disclose client's intent
Policy	Narrow future crime exception favors greater client confidentiality, except when personal injury or human life is at risk	Broad future crime, fraud, and illegal activity exception favors state's interest in protecting public safety and private property interests

Diagram 1⁶¹

59. Compare DEL. LAWYERS' R. PROFESSIONAL CONDUCT Rule 1.6 (1995) with N.J. R. PROFESSIONAL CONDUCT Rule 1.6 (1994).

60. The late Professor Brainerd Currie outlined the theoretical foundation for a choice-of-law approach now commonly known as governmental interest analysis. See Currie, *supra* note 36. His article identified three situations that posed significant challenges to courts and choice-of-law scholars. *Id.* at 171-72. At least one of those identified situations, the true conflict, remains a source of highly problematic choice-of-law issues and continues to form the basis for much modern choice-of-law scholarship. *E.g.*, Leo Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255 (1978); Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980); Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245 (1991); John J. Wasilczyk, Note, *Conflict of Laws: Choice of Law for True Conflicts*, 65 CAL. L. REV. 290 (1977).

A true conflict arises when the laws of more than one state could apply and the application of the law of any one state would advance the policy of that state. RICHMAN & REYNOLDS, *supra* note 22, at 213. Developing a coherent choice-of-law theory that satisfactorily resolves the true conflict situation, while also avoiding normative value preferences, has proven the basis for much choice-of-law scholarship, though little agreement has resulted. See, *e.g.*, Baxter, *supra* note 2; Currie, *supra* note 36; Kramer, *supra*.

61. For a discussion of diagramming conflicts-of-law analysis, see William M. Richman, *Diagramming Conflicts: A Graphic Understanding of Interest Analysis*, 43

Application of Delaware's law would advance the policy of Delaware's narrow future crime exception, which entitles the client to confidential communications unless that client's criminal intentions pose a risk of imminent death or substantial bodily harm.⁶² Conversely, New Jersey's law, if applied, would further New Jersey's broad future crime, fraud, and illegal activity exception that favors the state's interest in protecting public safety and private property over the client's interest in confidential communications.⁶³ Delaware's policy seeks to protect its client-domiciliary by preserving client confidentiality,⁶⁴ while New Jersey's policy aims at protecting the property interests that are threatened by the client's intended and illegal act.⁶⁵

IV. RESOLVING THE CONFLICT POSED BY THE DELAWARE-NEW JERSEY HYPOTHETICAL

A. Applying Model Rule 8.5

As the discussion in Part I indicated, Model Rule 8.5(b)(2) emphasizes two criteria in making the choice-of-law determination. The rule relies exclusively on where the lawyer principally practices and where the predominant effect of particular conduct occurs.⁶⁶ The rules of the jurisdiction in which the lawyer principally practices will apply unless the predominant effect occurs in another jurisdiction, in which case the rules of that jurisdiction will apply.⁶⁷ Given the interests in the hypothetical, the following permutations appear:

OHIO ST. L.J. 317 (1982); Joseph W. Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731 (1990).

62. See DEL. LAWYERS' R. PROFESSIONAL CONDUCT Rule 1.6 (1995).

63. See N.J. R. PROFESSIONAL CONDUCT Rule 1.6 (1994).

64. See DEL. LAWYERS' R. PROFESSIONAL CONDUCT Rule 1.6 cmt. (1995).

65. See N.J. R. PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1994).

66. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b)(2)(ii) (1994).

67. *Id.* For a discussion of the rule's potential ambiguities, see *supra* Part I.

	<u>Principally Practice</u>	<u>Predominant Effect</u>	<u>Rules Applied</u>
1)	Delaware	Delaware	Delaware
2)	Delaware	New Jersey	New Jersey
3)	New Jersey	New Jersey	New Jersey
4)	New Jersey	Delaware	Delaware

Table 1

Consider how Model Rule 8.5(b)(2)(ii) would apply to the Delaware-New Jersey hypothetical. As noted in Part I, it initially would be difficult even to determine where the lawyer principally practiced. Let us assume, however, that a lawyer is deemed to practice principally in the state where most of his clients are domiciled or incorporated.⁶⁸ Let us also assume that, for the purposes of the hypothetical, that state is Delaware, thus confining the analysis to rows one and two of Table 1.

In the Delaware-New Jersey hypothetical, the fraud will take place in New Jersey. This occurrence might mean that, under Model Rule 8.5(b)(2)(ii), the lawyer's conduct would have its predominant effect in New Jersey. If so, then the analysis in row two of Table 1 would apply the rules of New Jersey to the Delaware-New Jersey hypothetical. The future occurrence of a fraud in New Jersey arguably would justify the application of New Jersey's rules to a transaction between a Delaware domiciliary and a lawyer licensed by both Delaware and New Jersey.

Recalling the language of Model Rule 8.5(b)(2)(ii), however, one must ask whether New Jersey, as the future site of an illegal act, qualifies as the jurisdiction in which the "particular conduct *clearly has its predominant effect*"⁶⁹—assuming, albeit problematically,⁷⁰ that the client's conduct constitutes the "particular conduct" in question for the purpose of the Model Rule. If so, then the analysis in row two of Table 1 still indicates that New Jersey's rules will apply and that, as

68. This standard may prove both unworkable and unrealistic. Some standard, however, is necessary to test the plausibility of Model Rule 8.5, and the chosen one seems as plausible as the other methods suggested in Part I.

69. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b)(2)(ii) (1994) (emphasis added).

70. For a discussion of the ambiguity of the "particular conduct" phrase, see *supra* Part I.

a consequence, the lawyer in the hypothetical will be required to disclose his client's intentions "to the proper authorities."⁷¹

By making that disclosure, however, the lawyer in the Delaware-New Jersey hypothetical conceivably would be breaching his obligations under the Delaware rules if he considered Delaware to be the jurisdiction in which his "particular conduct clearly has its predominant effect," because it would be that jurisdiction that would discipline him for his breach of conduct.⁷² By this analysis, row one of Table 1 indicates that Model Rule 8.5(b)(2)(ii) would apply the rules of Delaware to the situation envisioned by the Delaware-New Jersey hypothetical. Consequently, the lawyer would be forbidden from disclosing his client's intent to defraud a New Jersey corporate secured creditor. As this example illustrates, determining which state's rules will apply thus depends on how the predominant effect exception is interpreted—a task that is not adequately informed by Model Rule 8.5.⁷³

Part I referred to one commentary that recommended eliminating the "predominant effect" exception and applying the rules of the jurisdiction in which the lawyer principally practices.⁷⁴ Adopting that recommendation, however, seems to produce potentially inequitable results. If one were to adopt a careless method of determining where a lawyer is deemed principally to practice, the applicable law conceivably could vary, even though much of the underlying substance of the transaction in the Delaware-New Jersey hypothetical would remain the same. The hypothetical situation would still involve a Delaware client who intends to commit a fraud in New Jersey, but the applicable law would depend on where the lawyer is deemed principally to practice—a determination that the client might never know and that the lawyer might find difficult, if not impossible, to make.

71. N.J. R. PROFESSIONAL CONDUCT Rule 1.6(b) (1994).

72. This perspective assumes that the Model Rule intends to refer to the lawyer's particular conduct, which may not necessarily be the case. For a discussion of this ambiguity, see *supra* Part I.

73. See *Developments, supra* note 3, at 1588–90.

74. *Id.*

B. Applying the Client-Based Rule

Although Model Rule 8.5 involves significant pragmatic difficulties when applied to the Delaware-New Jersey hypothetical, the client-based rule offers a simple and straightforward alternative; it requires the application of Delaware law since the client is domiciled in that state. Consequently, Delaware's Model Rule 1.6 would forbid the attorney from disclosing his client's intent to perpetrate a fraud on a corporate secured creditor in New Jersey.

Although application of the client-based rule proves unproblematic, its result in the Delaware-New Jersey hypothetical raises some important and valid concerns. Application of Delaware's law results in New Jersey's interest in public safety and private property—which probably motivated New Jersey's passage of its broad future crime and illegal activity exception—being subordinated to Delaware's interest in nearly absolute client confidentiality. Again, one encounters the conflict between the interests of the individual (the client) and the interests of the public.⁷⁵

The proposed client-based rule is not an uncontroversial solution to the choice-of-law problems which confront the multijurisdictional practitioner. As noted, the tension between the individual and society at large always exists in the search for a workable and just legal principle. Deciding which interest ought to prevail proves impossible without passing normative judgment on the merits of either side, a determination beyond the scope of this Note.

Model Rule 8.5, however, presents significant practical difficulties that could produce inequitable results. The client-based rule, by focusing on the client, furthers one of the policies underlying the professional responsibility regulations. More importantly, however, applying the law of the client's domicile is more certain, predictable, and rational than the existing rule. While the client-based rule does not represent the singular solution to the choice-of-law problems facing multijurisdictional practitioners, the improvements offered by the client-based rule—increased certainty, predictability, and rationality—justify consideration of its merits.

75. See *supra* Part II.

CONCLUSION

This Note has proposed a choice-of-law rule as an alternative to Model Rule 8.5(b)(2)(ii). The proposed client-based rule eliminates the ambiguity of the Model Rule and provides greater certainty and predictability. In addition, the client-based rule furthers the purposes of the attorney-client privilege, one of the primary goals of the professional responsibility regulations, and focuses on the types of interests and contacts emphasized by at least three modern choice-of-law approaches. Yet, despite these advantages, even the proposed client-based rule demonstrates that "any rule of choice of law, like any other common law rule, represents an accommodation of conflicting values."⁷⁶ One state's policies must invariably yield to those of another. In the choice-of-law world of the second best, however, this Note offers a significant improvement to the present rule and provides a plausible and rational method of resolving true conflicts of law among state professional responsibility regulations for multistate practitioners.

76. RESTATEMENT (SECOND) ON CONFLICT OF LAWS § 6 cmt. c (1971).