

**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL RESPONSIBILITY**

**Report on Conflicts of Interest in Multi-Jurisdictional Practice:
Proposed Amendments to New York Rules of Professional Conduct
8.5 (Disciplinary Authority and Choice of Law) and
1.10 (Imputation of Conflicts of Interest)**

March 2010

This Report addresses certain anomalies in the New York Rules of Professional Conduct (the “New York Rules”) relating to multijurisdictional practice, particularly in the context of concurrent representations being handled by different lawyers affiliated in a firm and practicing in more than one jurisdiction. Part I sets forth this Committee’s proposed amendments to New York Rules 8.5 and 1.10. Part II identifies significant differences between New York Rule 8.5 (Disciplinary Authority and Choice of Law) and Rule 8.5 of the Model Rules of Professional Conduct (“Model Rules”), and urges that the New York Rule be amended to conform to the Model Rule formulation, with one variation. Part III examines the application of New York Rule 8.5, Model Rule 8.5 and this Committee’s proposed amendments to New York Rule 8.5 in situations where there are jurisdictional variations in the conflicts-of-interest rules. Part IV explores the interplay between New York Rule 8.5 and New York Rule 1.10 (Imputation of Conflicts of Interest), and identifies the undesirable result under the existing imputation rules of the extra-territorial application of New York conflict-of-interest rules to lawyers who are neither licensed in New York nor engaged in matters with any nexus to New York. The Committee’s proposed amendments to New York Rules 8.5 and 1.10 would rectify this anomaly. Part V summarizes the Committee’s recommendations.

Part I. Text of Proposed Rule Changes

For the reasons set forth in this Report, the Committee urges the following amendments to New York Rules 8.5 and 1.10. The proposed text to be deleted appears in ~~strike-through~~ and the proposed text to be added appears in *italics*.

Proposed Revisions to New York Rule 8.5:

RULE 8.5: Disciplinary Authority and Choice of Law

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer’s conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:

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

(2) For any other conduct:

~~(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and~~

~~(ii) If the lawyer is licensed to practice in this state 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. the rules to be applied shall be the rules of this state; provided, however, that if a lawyer reasonably believes that the services for which the lawyer or the lawyer's firm has been retained have their predominant effect in another jurisdiction, such lawyer may rely on the rules of professional conduct of such other jurisdiction.~~

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this state is subject to the disciplinary authority of this state. Extension of the disciplinary authority of this state to other lawyers who provide or offer to provide legal services in this state is for the protection of the citizens of this state. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. *See* ABA Model Rules for Lawyer Disciplinary Enforcement, Rules 6 and 22. A lawyer who is subject to the disciplinary authority of this state under Rule 8.5(a) appoints an official to be designated by the Appellate Division to receive service of process in New York State. The fact that the lawyer is subject to the disciplinary authority of this state may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct, imposing different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the

jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions. Paragraph (b) is not intended to subject lawyers to discipline if they act reasonably in the face of uncertainty about where the predominant effect of their conduct will occur.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice-of-law rules, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of *this state, unless the lawyer reasonably believes that the admitting jurisdiction in which the lawyer's conduct occurred, principally practices or, if the predominant effect of the services for which the lawyer, or the lawyer's firm, has been retained conduct clearly is in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to the conduct. In such case, the lawyer may rely on the rules of professional conduct of the jurisdiction where the predominant effect of the services occurs.* In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the lawyer principally practices, where the conduct occurred, where the tribunal in which the proceeding is ultimately brought sits, or in another jurisdiction.

[5] When a lawyer is licensed to practice in this state and another jurisdiction and the lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear ~~whether in which jurisdiction the predominant effect of the lawyer's conduct will occur. in an admitting jurisdiction other than the one in which the lawyer principally practices.~~ So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer is licensed and reasonably believes the predominant effect will occur, the lawyer should not be subject to discipline under this Rule. *Where a lawyer, under paragraph (b)(2) of this Rule, relies upon the rules of professional conduct of another jurisdiction, such lawyer must become familiar with the relevant rules of such jurisdiction, and conform the lawyer's conduct thereto.*

[6] *When a lawyer reasonably believes that the lawyer's conduct will be governed by the rules of a jurisdiction other than this state, and the rules of such other jurisdiction differ from those of this state, the lawyer must likewise comply with the obligation, pursuant to Rule 1.4, to promptly inform the client of such a material development in the matter.*

[67] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[78] The choice-of-law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between or among competent regulatory authorities in the affected jurisdictions provide otherwise.

Proposed Revisions to New York Rule 1.10:

RULE 1.10: Imputation of Conflicts of Interest

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(d) Notwithstanding the foregoing, no conflict will be imputed hereunder where (i) a conflict arises under these rules from the conduct of lawyers practicing in another jurisdiction in accordance with such jurisdiction's rules of professional conduct, and (ii) such conduct is permitted by the rules of professional conduct of that other jurisdiction.

~~(d)~~ (e) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

~~(e)~~ (f) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

- (1) the firm agrees to represent a new client;
- (2) the firm agrees to represent an existing client in a new matter;
- (3) the firm hires or associates with another lawyer; or
- (4) an additional party is named or appears in a pending matter.

~~(f)~~ (g) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

~~(g)~~ (h) Where a violation of paragraph (f) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

~~(h)~~ (i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

Part II. Proposed Amendment to Rule 8.5: Disciplinary Authority and Choice of Law

New York Rule 8.5(a) contains the uncontroversial proposition that a lawyer admitted in New York is subject to discipline in this state. New York Rule 8.5(b) governs situations where more than one jurisdiction's ethics rules are implicated by a lawyer's conduct. Rule 8.5(b)(1) distinguishes between litigation conduct and "any other conduct," identifying the applicable ethics rules, in sum, as follows:

- If the conduct occurs in the context of a proceeding in a "court" before which the lawyer has been admitted to practice (whether generally or on a *pro hac vice* basis), Rule 8.5(b)(1) provides that the applicable ethics rules are the rules of the jurisdiction where the court sits, unless the rules of the applicable court provide otherwise.
- If the conduct does not occur in the context of a court proceeding, Rule 8.5(b)(2) first looks at whether the lawyer is licensed only in New York or in New York and another jurisdiction. Then:

- (a) if the lawyer is licensed to practice only in this state, the New York Rules apply; and
- (b) if the lawyer is licensed in New York and another jurisdiction, the ethics rules are those of the place where the lawyer “principally practices,” *unless* the conduct has its “predominant effect” in that other jurisdiction, in which case that jurisdiction’s rules shall apply.

Model Rule 8.5, adopted by the majority¹ of states, is similar in structure to the New York Rule. Model Rule 8.5(a) provides, in substance, that a lawyer admitted to practice in a jurisdiction, or a lawyer providing or offering to provide legal services in such jurisdiction, is subject to that jurisdiction’s disciplinary authority, regardless of where the lawyer’s conduct occurs. Model Rule 8.5(b) provides as follows:

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

Model Rule 8.5(b) thus differs from the New York Rule in at least three significant respects. First, Model Rule 8.5(b)(1) uses the broader term “tribunal” -- not “court” -- thereby bringing arbitration and various administrative proceedings within its scope. Second, Model Rule 8.5(b)(2) contains an important safe harbor for lawyers engaged in multijurisdictional practice: that is, that such lawyers will not be subject to discipline where their conduct complies with the ethics rules of the jurisdiction in which they “reasonably believe[] the predominant effect” of their conduct will occur. This safe harbor is currently embodied only in the comments to the New York Rules.² Finally, and most significantly, under the Model Rule, the applicability of another state’s ethics rules to a lawyer’s conduct does not hinge on actual

¹ To date, 36 states have adopted the Model Rules formulation, either verbatim or in substance, for choice of disciplinary authority and choice of law. See ABA Commission on Multijurisdictional Practice, State Implementation of ABA Model Rule 8.5, *available at* http://www.abanet.org/cpr/jclr/8_5_quick_guide.pdf.

² The Comment [5] to New York Rule 8.5 states: “When a lawyer is licensed to practice in this state and another jurisdiction and the lawyer’s conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer’s conduct will occur in an admitting jurisdiction other than the one in which the lawyer principally practices. So long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer is licensed and reasonably believes the predominant effect will occur, the lawyer should not be subject to discipline under this Rule.”

admission in the state where the conduct occurs or where the predominant effect of the lawyer's conduct is felt.

A simple scenario demonstrates the advantages of the Model Rule approach over the current New York Rule:

Scenario 1:

Lawyer A, a New York admitted attorney, receives a referral from a current client, a New York headquartered corporation, to represent, as co-counsel with a local Texas firm, its Texas subsidiary, Company Y, in an asset sale to Company Z, which is also a Texas corporation.³ The transaction in question will be governed by Texas law. Company Y has no assets in New York and Lawyer A is being engaged solely because of Lawyer A's extensive experience with the type of transaction at issue.

Which ethical rules apply to Lawyer A's conduct with respect to its representation of Company Y in Texas?

The matter in question is transactional in nature and therefore does not trigger the jurisdictional provisions of Model Rule 8.5(b)(1). Under Model Rule 8.5(b)(2), Lawyer A's conduct is governed by the ethical rules in effect in the jurisdiction in which Lawyer A's conduct occurs and/or has its predominant effect.⁴ Since the matter involves two Texas companies in a

³ Prior to August 2002, when the American Bar Association adopted Model Rule 5.5, there was no ethical mechanism by which lawyers could engage in cross-border representation absent dual admission or admission *pro hac vice*. The pre-2002 version of Model Rule 5.5 provided simply that "a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction." Since only three jurisdictions—the District of Columbia, Michigan and Virginia—then permitted practice in the absence of admission to the Bar (either by virtue of temporary or permanent license), it was not clear whether a lawyer could ethically engage in cross-border practice except in those three states. See John A. Holtaway, *Cross-Border Representation of Your Client* (April 2007), available at http://www.abanet.org/cpr/about/Cross_Border_Representation.html; Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 666 (1995). Model Rule 5.5, which provides numerous exceptions to the unauthorized practice rules, has significantly facilitated cross-border practice in the 35 jurisdictions that have adopted a variation of it. See ABA Commission on Multijurisdictional Practice, *State Implementation of ABA Model Rule 5.5*, available at http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf. New York is not one of those jurisdictions. Indeed, the Presiding Justices of the Four Appellate Departments in New York have expressed reservations about the adoption of the Model Rule's multi-jurisdictional practice provisions. See Letter of March 6, 2006 from Vincent Buzard, President of the New York State Bar Association to the Presiding Justices of the Four Appellate Departments reprinted in Roy Simon, *Simon's New York Code of Professional Responsibility Annotated*, at 513 (2007). Accordingly, lawyers who conduct business in New York without being licensed here can take cold comfort only in former Ethical Consideration 8-3 which stated that "Clients and lawyers should not be penalized by undue geographic constraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce."

⁴ This predominant effect test is consistent with the comments to the multijurisdictional practice provisions of the Model Rules, which provide that "a lawyer who practices law in this jurisdiction pursuant to Model Rule 5.5(c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction." Model Rule 5.5, Comment [19].

transaction taking place in Texas and governed by Texas law, the Texas rules of professional conduct would govern Lawyer A's conduct.

Not so in New York under current New York Rule 8.5. Since the matter for which Lawyer A has been retained does not involve proceedings before a court, Rule 8.5 (b)(1) is inapplicable. Lawyer A is not admitted in any jurisdiction other than New York, so Rule 8.5 (b)(2)(ii) is also inapplicable. Accordingly, the ethics rules to be applied to Lawyer A's conduct in this matter, per Rule 8.5(b)(2)(i), would be those in the only jurisdiction in which Lawyer A is admitted, New York—a state whose sole nexus with the transaction is Lawyer A's involvement. Under the Model Rule or this Committee's proposed Rule 8.5, however, this anomalous result would be avoided. Lawyer A would not behave unethically if, reasonably believing that the services for which she has been retained have their predominant effect in Texas, she conformed her conduct to the Texas Rules of Professional Conduct.⁵

This Committee's proposed amendment to Rule 8.5 differs from the Model Rule approach in two significant respects. First, the Committee's proposed amendment omits Model Rule 8.5's reference to "the jurisdiction in which the lawyer's conduct occurred." This Committee believes that such reference is confusing and that, for the sake of clarity, the default rules of professional conduct for New York licensed attorneys should be New York. Second, this Committee's proposed amendment, again for the sake of clarity, collapses Model Rule 8.5's reference to "predominant effect" and the safe harbor for "reasonable belief" into a single permissible reliance standard: "if a lawyer reasonably believes that the services for which the lawyer or the lawyer's firm has been retained have their predominant effect in another jurisdiction, such lawyer *may* rely on the rules of professional conduct of such other jurisdiction." (Emphasis added).

The safe harbor contained in the Model Rules, and in this Committee's proposed amendment to Rule 8.5, is significant. Under each Rule -- but not the current New York Rule 8.5 -- if Lawyer A in Scenario 1 reasonably believes that her conduct will have its predominant effect in Texas (and Lawyer A, having duly notified her client of that belief, conforms her conduct to the Texas rules), Lawyer A will not be subject to discipline in New York for failing to follow a differing New York rule.

Part III. Rule 8.5 in the Context of Varying Conflicts-of-Interest Rules

The foregoing choice-of-law and choice-of-authority provisions have greatest salience where there is a substantive jurisdictional conflict with respect to a particular ethics rule. In other words, where there is no substantive difference between the relevant Texas and New York rules, Lawyer A in Scenario 1 need not be concerned with which state's rules govern her

⁵ As set forth in greater detail below, this Committee is of the view that a lawyer relying on this provision would be required, under New York Rule 1.4, where there was a substantial difference between the rules of the admitting jurisdiction and the jurisdiction where the conduct occurs to provide his or her client with clear notice as to the ethical rules applicable to the lawyer's conduct. See Rule 1.4 ("A lawyer shall promptly inform the client of... material developments in the matter."). Such notice would be particularly necessary if the lawyer was of the view that the predominant effect of a representation was in a jurisdiction other than the jurisdiction in which the client resides.

conduct. Where there is such a substantive difference, the choice of law provisions become significant.⁶

In most United States jurisdictions—save Texas—the governing conflicts-of-interest rules are substantively similar to Model Rule 1.7. That is, a lawyer is ethically prohibited from acting against the interests of a client (absent such client’s informed consent) even if the adverse representation bears no relationship to the lawyer’s concurrent representation of the client. New York Rule 1.7(a); Model Rule 1.7(a).

In Texas, and in many, if not most jurisdictions outside of the United States, however, the rules governing conflicts of interest are markedly different. In such jurisdictions, a lawyer is only prohibited from acting against the interests of existing clients where there is a significant risk that the clients’ confidences will be used against them, or where the matters the lawyer is handling for the clients are substantially related. *See, e.g.*, The Code of Conduct for Lawyers in the European Union, Rule 3.2 (“A lawyer may not advise, represent or act on behalf of two or more clients *in the same matter* if there is a conflict, or a significant risk of a conflict, between the interests of those clients. A lawyer must cease to act for both clients when a conflict of interest arises between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired.”); National Bar Council of France Regulatory Decision No. 1999-001 establishing Harmonised Practice Rules for the French Bars, Article 4.1 (“Lawyers may not advise, represent or act on behalf of two or more parties *in the same matter* if there is a conflict between their interests or, without the agreement of the parties, there is a serious risk of such a conflict.”); Solicitor’s Code of Conduct 2007 (United Kingdom) (“Solicitor’s Code”), Rule 3.01(2) (“There is a conflict of interest if you owe, or your firm owes, separate duties to act in the best interests of two or more clients in relation to the *same or related matters*, and those duties conflict, or there is a significant risk that those duties may conflict.”) (Emphases added). In such jurisdictions, it is a common and accepted practice to take adverse action—whether in transactional matters or in contentious proceedings—against existing clients in unrelated matters. Indeed, in such jurisdictions, the freedom of lawyers to act adversely to their current clients in unrelated matters is generally considered to be a necessary corollary to a client’s freedom to select counsel of its choice.

The following scenario illustrates how a client’s choice of counsel, and a lawyer’s freedom to act, differ under the current New York Rule and the Model Rule.

⁶ For the sake of brevity, we limit our discussion of the issues presented by New York Rule 8.5 to substantive variations in the rules governing conflicts of interest. However, the issues discussed in this part of the Report arise in myriad other forms among lawyers engaged in multijurisdictional work. Take, for example, a lawyer conducting an internal investigation for a client in another state. The client is concerned that it may be investigated by federal and state authorities for alleged violations of antitrust laws. If private litigation ensues, the lawyer will seek, as a matter of course, *pro hac vice* admission to the state in question. As of now, however, no mechanism for such admission exists. Under the ethics rules of the state in which the client is located, interviews of employees of a competitor that one knows to be represented by counsel is permitted. Under the New York Rules, such interviews are only permitted in very limited circumstances absent the consent in advance of the competitor’s counsel. The client is confident that its competitor has hired local counsel and that such counsel is already attempting to interview the client’s employees. Must the New York admitted lawyer: (a) turn down the work; (b) request that the client incur the additional expense of engaging local counsel to conduct the interviews; or (c) forego the interviews altogether in conformity with the New York Rule, even if detrimental to the client?

Scenario 2:

Lawyer A, an attorney admitted only in New York, is currently representing (Texas-based) Company Y, assisted by local counsel, in an asset sale to (Texas-based) Company Z. Lawyer A also wishes to represent Company X in the purchase of certain other subsidiaries of Company Y in Texas. Neither company has any New York assets and Lawyer A is being retained solely because of Lawyer A's extensive experience in the types of transaction at issue. None of the information that Lawyer A has learned by virtue of her ongoing representation of Company Y is relevant to the acquisition contemplated by Company X.⁷

Simply put, under the existing New York Rule 8.5, Lawyer A in Scenario 2 cannot ethically represent Company X in acquiring subsidiaries of Company Y because the governing ethics rules (New York's) prohibit Lawyer A from representing interests adverse to those of her current client, absent each client's informed consent. (We can assume that Company X will consent but Company Y may not.) Under the Texas Rules, however, a lawyer similarly situated to Lawyer A could ethically represent Company X without Company Y's consent, provided that Lawyer A's work for both Company X and Company Y occurs or has its predominant effect in Texas. Both the Model Rule and this Committee's proposed revisions to New York Rule 8.5 would also authorize the simultaneous representations: Since Lawyer A's conduct in each transaction will have its predominant effect in Texas, Lawyer A will have acted ethically as long as her conduct conforms to the Texas rules of professional conduct.⁸

Imagine now that the acquisitions described in Scenario 2 are taking place in the U.K. and are governed by U.K. law. Under the Solicitor's Code, a solicitor in the United Kingdom (Lawyer B) would be free to represent Company X in acquiring subsidiaries from Company Y (and even in suing Company Y for breach of contract were the deal to fall through) even if he concurrently represented Company Y in unrelated matters. Company X therefore has the ability to retain its counsel of choice when retaining Lawyer B. Company X, likewise, may retain any lawyer admitted in a jurisdiction that has adopted the Model Rules approach (Lawyer C), since the applicable rules governing Lawyer C's representation of Company X under Model Rule 8.5 are the Solicitor's Code.⁹ But what if Company X wants to retain a New York licensed lawyer (still Lawyer A)? In the absence of dual admission in the U.K., Lawyer A's conduct will be governed by the New York Rules. Absent the informed consent of Company Y, Lawyer A will be required to forego a matter that both Lawyers B and C would be free to accept and Company

⁷ For a further discussion on whether information learned during the course of the representation of a client is relevant to a concurrent adverse representation, please see the discussion following Scenario 6 below.

⁸ As well, Lawyer A must advise the affected clients of the applicable ethical rules.

⁹ Comments to the Model Rules and the New York Rules specifically (and identically) state that Rule 8.5 applies to transnational matters: "The choice-of-law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between or among competent regulatory authorities in the affected jurisdictions provide otherwise." Model Rule 8.5 Comment [7]; New York Rule 8.5, Comment [7].

X will be deprived of its lawyer of choice simply because Lawyer A is licensed in New York.¹⁰ This Committee's proposed Rule 8.5 would remedy that imbalance, and permit New York licensed Lawyer A to act in accordance with the Solicitor's Code with respect to the matters described in scenario 2, where the predominant effect of the representation occurs in the U.K.; provided, of course, that Lawyer A has duly informed her clients, at the outset of the representation or whenever relevant, of the applicability of such ethical rules to her conduct.

It should be acknowledged that the applicability of professional conduct rules addressing conflicts of interest is particularly complex in the context of multijurisdictional practice because generally concurrent client conflicts involve more than one matter which may, in turn, invoke the rules of more than one jurisdiction. Take, for example, the following scenario:

Scenario 3:

Lawyer A is licensed both in New York and as a Solicitor with the U.K. Law Society. Lawyer A is representing Company Y, a U.K. plc, in an asset sale to Company Z, a New York corporation, in a transaction that will be governed by New York law and involve solely New York assets. Lawyer A is then asked by Company X, a U.K. plc, to represent it in connection with the purchase of certain other subsidiaries of Company Y. Companies X and Y are both U.K. entities, the subsidiaries being purchased are all located in the U.K. and the agreements will be governed by U.K. law. As in Scenario 1 above, none of the information that Lawyer A has learned by virtue of her ongoing representation of Company Y is relevant to the acquisition contemplated by Company X.

Under each of current New York Rule 8.5, Model Rule 8.5 and this Committee's proposed amendments to Rule 8.5, Lawyer A's conduct with respect to the first representation (of Company Y in its sale of New York assets to New York Company Z) is governed by the New York Rules. With respect to the second representation (of Company X in its purchase of Y's U.K. subsidiary), since Lawyer A is dually admitted and the representation of Company X will have its predominant effect in the U.K., under all three regimes, Lawyer A will have behaved ethically if she conforms her conduct to the Solicitor's Code. Yet Lawyer A cannot simultaneously ethically represent both Company X and Company Y in these two separate transactions, absent client consent, under the New York Rules. She can ethically represent both under the Solicitor's Code. What is Lawyer A to do?

Only a handful of ethics opinions have addressed this conundrum and none in the context of conflicts of interest. Numerous ethics opinions have approved the concept of partnerships between lawyers admitted in different jurisdictions. *See, e.g.,* ABA Formal Op. 01-423 (endorsing partnership with foreign lawyers); New York State Bar Association Op. 762

¹⁰ We note, of course, that both Lawyer B and Lawyer C may face constraints on adverse representation imposed by their clients. Taking on an adverse representation that is permitted by the ethical rules but is likely to anger a key client simply constitutes poor business judgment.

(approving partnership with lawyers admitted in foreign jurisdictions provided that appropriate supervision to ensure compliance with applicable ethical rules occurs); New York State Bar Association Op. 658 (approving partnership between New York lawyer and Swedish lawyer); New York State Bar Association Op. 658 (approving partnership between New York lawyer and Japanese *bengoshi*); New York State Bar Association Op. 542 (approving partnership between New York lawyer and British solicitor); The District of Columbia Bar Op. No. 278 (endorsing partnership with foreign lawyers). But only a handful of such opinions have discussed the ethical quandary faced by partners subject to substantively diverse ethics rules. In New York State Bar Association Opinion 762, for example, the State Bar opined that the supervisory duties of a New York lawyer under former DR 1-104 were satisfied once she or he assured that the conduct of fellow lawyers and staff *to whom the New York rules were applicable* conformed to the Code and that therefore a New York lawyer was not obligated to conform the conduct of other non-New York lawyers and staff of the firm to New York rules.

On the other hand, a few ethics opinions approving affiliations between lawyers licensed in different jurisdictions have indicated that the extra-territorial application of the U.S. conflicts rules is appropriate. See, e.g., ABA Formal Op. 01-423 (endorsing partnerships with foreign lawyers provided that “conflicts with the interests of clients with U.S. matters are managed as Rule 1.7 and related rules require”); The District of Columbia Bar Op. No. 278 (endorsing partnerships with foreign lawyers “only to the extent that they do not impair the D.C. Bar member’s ability and obligation to uphold ethical standards”). Of note, however, is the fact that both of these opinions pre-date the 2002 adoption of Model Rules 5.5 and 8.5 (and their D.C. Rules of Professional Conduct corollaries) which arguably require a different interpretation of the extra-territorial effect of a given jurisdiction’s conflict of interest rules. Indeed, the comments to both Model Rule 8.5 and New York Rule 8.5 indicate that the intent of paragraph (b) is to satisfactorily resolve conflicts between ethics rules: “Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession).”

The most salient opinion addressing how lawyers admitted in multiple jurisdictions should act with respect to substantively diverse ethics rules was issued by the American Bar Association in Formal Ethics Opinion 91-360. There the American Bar Association was faced with determining which ethical regime should govern the conduct of a lawyer admitted in one jurisdiction that permitted partnership with non-lawyers and another that prohibited the same conduct. Although the opinion pre-dates the passage of Ruled 8.5, the American Bar Association concluded that the lawyer complied with each ethical regime if he or she refrained from sharing fees with non-lawyers in matters in the jurisdiction in which such fee-sharing was prohibited, and shared fees with non-lawyers only with respect to those matters in jurisdictions in which such fee-sharing was permissible. *See also* Mich. Ethics Op. RI-225 (1995) (Michigan licensed lawyer may invest in out-of-state firm that permits fee-sharing with non-lawyers as permitted under that state’s ethics rules, provided that the lawyer does not practice in affiliation with that firm in Michigan). In short, the approach adopted in the American Bar Association opinion is: “When in Rome, do as the Romans do.”

This Committee endorses that approach. Returning to Scenario 3 above, if Lawyer A conforms her conduct with respect to all New York matters -- *i.e.*, all matters in which the

representation will have its predominant effect in New York -- to the New York Rules and conforms her conduct with respect to all U.K. matters -- *i.e.*, all matters in which the representation will have its predominant effect in the U.K. -- to the Solicitor's Code, this Committee believes that Lawyer A has fulfilled her ethical obligations. Since Lawyer A can concurrently represent Company X and Company Y under the ethics rules governing the representation of Company X (the Solicitor's Code), it logically follows that Lawyer A can accept the concurrent representation. To the extent that the language of Model Rule 1.7 and New York Rule 1.7 appear at first reading to prohibit such concurrent representation, such prohibition should be understood to apply only with respect to those matters where a conflict arises under the rules of the jurisdiction where such matter has its predominant effect. Any other interpretation of the interplay between Rules 1.7 and 8.5 would render Rule 8.5 meaningless and would result in the extraterritorial application of the New York conflict of interest rules to matters with no nexus to New York.

This approach to resolving multijurisdictional conflicts is entirely consistent with the stated purpose of both the Model Rule and the current New York Rule 8.5. As set forth in Comment 3 to the New York Rule, the purpose of the Rule is to "minimize[e] conflicts between rules, as well as uncertainty about which rules are applicable" by: "(i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions." Moreover, Comment 3 makes clear that Rule 8.5(b) "is not intended to subject lawyers to discipline if they act reasonably in the face of uncertainty about where the predominant effect of their conduct will occur." Resolving the ethical conundrum as set forth above is the only resolution that applies a single set of rules to Lawyer's A conduct with respect to each representation described in Scenario 3,¹¹ provides Lawyer A with sufficient protection from discipline in the face of uncertainty and permits clients, such as Company X, in jurisdictions where the conflicts rules are less restrictive, to enjoy their accustomed degree of free choice in the selection of counsel.

Is this fair to Company Y, a client that has retained Lawyer A to represent it in a New York matter and therefore has a reasonable expectation of conflict-free counsel in accordance with the New York Rules? This Committee believes that the answer is "Yes"—provided that Lawyer A has complied with her obligations to keep Company Y aware of the concurrent representation of Company X and the applicability of the Solicitor's Code, including the relevant rules on conflicts of interest, to that representation. Such concurrent representation is a significant development in the representation of Company Y and therefore must be disclosed under New York Rule 1.4 ("A lawyer shall promptly inform the client of... material developments in the matter."). Since Company Y may have previously assumed that only New York Rule 1.7 applied to Lawyer A's conduct, the fact that Lawyer A's representation of Company X is governed by the Solicitor's Code -- and, therefore, adverse representation in unrelated matters may be undertaken with respect to matters being handled in the U.K. -- is a

¹¹ Resolving the conflict between New York Rule 1.7 and the Solicitor's Code in favor of prohibiting Lawyer A from undertaking the representation of Company X would in effect require Lawyer A to conform her conduct to the rules of two jurisdictions with respect to her representation of Company X.

material development of which Company X should be advised. Company Y cannot preclude Lawyer A from taking on such concurrent representation. However, if such a development is abhorrent to Company Y, it will have the opportunity to discharge Lawyer A and obtain new counsel.

Part IV. The Effect of the Imputation Rule

New York Rule 1.10, better known as the imputation rule, provides as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

New York Rule 1.10(a). Model Rule 1.10(a) contains a substantively identical provision. The following serves as an illustration of the complications introduced by the imputation rule in the context of multijurisdictional practice:

Scenario 4:

Lawyer A is again representing Company Y in the New York asset sale to Company Z, as described in Scenario 3. Lawyer B, Lawyer A's partner, a U.K.-admitted lawyer, is subsequently asked (while the New York matter is still pending) to represent U.K.-based Company X in the U.K. acquisition of a Company Y's U.K. subsidiary, as described in Scenario 3.

Under the Solicitor's Code, Lawyer B may ethically represent Company X without obtaining consent from Company Y. However, the impact on Lawyer A of Lawyer B's conduct is not clear under current New York Rule 1.10.

There are two possible interpretations of how the imputation rule should be read in the context of lawyers governed by differing ethical regimes. The first, focusing on the "any one of them practicing alone" language, would lead to the conclusion that a lawyer who is not otherwise subject to New York Rule 1.7 fulfills his or her ethical obligations if he or she conforms his or her conduct to that expected of him or her as a solo practitioner in the jurisdiction whose rules are applicable to the conduct. Under this interpretation of the imputation rule, if a U.K. solicitor is ethically permitted to take on an adverse representation of a current client when acting alone as a solo practitioner, then he or she is permitted to do so in the context of legal work undertaken in a law firm in which he or she is affiliated with lawyers admitted in other jurisdictions. That is, if Lawyer B would, in Scenario 4, be ethically permitted to represent Company X when acting alone, he or she would also be ethically permitted to do so when affiliated with other lawyers subject to other conflicts of interest rules.

The second possible interpretation of the imputation rule, focusing on the "none of them" language, would prohibit Lawyer B from taking on the matter for Company X in the scenario above if Lawyer A, a lawyer affiliated in the same firm as Lawyer B, is not ethically permitted to

do so. That is, if Lawyer A (admitted solely in New York) and Lawyer B (admitted solely in the United Kingdom) are associated together in a law firm, and Lawyer B is rendering services only in the U.K. to a British client (and therefore the Solicitor's Code is solely applicable to his conduct), Lawyer B must nonetheless conform his conduct to that expected of Lawyer A with respect to conflicts of interest with Lawyer A's clients. According to this interpretation of the imputation rule, where lawyers practice in a firm with lawyers licensed in other jurisdictions, not only the New York lawyer but all other lawyers associated with such lawyer are arguably bound by the New York Rules governing conflicts of interest.¹² Consistent with this interpretation of the imputation rule, Lawyer B in Scenario 4 would be required to decline the proposed representation of Client X absent Client Y's consent.¹³ A troubling result? Certainly it is one that should give some pause to lawyers interested in affiliating with New York-licensed lawyers and clients seeking the advice of New York-licensed lawyers for out-of-state matters.

New York Rule 8.5 clearly provides that Lawyer A is bound by the New York ethics rules because he or she is admitted only in New York. Even if Lawyer A is dually admitted in New York and the United Kingdom, under current New York Rule 8.5(b)(2)(ii) the governing ethics rules are those of the jurisdiction in which the lawyer's conduct has its predominant effect. Lawyer A's conduct—*i.e.*, her representation of Company Y in the New York sale—plainly has its predominant effect in New York. Accordingly, Lawyer A cannot take on a representation adverse to her current client, absent informed consent. Lawyer B's conduct, however, has its predominant effect in the U.K.—the jurisdiction, as it happens, of Lawyer B's licensure. The ethical rules applicable to Lawyer B's conduct are, therefore, those of the Solicitor's Code which would not prohibit Lawyer B's representation of Company X.

Under the first interpretation of the imputation rule set forth above, as long as Lawyer B's conduct conforms to the rules of the jurisdiction in which his conduct has its predominant effect (*i.e.*, the U.K.), Lawyer B can represent Company X because Lawyer B would not be prohibited, if practicing alone, from undertaking the matter. Under this Committee's interpretation of the Model Rules and the proposed New York Rule 8.5, moreover, Lawyer A would not be subject to discipline (provided that she reasonably believes that the predominant effect of the services performed for Company X is in the U.K.) on the sole basis of Lawyer B's concurrent representation of Company X. If Lawyer A could, acting alone, concurrently represent Client Y in the New York matter and Company X in the U.K. matter, there is no logical rationale for prohibiting Lawyer B from doing so.

Adopting this Committee's proposed amendment to the imputation rule would resolve any ambiguity as to the correct interpretation of the imputation rule and would be entirely consistent with this Committee's proposed revisions to New York Rule 8.5. Specifically, we

¹² 22 NYCRR 602.3(b), which provides that any law firm with an office in the First Department, must comply with any rules of professional conduct applicable to law firms, only compounds this problem.

¹³ It also bears mention that in some jurisdictions, most notably in France and Germany, the Bar rules governing attorney disclosure of client information are such that obtaining a waiver may, in and of itself, create ethical dilemmas for the lawyers involved. *See, e.g.*, Article 2.2 of the Rules of the National Bar Council of France (prohibiting disclosure of client information to "auditors or any third party"); Article 43a(2) of the Federal Lawyer's Act (Bundesrechtsanwaltsordnung – BRAO) ("A Rechtsanwalt has a duty to observe professional secrecy. This duty relates to everything that has been known to the Rechtsanwalt in professional practice.").

propose that Rule 1.10 be amended to provide that: “*no conflict will be imputed hereunder where (i) a conflict arises under these rules from the conduct of lawyers practicing in another jurisdiction in accordance with such jurisdiction’s rules of professional conduct, and (ii) such conduct is permitted by the rules of professional conduct of that other jurisdiction.*”

The necessity of providing clarity as to how the imputation rule works in the context of multijurisdictional practice can best be demonstrated through recourse to a scenario familiar to any lawyer associated with a law firm with offices in more than one jurisdiction.

Scenario 5:

Lawyer B, the London-based lawyer described in Scenario 4, is handling the acquisition matter for Company X described in Scenario 4. Lawyer C, who is Lawyer B’s German-licensed partner in Germany, is concurrently handling a matter for Company Q involving the negotiation of a credit facility with Company X. Neither lawyer is prohibited under the applicable rules of professional conduct from undertaking such a concurrent representation. Company X, however, is concerned that it may have certain tax liabilities under U.S. law, arising from the acquisition, and so it asks Lawyer B to consult with his New York partner, Lawyer A, a tax attorney licensed only in New York.

Under the current New York Rule 8.5, Lawyer A, who is admitted only in New York, must comply with the New York rules governing conflicts of interest—including the provision that she must refrain from acting adversely to any client of her firm. The fact that Lawyer A reasonably believes that the services for which she has been retained have their predominant effect in the U.K. is irrelevant under the current version of Rule 8.5. Add to this the uncertainty of the current version of the imputation rule, which could be interpreted to provide that if Lawyer A is prohibited to act, then all associated lawyers in the Firm would be prohibited to act, and Lawyer B and C are in a bind. Under the Model Rule and this Committee’s proposed revisions to Rule 8.5, however, Lawyer A may rely on the Solicitor’s Code provisions governing conflicts of interest, since the U.K. is the jurisdiction where all lawyers involved believe the representation will have its predominant effect. Under the Solicitor’s Code, Lawyer A’s concurrent representation of Company X and Company Q is entirely permissible and, accordingly, Lawyer A may provide the requested tax advice.

The wisdom of adopting this Committee’s proposed revisions to Rules 8.5 and 1.10 is perhaps best illustrated by the fact that the clients of many large, international law firms both want and expect their lawyers to analyze non-litigation conflicts so as to permit multijurisdictional practice in accordance with local rules of conduct. At least in the transactional setting, most large, sophisticated financial industry clients routinely grant waivers permitting their lawyers to act adversely to them in unrelated matters and expect lawyers they retain to be free to represent them in matters adverse to such lawyers’ other concurrently represented clients. What happens, however, where the matter at issue involves litigation? To analyze litigation conflicts, we turn to another scenario.

Scenario 6:

Lawyer A represents Company Y in a breach of contract suit arising out of the sale of its subsidiary to Company X. The action is brought in New York Supreme Court. Lawyer B, a London-based U.K.-licensed partner of Lawyer A, has simultaneously been asked to represent Company X in an indemnity proceeding against Company Y arising from the acquisition matter described in Scenario 2. The indemnity proceeding has been filed in London by Company Y.

Under each of New York Rule 8.5 (b)(1), Model Rule 8.5(b)(1) and this Committee's proposed revisions to New York Rule 8.5(b), the rules of the jurisdiction of the tribunal hearing Lawyer A's matter apply to Lawyer A's conduct. Under both Model Rule 8.5(b)(2) and this Committee's proposed New York Rule 8.5(b), the Solicitor's Code applies to Lawyer B's conduct. Lawyer A is prohibited from undertaking a concurrent representation adverse to her current client under New York Rule 1.7. Under the second interpretation of the imputation rule described above, Lawyer B would be prohibited from representing Company X since his representation of Company X would be imputed to Lawyer A. Under the Solicitor's Code, however, Lawyer B is not prohibited from undertaking the representation of Company X as long as he or she has not been privy to confidential information about Company Y gained during the course of the firm's relationship with Company Y.¹⁴ Will Company X be deprived of its counsel of choice due to the simple fact that Lawyer B is affiliated with Lawyer A?

Under this Committee's proposed revisions to New York Rules 8.5 and 1.10, Lawyer A and Lawyer B are ethically permitted to accept the concurrent representations, provided that Lawyer A has informed Company Y of the applicable ethics rules.¹⁵ Some may disagree with this outcome. In the United States, a high premium is still placed on law firm loyalty, and many

¹⁴ The Committee notes that under all ethical regimes of which we are aware, a lawyer is prohibited from disclosing or using to a client's disadvantage confidential information learned about the client during the course of the representation. *See, e.g.*, Rule 1.6 of the New York Rules of Professional Conduct ("a lawyer shall not knowingly reveal confidential information or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless the client gives informed consent... the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community or the disclosure is permitted by paragraph (b)."); Model Rules of Professional Conduct Rule 1.6(a) ("a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent"). This is certainly the case in the United Kingdom where it is not permissible to undertake a concurrent adverse representation where the lawyer possesses confidential information about the adversely represented client which is relevant to the matter. U.K. Solicitor's Code of Conduct, Rule 4.03 ("If you hold, or your firm holds, confidential information in relation to a client or former client, you must not risk breaching confidentiality by acting, or continuing to act, for another client in a matter where: (a) that information might reasonably be expected to be material; and (b) that client has an interest adverse to the first-mentioned client or former client.").

¹⁵ At least one leading ethicist has endorsed this approach as consistent with the drafting history of the predecessor to New York Rule 8.5, DR 5-105. *See* ROY SIMON, *Simon's New York Code of Professional Responsibility Annotated* (2008 Ed.).

an in-house lawyer would be distressed to learn that one of the firms receiving substantial legal fees from the in-house lawyer's employer had undertaken a lawsuit against the employer, regardless of the jurisdiction in which the suit is brought.

Moreover, most clients remain concerned that confidential information learned about them during the course of a representation may be used against them even in seemingly unrelated adverse representations. Adjusting client expectations with respect to conflicts of interest and providing reassurances regarding the treatment of client confidential information (including, where appropriate, the use of ethical screens) is a prudent step lawyers can, and should, take. Indeed, this Committee believes that lawyers have a duty to inform their clients of all material issues affecting their representation—including the applicable ethics rules and the possibility that the applicable conflicts of interest rules may vary by the nature of the matters they refer. *See* New York Rule 1.4 (“A lawyer shall promptly inform the client of... material developments in the matter.”).

In previous opinions, this Association's Committee on Professional and Judicial Ethics has endorsed the use of advance waivers as a means of both securing client consent to future adverse representations and adjusting client expectations as to the terms of the lawyer's representation of the client. *See* The Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Op. 2006-1 (Feb. 16, 2006). This Committee echoes those sentiments here. Of course, clients are always free to protect themselves against surprise by clearly stating their expectations of counsel and requiring disclosure and consent to even ethically permissible adverse representations.

Adoption of this Committee's proposed revisions to Model Rules 8.5 and 1.10 would not change the fact that lawyers undertaking adverse representation of current clients must at all times be mindful of the nature of the confidential information they have acquired in the course of representing their respective clients. The question of whether confidential information learned about a client is relevant to a concurrent adverse representation is a question of fact and law in each applicable jurisdiction. It is clear from existing case law in New York, however, that some forms of confidential information—such as how a client's files are kept, its settlement strategies, and its internal operations—may sometimes be deemed relevant to an adverse representation, even if the underlying matters are not substantially related. *See, e.g., Anderson v. Nassau Cty. Dep't of Corrections*, 376 F. Supp.2d 294 (E.D.N.Y. 2005) (an attorney may not take on an adverse representation against a client where the latter's confidences will be used to his or her disadvantage). Lawyers in New York, moreover, should also be aware that even arrangements deemed to be ethically permissible may not be deemed permissible by courts before whom a motion to disqualify has been brought. *See, e.g., Cinema 5, Ltd., v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976) (holding that the ethical rules are relevant but not dispositive as to the question of whether a disabling conflict exists).

Finally, this Committee cautions that lawyers in New York and elsewhere must be mindful of how information is transmitted within their respective firms. If Lawyer B in Scenario 6 were granted access to information acquired about Client Y by Lawyer A during the course of Lawyer B's representation of Client X, there would be a high risk that at least some of that information would be relevant to Lawyer B's matter and he would be in breach of the Solicitor's

Code. *See, e.g.*, U.K. Solicitor's Code of Conduct Rule 4.03 (prohibiting acting for a client where doing so risks breach of another client's confidences). Accordingly, lawyers on either side of the Atlantic would be well-advised to consider how information is stored and accessed within their respective offices, how information about current matters is distributed within the firm, and whether a screen may be necessary to ensure that client confidentiality is not compromised in the context of even ethically permissible adverse representations.

Part V. Conclusion

It is this Committee's view that a non-New York lawyer should not be required to comply with New York ethics rules solely by virtue of his or her affiliation with a New York lawyer. Nor should a client who has engaged a lawyer on a matter with no nexus to New York be deprived of his or her choice of counsel because of a New York ethics rule that has no bearing on his or her matter. Such extraterritorial application of the New York Rules serves as both an inhibition to affiliation with New York lawyers and an unnecessary restriction on client choice. It is also inconsistent with the expectations of both non-New York lawyers and their clients. Accordingly, this Committee respectfully urges adoption of the proposed revisions to New York Rules 8.5 and 1.10 as set forth in Part I hereof.