CHOICE OF LAW AND RISK MANAGEMENT FOR CONFLICTS OF INTEREST

Nathan M. Crystal & Francesca Giannoni-Crystal

INTRODUCTION

Lawyers often face issues of "conflicts of interest." Indeed, Professor Crystal has written that the three most important ethical issues that lawyers face are "conflicts, conflicts, and conflicts."[1] However, this general statement of the issue hides three important questions: (1) What law or ethics rules or other applicable standards govern the conflicts issue? (2) What is the

1. Nathan M. Crystal, *Conflict Waivers [sic?]-A Primer,* 20 S. CAR. LAWYER 10, 10 (Mar. 2009).

nature of the proceeding in which the conflict arises? (3) How should a lawyer decide how to deal with a conflict issue in conditions of uncertainty?

(1) *Major Differences in Law or Ethics Rules Govern Conflicts of Interest.* Ethics rules in the United States are "relatively" uniform, based on the American Bar Association's Model Rules of Professional Conduct, but significant differences nonetheless exist. When the matter involves foreign lawyers, the applicable standards become much more diverse.

(2) *Choice of Law Rules Vary Depending on the Nature of the Proceeding.* Conflicts issues can arise in lawyer disciplinary proceedings, in disqualification motions, or in civil litigation for malpractice, breach of fiduciary duty or other civil matters, to name several major types of proceedings in which conflict of interest issues arise. In addition, to having many differences, such as standards of proof and possible outcomes, each type of proceeding will have different approaches to determining the applicable conflicts principles. Differences can also arise in federal and state court and in mass actions like class actions or multidistrict litigation (MDL).

(3) *Decision-making Involving Conflicts of Interest Often Occurs in Conditions of Uncertainty.* Before engaging in conduct that raises possible conflict issues, a lawyer (or an ethics advisor to the lawyer), needs to consider the applicable standards that might govern reasonably foreseeable proceedings against the lawyer arising from the possible conflict and the possible outcome and consequences, discounted by the likelihood of such a result. The resulting matrix of foreseeable proceedings, possible applicable standards, and discounted outcome may be difficult to identify, to analyze, and to predict, leading to uncertainty in decision-making. Choice-of-law provisions in lawyers' engagement agreements are one way of reducing this uncertainty.

A conflict of interest arises when a lawyer has two or more competing interests related to the representation of a client. Conflicts of interest, however, do not arise in the abstract but instead depend on the applicable law. Part I focuses on differences in applicable law and rules of ethics regarding conflicts of interest, both in domestic and in international

matters.

Part II discusses the choice-of-law rules applicable to conflict-of-interest issues. Choice-of-law principles regarding conflict issues vary depending on the type of proceeding in which the conflict arises. While conflict issues can arise in many types of proceedings, this part focuses on disciplinary matters, disqualification motions, and civil litigation for malpractice or breach of fiduciary duty.

Part III examines the issue of decision-making under uncertainty resulting from differences in applicable law and differences in reasonably foreseeable proceedings. This part offers suggestions on how lawyers can deal with this uncertainty, including provisions in their engagement agreements on choice of law.

PART I: DIFFERENCES AMONG JURISDICTIONS IN DETERMINING WHETHER A CONFLICT OF INTEREST EXISTS

Conflicts of interest do not exist abstractly. The existence of a conflict of interest depends on the applicable law: a lawyer has a conflict of interest when the applicable law so provides. Differences in applicable law and rules of ethics exist in both domestic and in international matters.

A. Domestic Matters.

Conflict-of-interest rules tend to be the same in the U.S. Most jurisdictions have adopted rules of professional conduct based on the ABA Model Rules of Professional Conduct.[2] In addition, the ethics rules themselves grew out of common law decisions. For example, ABA Model Rule 1.9[3] adopts what is known as the "substantial relationship" test, which prohibits representation against former clients when the current and former matters are the same or substantially related; the ABA rule is a codification of Judge Weinfeld's decision in *T.C. Theatre Corp. v. Warner*

2. MODEL RULES OF PROF'L CONDUCT r. # (AM. BAR ASS'N 1983) (hereinafter cited as "ABA MODEL RULE #").

3. ABA MODEL RULE 1.9.

Bros. Pictures, Inc.[4] To be sure, some jurisdictions have adopted variations or additions to the Model Rules; for example, New York's version of Rule 1.7[5] is somewhat different from the ABA Model Rule.[6] Another example involves the movement of a lawyer from one private firm to another private firm. Under ABA Model Rule 1.10(a)(2)[7] when a lawyer would be disqualified from representing a former client and the disqualification arises out of the lawyer's relationship with a prior firm, the lawyer's current firm is not disqualified if the firm promptly implements "screening" procedures for the disqualified lawyers. However, the ABA's screening rule has not been adopted in a number of states.[8] Differences also exist in nonlitigation matters. For example, Arizona recently adopted changes to its Rules of Professional Conduct to allow nonlawyer ownership in law firms.[9] Despite these differences, the conflict rules in the U.S. are basically the same regardless of jurisdiction.

B. Foreign Matters.

Differences in ethics rules are particularly significant in other countries, where the very definition of "conflict of interest" varies depending on the jurisdiction. These differences are especially important in the increasingly connected world of international practice:

> Indeed, the definition of what a conflict of interest is also varies from jurisdiction to jurisdiction. While the International Bar Association (IBA) maintains that a conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, a third person or by a personal interest of the lawyer," many countries

4. 113 F. Supp. 265 (S.D.N.Y. 1953).

5. N.Y. RULES OF PROF'L CONDUCT r. 1.7 (2018).

6. ABA MODEL RULE 1.7.

7. ABA MODEL RULE 1.10(a)(2).

8. *See, e.g.*, FLA. RULES OF PROF'L CONDUCT 4-1.10; N.Y. RULES OF PROF'L CONDUCT 1.10; TEX. DISCIPLINARY RULES OF PROF'L CONDUCT 1.09 and 1.10. *But see* CALI. RULES OF PROF'L CONDUCT 1.10; D.C. RULES OF PROF'L CONDUCT 1.10.

9. Nathan M. Crystal, *Change is in the Air,* 32 S. CAR. LAWYER 15 (Nov. 2020).

> have a different understanding of the term. . . . It seems that the differences in national rules on conflicts of interest have to be taken into account in each individual case of cross-border practice.[10]

Even among common law countries the approach to conflicts differs significantly. For example, the Canadian approach to conflicts is similar to the U.S. approach for current clients but is less strict for former clients.[11] The way in which the U.K. defines conflicts shows even more variation from the U.S. approach:

> The [Solicitors' Regulation Authority's (SRA) Code of Conduct] divides conflicts into two categories: (1) lawyers acting where their own interests are involved (personal or own interest conflicts); and (2) lawyers acting where a conflict arises between two or more current clients (client conflicts).
>
> The ABA, on the other hand, classifies conflicts as follows: (1) lawyers acting where a conflict arises between two or more existing clients (concurrent conflicts); (2) lawyers acting where their own interests are involved (personal interest conflicts); (3) lawyers acting against former clients (former client conflicts); and (4) lawyers practicing in a firm acting when another member of the firm would be prevented in (1) to (3) above (imputation conflicts).[12]

Among other differences, it appears that the rules on conflicts with former clients are stricter in the U.S. than in the

---

10. Janine Griffiths-Baker & Nancy J. Moore, *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?,* 80 FORDHAM L. REV. 2541, 2544 (2012) [hereinafter *Regulating Conflicts of Interest*] (internal quotation marks omitted).

11. Barrett Schitka, *Private International Law Implications in Conflicts of Interest for Lawyers Licensed in Multiple Countries*, 60 MCGILL L.J. 431 (2015) (comparing Canadian rules and American rules; finding substantial uniformity in current clients rules but discrepancies in former client rules, particularly with regard to imputation of conflicts of interest to a firm).

12. *Regulating Conflicts of Interest,* 80 FORDHAM L. REV. at 2548. On November 25, 2019, the SRA Standards and Regulations came into effect, replacing the SRA Handbook. *SRA Standards and Regulations*, SOLICITORS REGULATION AUTHORITY (Nov. 25, 2019), https://www.sra.org.uk/solicitors/handbook/code/part2/rule3/. On March 2, 2020, the Solicitor Regulatory Authority issued a Guidance on Conflicts of Interest. *Conflicts of interest*, SOLICITORS REGULATION AUTHORITY (Mar. 2, 2020), https://www.sra.org.uk/solicitors/guidance/ethics-guidance/conflicts-interest/.

U.K.[13] and so are the rules on imputation of conflicts.[14] Conversely, in the U.S. a lawyer may obtain from clients informed consent to a conflict more easily than in the U.K., where "clients can give informed consent only in limited situations."[15] Another important difference between the two systems is that disqualification in the U.S. and the U.K. are based on a different set of rules: the rules of professional conduct in the U.S. and common law in the U.K.[16]

For the reasons above, applying U.S. ethics rules or U.K. rules on conflicts might produce different results. This is an example taken from Legal Ethics Forum:

> The New York office of Law Firm represents Company A on a transactional matter involving parties and commitments in New York and London. While that matter is pending, Company B (in London) wants to retain a lawyer in the London office of Law Firm to handle a London-based arbitration against Company A. Assume the arbitration is completely unrelated to the work that the New York office of Law Firm is handling for Company A.
>
> Now consider that the ethics rules in England permit law firms to be adverse to existing clients in unrelated matters. In other words, under the Rules applicable in England, Law Firm

13. *See Regulating Conflicts of Interest,* 80 FORDHAM L. REV. at 2550 ("Lawyers in the United Kingdom are under a duty to keep the affairs of their clients confidential, but may still act against former clients provided that they are able to obtain informed consent or, if that is not feasible, that effective safeguards (including information barriers) are put in place. . . . It is difficult to imagine, however, a way in which an individual lawyer could ensure 'effective safeguards' were in place to allow him to act against a former client.").

14. *See id.* at 2552 ("The United Kingdom's approach to imputation conflicts is far more flexible, regardless of whether the conflict involves current or former conflicts. The fee-earner must personally hold confidential information, so there is no imputation within the firm, and the lawyer is required to disclose only information that is 'material,' so he may himself proceed with the representation if the information is not expected to be material. Moreover, even if a fee-earner is in possession of 'material' information, he or his firm may continue to act provided that the information could be protected by the use of appropriate safeguards. This may even extend to acting without an affected client's consent if it would not be possible to obtain such agreement.").

15. *Id.*

16. *Id.* at 2554 n.72.

> would have no conflict of interest if it represents Company B in the arbitration. In contrast, the Model Rules (and the New York Rules) do not permit lawyers to be adverse to current clients in unrelated matters. Thus, Law Firm would have a conflict under the New York Rules. So does Law Firm have a conflict of interest if it represents Company B?[17]

The differences among rules dealing with conflicts of interests in civil law countries are even more remarkable. On one hand, civil law countries seem to be stricter on conflicts of interest because of a general ban against lawyers engaging in designated occupations that are inconsistent with professional independence. The Council of Bars and Law Societies of Europe (CCBE)[18] has adopted a Code of Conduct for European Lawyers

---

17. Andrew Perlman, *Ethics 20/20 on Choice of Law and Conflicts of Interest*, LEGAL ETHICS FORUM (July 13, 2012), https://www.legalethicsforum.com/blog/2012/07/ethics-2020-on-choice-of-law-and-conflicts-of-interest.html. In the Forum, after the hypothetical, there is a mention of a possible amendment to Rule 1.7 (Rule 1.7(c)) that the ABA 20/20 Commission was considering proposing. *Id.* This was the amendment being discussed, which never passed:

> (c) A lawyer and client can agree that the lawyer's work on a matter will be governed by the conflict of interest rules of a particular jurisdiction, but only if:
>
> (1) the client gives informed consent to the agreement, confirmed in writing;
>
> (2) the lawyer advises the client in writing of the desirability of seeking independent counsel regarding the agreement;
>
> (3) the client has a reasonable opportunity to consult with independent counsel regarding the agreement;
>
> (4) the selected jurisdiction is one in which the predominant effect of, or substantial work relating to, the matter is reasonably expected to occur; and
>
> (5) the agreement does not result in the application of a conflict rule to which informed client consent is not permitted under the rules of the jurisdiction whose rules would otherwise govern the matter.

See ABA MODEL RULE 8.5(b). Instead of this amendment, the ABA changed Comment 5 of Rule 8.5; Part III of this article discusses this amendment.

18. The CCBE, founded in 1960, is an international non-profit association created to deal with the cross-border practice of European lawyers to which today all the national bar associations of the Member States of the European Union and of the three Member States of the European Economic Area (Norway, Liechtenstein, and Iceland) and Switzerland are full members. *See*

("CCBE Code").[19] With regard to incompatible professions the CCBE Code states:

> 2.5.1. [Incompatible Occupations] In order to perform his or her functions with due independence and in a manner which is consistent with his or her duty to participate in the administration of justice a lawyer may be prohibited from undertaking certain occupations.[20]

The CCBE Code then refers to the national law to determine which occupations present such a conflict of interest for lawyers and therefore are incompatible with the practice of law.

> 2.5.2. A lawyer who acts in the representation or the defense of a client in legal proceedings or before any public authorities in a Host Member State shall there observe the rules regarding incompatible occupations as they are applied to lawyers of the Host Member State.
>
> 2.5.3. A lawyer established in a Host Member State in which he or she wishes to participate directly in **commercial or other activities not connected with the practice of the law** shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that

---

CCBE, https://www.ccbe.eu (last visited Mar. 11, 2022).

19. *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers*, CCBE 12, https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf [hereinafter "CCBE Code"] (last visited Mar. 11, 2022). The CCBE Code was adopted by the CCBE on October 28, 1988, to address "the potential difficulties occurring when lawyers are subject to two divergent ethical codes—the code of the lawyer's home country and the code of the country in which the lawyer is working." Lauren R. Frank, Note, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957, 962. The CCBE Code, although not binding law, is not a "purely advisory document" either. In fact, the Code's authors intended it to be adopted by the Member States and most have done so. *Id.* at 963.

20. CCBE Code §2.5.1. *See also* Frank, *Ethical Responsibilities and the International Lawyer*, 2000 U. ILL. L. REV. at 967 ("A greater degree of mistrust of lawyers is grounded in the French and Spanish systems, so authorities strive to limit the attorneys' power. For example, in these two countries, lawyers may not hold a wide variety of offices, including various public and corporate positions, while engaged in the practice of law, although they are less regulated in France than in for instance, are regulated by law, rather than by a self-regulating bar. American lawyers, in contrast, are only prohibited from holding positions creating a clear, articulable conflict of interest.").

Member State.[21]

In addition, the CCBE Code contains conflict provisions that some commentators view as more stringent than the ABA Model Rules on conflicts. The CCBE provides:

> 3.2.1. 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.
>
> 3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.
>
> 3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give

---

21. CCBE Code §2.5.2, 2.5.3 (emphasis added). For example, in Italy, Article 18, L. 247/2012 (Incompatibility) listed the incompatible activities:

> 1. The profession of lawyer is incompatible:
>
> a) with any self-employment activity, excluding those of a scientific, literary, artistic and cultural nature, and with the activity of a notary;
>
> b) with the exercise of any commercial business activity;
>
> c) with the status of unlimited shareholder or director of a company of persons, as well as with the capacity of sole director or chief executive officer of limited liability company, as well as with the status of president of board of directors with individual management powers.
>
> d) with any employment activity even if with limited working hours.

See Avv. Amilcare Mancusi, *Avvocati e "conflitto di interessi": un caso pratico*, PUNTODIDIRITTO (Feb. 10, 2018), http://www.avvocatoamilcaremancusi.com/avvocati-conflitto-interessi-caso-pratico/; ORDINE DEGLI AVVOCATI DI BRESCIA, http://www.ordineavvocatibrescia.it/uploads/allegati_pagine_allegati/pareri_per_pubblicazione_sit-418-39.pdf (last visited March 22, 2022); Serenella Zanfini, *Conflitto di interessi dell'avvocato*, LA LEGGE PER TUTTI (June 10, 2017), https://www.laleggepertutti.it/163024_conflitto-di-interessi-dellavvocato [translation by authors].

an undue advantage to the new client.

> 3.2.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

Rule 3.2.3 also refers to an "undue advantage," a concept that is broader than similar concepts in the ABA Model Rules. Other commentators, however, noted that, "European lawyers interpret the term 'conflict of interest' much more narrowly than their American counterparts."[22] In addition, unlike the ABA Model Rules, the CCBE Code does not provide for the possibility of waiver of conflicts of interest.[23]

However, Professor Mary Daly argued that conflicts of interest contemplated in foreign codes of lawyer conduct mostly resemble the sorts of direct adversity considered not waivable even in the United States.[24] Also, the absence of a waiver provision in the CCBE Code reflects a sustained confidence in a lawyer's ability to identify a conflict and a willingness to decline a representation through an exercise of self-discipline. In addition, Professor Daly explained that the United States has adopted an "autonomy model," which "defines conflicts broadly, imposes on a lawyer the duty to inform the client fully of the conflict, and leaves the decision on consent or waiver to the client."[25] Europe, in contrast, makes use of a paternalistic model, which "leaves the evaluation of a conflict to the lawyer and

22. Frank, *Ethical Responsibilities and the International Lawyer,* 2000 U. ILL. L. REV. at 975.

23. *Id.* ("More specifically, '[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 conflict, between the interests of those clients.' Rules similarly forbid representation if a lawyer's representation of a former client could somehow give an 'undue advantage to the new client.' Most importantly, the CCBE has no waiver option; that is, the client cannot waive his right to a conflict-free lawyer, as is the common practice in America. Yet this omission is not so glaring as it first appears. European lawyers interpret the term 'conflict of interest' much more narrowly than their American counterparts; client consent, therefore, is often not a 'real issue'").

24. Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century,* 21 FORDHAM INT'L L.J. 1239, 1289 (1998).

25. *Id*. at 1290.

makes no provision for informing the client or obtaining consent."[26]

On the other hand, the conflict approach of civil law countries can be seen as looser than the U.S. approach in terms of likelihood of enforcement because in many European countries there is no disqualification for a conflict of interest but only a possible disciplinary action or malpractice.[27]

In conclusion, there are situations in which it would be important to understand whether European law or U.S. law applies in determining whether a conflict exists; for example, consider a case in which a lawyer asks a client to sign a conflict waiver, which is allowed under certain circumstances in the U.S. but not in Europe.

Differences between conflict rules become even more significant outside the Western countries. In China, for example,

> [E]thical rules for lawyers have a "bright line" rule forbidding them from representing both sides in the same conflict, but they go little beyond that. . . . China does not require lawyer loyalty to former clients, nor is there a proposed rule change to that effect. Without the affirmative duty of loyalty to former clients, a lawyer can turn on his own clients while not offending his duty of confidentiality to them.[28]

---

26. *Id*.

27. Standards in the U.K are more similar to the U.S. than to civil law countries. In the U.K., the party affected by a lawyer's conflict of interest, can ask an injunction. The leading case of *Rakusen v. Elliss, Munday and Clarke*, [1912] 1 Ch. 831, involved a firm of solicitors with two partners (who did business separately without knowledge of the other solicitor's clients) one of which was consulted by an employee for an action for wrongful dismissal from a company. The employee ultimately changed lawyers and the litigation moved to arbitration. The other solicitor, completely unware that his partner had been consulted by the employee, accepted to defend the company in the arbitration. The employee sought an injunction against the firm. The injunction was refused by the court, which argued that there is no general rule that a solicitor could not act for the opposite side. An injunction is granted only if "mischief "would result from the solicitor acting for the new client and the inquiry is fact-specific. See here for more cases: *Rakusen v Ellis, Munday and Clark: 1912,* SWARB.CO.UK, https://swarb.co.uk/rakusen-v-elliss-munday-and-clark-1912/ (last visited Mar. 22, 2022).

28. Dan Harris, *China Lawyer Ethics*, CHINA LAW BLOG (July 24, 2007), https://www.chinalawblog.com/2007/07/china_lawyer_ethics_perils_and.html.

PART II: THE RELATIONSHIP BETWEEN CHOICE OF LAW AND TYPE OF PROCEEDING

Part I highlighted some significant differences among jurisdictions on the rules governing conflicts of interest making clear why the choice of law matters. This Part deals with a second perspective that intensifies the difficulty in analyzing conflict issues: the choice of ethics rule or law that a decisionmaker will apply to the conflict issue. As more fully discussed below, the choice of ethics rule or law depends on the nature of the proceeding in which the conflict issue arises. This Part discusses the three most important proceedings in which a conflict-of-interest issue may arise:[29]

(A) *Disciplinary proceedings*. Is it likely that a lawyer will be subject to professional discipline because of the conflict?

(B) *Disqualification or sanctions motions*. Will a judge disqualify the lawyer from representing a client because of the conflict or impose some lesser sanction such as an award of attorney's fees to the opposing party?

(C) *Civil liability*. Will the court award damages to an injured client or perhaps even an injured opposing party or third party, for malpractice, breach of fiduciary duty, fraud, or some other legal theory?

Conflicts of interest can arise also in a number of settings other than the three discussed in this Part. In bankruptcy proceedings, a law firm might face objections to its appointment as debtor's counsel because of a conflict of interest.[30] Arbitration

29. Barrett Schitka makes the same tripartition and focuses his work on a comparison between United States and Canada. On the specific point of the tripartition he writes:

> When a conflict of interest issue arises, three separate concerns must be addressed. First, the lawyer or firm may face a motion for disqualification, preventing further representation of a client on the transaction or dispute. Second, the individual lawyer might be subject to disciplinary proceedings in front of a provincial law society or state bar. Third, the client may sue the lawyer or firm for breach of fiduciary duty.

Barrett Schitka, *Private International Law Implications in Conflicts of Interest for Lawyers Licensed in Multiple Countries,* 60 MCGILL L.J. 431, 437 (2015).

30. Gerald K. Smith, *Conflicts of Interest in Workouts and Bankruptcy*

panels, particularly in international arbitration, often face difficult ethical issues where the applicable rules are uncertain.[31] A lawyer might even be exposed to criminal prosecution.[32]

A corporate client may have adopted outside counsel's guidelines: a document elaborated by a client's legal department "that formally communicates the legal department expectations."[33] These guidelines may include standards for conflicts of interest that go beyond the Rules of Professional Conduct, such as prohibitions on representation of competitors. Such guidelines, if incorporated into the engagement agreement between lawyer and client, can become the basis of an action by the client for breach of contract.[34]

Another setting in which conflict-of-interest issues could arise involves a claim by an insured to be represented by independent counsel, at the insurer's expense, because insurance defense counsel has a conflict of interest.[35] Such claims are often adjudicated in declaratory judgment actions.

However, this article focuses on the three major types of proceedings. Each of these proceedings can be compared and contrasted on a number of grounds—standard of proof or remedy, for example—but our focus is on the choice of law principles that the tribunal will use in the proceeding.

A. Disciplinary Proceedings.

With increased globalization of the practice of law, lawyers may be subject to a disciplinary proceeding even outside their

Reorganization Cases, 48 S.C. L. REV. 793 (1997).

31. *See* Nathan M. Crystal & Francesca Giannoni-Crystal, *"One, No One and One Hundred Thousand" . . . Which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration*, 32 MISS. C. L. REV. 283 (2013).

32. United States v. Russell, 639 F. Supp. 2d 226 (D. Conn. 2007) (prosecution for obstruction of justice).

33. *See* Carla del Bove, *Practical Tips for Using Outside Counsel Guidelines,* COUNSELLINK, https://counsellink.com/2016/02/outside-counsel-guidelines/ (last visited Feb. 5, 2022).

34. *See* James B. Kobak, Jr., *Dealing with Conflicts and Disqualification Risks Professionally,* 44 HOFSTRA L. REV. 497, 529-30 (2015).

35. *See* Chi of Alaska, Inc. v. Employers Reinsurance Corp., 844 P.2d 1193 (Alaska 1993).

states of admission or residence.[36] With regard to jurisdiction to discipline, ABA Model Rule 8.5(a)[37] provides that (1) the jurisdiction of the lawyer's admission is competent to discipline the lawyer; (2) a state is competent to discipline a non-admitted lawyer "if the lawyer provides or offers to provide any legal services in this jurisdiction"; and (3) a lawyer might also be subject to the disciplinary authority of more than one jurisdiction. These jurisdictional provisions seem fully consistent with constitutional requirements.[38] Of course, each state will have its own version of Rule 8.5(a), which must be applied in a particular matter.

Even if a state chooses to start a disciplinary proceeding against a lawyer, it does not necessary mean it will apply its own law. In such matters the disciplinary tribunal will turn to its conflict-of-law or ethics rules. Most states[39] have adopted ABA

---

36. Charles W. Wolfram, *Conference on Legal Ethics: "What Needs Fixing?": Expanding State Jurisdiction to Regulate Out-Of-State Lawyers,* 30 HOFSTRA L. REV. 1015 (2002). *See also* Nathan M. Crystal, *Change is in the Air*, 32 S. CAR. LAWYER 15, 15-17 (2020) (discussing the "butt-in-the-seat" rule).

37. The Rule states:

> Rule 8.5 (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

ABA MODEL RULE 8.5(a). The comments to Rule 8.5 recognize that a lawyer might be subject to different (and sometimes inconsistent) requirements.

> [2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose 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.

ABA MODEL RULE 8.5 cmt. 2.

38. *See* Wolfram, *Expanding State Jurisdiction*, 30 HOFSTRA L. REV. at 1017 n.9.

39. The American Bar Association publishes charts for each of the Model Rules showing the extent of state adoption and also variations from the Model

Model Rule 8.5 which 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.[40]

The rule draws a distinction between "conduct in connection with a matter pending before a tribunal" and "any other conduct." As to the former, the rules of the jurisdiction in which the tribunal "sits" govern the matter; as to the later, the rules of the jurisdiction where the "conduct occurred" govern the matter, unless the "predominant effect" of the conduct is in another jurisdiction.

Rule 8.5(b) aims at solving the problem of "double deontology" for the same conduct.[41]

> [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

---

Rule. *See Jurisdictional Rules Comparison Charts*, AMERICAN BAR, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ (last visited Feb. 5, 2022).

40. ABA MODEL RULE 8.5.

41. "Double deontology" describes the situation in which "a person a is obligated to simultaneously follow two different sets of ethical standards." *See* Matthew T. Nagel, *Double Deontology and the CCBE: Harmonizing the Double Trouble in Europe,* 6 WASH. U. GLOBAL STUD. L. REV. 455, 459 (2007). Comment 3 explains that Rule 8.5(b) seeks to identify which set of rules exclusively regulates a certain conduct and to make this identification as "straightforward as possible" thus providing protection "from discipline for lawyers who act reasonably in the face of uncertainty." ABA MODEL RULE 8.5 cmt. 3.

> the tribunal sits unless the rules of the tribunal, including its choice of law rule, 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 the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. 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 conduct occurred, where the tribunal sits or in another jurisdiction.[42]

These standards do not always work well. For example, the place where a tribunal sits is poorly suited to identify a meaningful set of rules in international arbitration;[43] while the standard "predominantly effect" does not work efficiently when a lawyer's conduct is significantly connected with more than one jurisdiction. For example, Comment 5 to ABA Model Rule 8.5 provides:

> [5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.[44]

In addition, Comment 5 to Rule 8.5 recognizes the possibility that an agreement between the lawyer and client, with the client's informed consent, specifying which jurisdiction's rules apply to determine if a conflict of interest exists may be considered in deciding conflict-of-ethics-rule issues:

---

42. ABA MODEL RULE 8.5 cmt. 4.

43. *See*, Nathan M. Crystal & Francesca Giannoni-Crystal, *"One, No One and One Hundred Thousand" . . . Which Ethical Rule to Apply Conflict of Ethical Rules in International Arbitration,* 32 MISS. C.L. REV. 283 (2013). The argument of the article is that Rule 8.5(a) (place of the tribunal) is poorly suited to identify a meaningful set of rules in international arbitration and that Rule 8.5(b) should instead be used.

44. ABA MODEL RULE 8.5 cmt. 5.

> With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.[45]

Both aspects of Comment 5—the lawyer's reasonable belief as to where the lawyer's conduct may have its predominant effect and the possible application of an agreement between lawyer and client as to which jurisdiction's rules apply—may be very significant when the determination of which rules apply is uncertain as discussed below.

An illustration of the interplay between these rules is *Attorney Grievance Commission of Maryland v. Zhang*.[46] In April 2010 Husband, a U.S. citizen, married Zhang's niece ("Niece"), a noncitizen.[47] Zhang agreed to represent Husband in an immigration petition for Niece's benefit to obtain citizenship for his new wife.[48] Zhang continued that representation and did not withdraw even though the Husband and Niece separated a short time later in November 2010.[49]

At that time, the Niece asked Zhang to represent her in an annulment action in Virginia.[50] Because Zhang was not admitted to practice in Virginia, she asked another lawyer who was admitted in Virginia and with whom she shared office space to co-counsel the annulment action with her.[51] The lawyers agreed that the co-counsel would file a petition in Virginia for Zhang's admission *pro hac vice*.[52] Because the Niece did not speak fluent English, Zhang was the Niece's principal contact regarding the annulment action.[53] Zhang recognized she faced a conflict of interest due to her representation of the Husband in the

45. *Id.*
46. 100 A.3d 1112 (Md. 2014).
47. *Id.* at 1118.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1119.

immigration matter, so she did not enter an appearance in the annulment action.[54] Instead, she drafted a complaint for the Niece to file pro se.[55] The annulment complaint contained allegations of fraud in the marriage. Zhang continued to represent the Niece in connection with the annulment matter without entering an appearance in Virginia.[56] The hearing judge in the disciplinary case found: "Although [Zhang] did not enter her appearance in the [Virginia Court], there is no question that she was acting as an attorney as she provided legal counsel, advice, and representation to Wife as co-counsel . . . ."[57]

Maryland Bar Counsel filed a petition against Zhang for discipline based on her conduct in the matter. Zhang moved to dismiss on grounds of lack of disciplinary jurisdiction and inapplicability of the Maryland Rules of Professional Conduct.[58] With regard to jurisdiction, the Maryland court held it had jurisdiction under Rule 8.5(a) because Zhang was a member of the Maryland Bar.[59] Note that the issue of jurisdiction to discipline is different from the issue of choice of law in disciplinary matters, which is governed by Rule 8.5(b). Jurisdiction to discipline extends beyond lawyers who are admitted to practice. Under Model Rule 8.5(a): "[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."[60] Model Rule 8.5(a) further provides a lawyer may be subject to disciplinary authority of multiple jurisdictions for the same conduct.[61]

Turning to the choice of ethics rules issue, the court found that the choice of ethics rule was governed by Rule 8.5(b)(2)

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 1121-22.
58. *Id.* at 1122.
59. *Id.* at 1122 n.4.
60. ABA MODEL RULE 8.5.
61. Maryland goes further. MdRPC 8.5(a)(2)(C) provides that a lawyer not admitted to practice in Maryland is subject to the disciplinary authority of the Maryland courts if the out-of-state lawyer "has an obligation to supervise or control another attorney practicing law in this State whose conduct constitutes a violation of these Rules."

rather than Rule 8.5(b)(1).[62] Rule 8.5(b)(1) provides that "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."[63] With regard to the application of Rule 8.5(b)(1) the court stated that the disciplinary action was filed after the Virginia annulment proceeding ended; therefore at no time during the disciplinary case was there a matter "pending" in Virginia.[64] This analysis is questionable. A lawyer must decide the ethical propriety of his or her conduct at the time of the conduct not based on a later procedural development. Under the court's analysis conduct that was proper might suddenly become improper when a proceeding is dismissed.

Another question could be raised about the application of Rule 8.5(b)(1): Does it apply to the conduct of a lawyer who does not enter an appearance in the matter, as was the case with Zhang? A lawyer should be on fair notice that if he or she engages in conduct related to a proceeding that the rules of the tribunal would govern. In addition, it would give lawyers the ability to avoid the rules of a tribunal by not entering an appearance in the matter.

The court then turned to the application of Rule 8.5(b)(2).[65] The court rejected Zhang's argument that the predominant effect of Zang's conduct was in Virginia.[66] The court pointed out that Zhang had a law office in Maryland, engaged in discussions with co-counsel in Maryland, and engaged in conduct involving the representation of the Niece in Maryland.[67] All of this is true, but is it sufficient to show that the predominant effect of Zhang's conduct was in Maryland when the basis of the conflict of interest

62. 100 A.3d at 1122.

63. This language can produce arbitrary and unsound results when applied to arbitration, particularly international arbitration, and we have offered some suggestions for dealing with this problem. *See* Nathan M. Crystal & Francesca Giannoni-Crystal, *"One, No one and One Hundred Thousand" . . . Which Ethical Rule to Apply? Conflict of Ethical Rules in International Arbitration*, 32 MISS. C. L. REV. 283 (2013).

64. 100 A.3d at 1122 n.5.

65. *Id.* at 1122-23.

66. *Id.* at 1122 n.5.

67. *Id.*

was representation of the Niece in connection with the Virginia litigation and the Husband was apparently a resident of Virginia? On these facts the predominant effect was in Virginia. Perhaps a better analysis would have been to examine whether application of the Virginia rules would have produced a different result, and they probably would not because Virginia's conflict of interest rules are similar to Maryland's. In fact, the court noted that Zhang failed to show any significant differences between the Virginia and the Maryland rules.[68]

B. Disqualification Motions.

Modern litigation has seen an explosive growth of disqualification motions—motions filed by one party seeking a court order that the other party's lawyer may not continue to represent that party because of some violation of the rules of professional responsibility, typically a conflict of interest.[69] Although disqualification motions were traditionally used to protect the confidentiality of information of former clients (i.e., "to prevent that former lawyer from now using confidential information on behalf of a new client against the former client"[70]), today disqualification is often sought in other situations.[71]

---

68. *Id.* at 1123.

69. NATHAN M. CRYSTAL & GRACE M. GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 56 (7th ed. 2020).

70. *Id.* at 57.

71. Crystal and Giesel give the following two examples in their book: "for example if the opposing lawyer might be called as a witness in the case or if the lawyer had used some improper investigative technique, such as contacting the employees of the moving party." *Id.*

Keith Swisher divides disqualification into ten categories: (1) Concurrent Client Conflicts of Interest; (2) Personal Interest Conflicts; (3) Former Client Conflicts of Interest; (4) Lawyers as Witnesses; (5) Receipt of Confidential, Privileged, or Stolen Information; (6) Contact with a Represented Party; (7) Misconduct with Witnesses; (8) "Other Misconduct;" (9) Imputed Misconduct (Including Conflicts of Interest); and (10) the Appearance of Impropriety". Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 76 (2014). In the period from 2003-2012, Swisher ranked 276 disqualification decisions in federal court in order of importance by the number of such decisions. Some decisions had more

Disqualification of counsel is a discretionary remedy. The Restatement (Third) of the Law Governing Lawyers states: "In most instances, determining whether a lawyer should be disqualified involves a balancing of several interests and is appropriate only when less-intrusive remedies are not reasonably available."[72] Disqualification of counsel is a disfavored remedy for a conflict of interest because it deprives a client of the choice of counsel,[73] imposes costs on both the client who must obtain replacement counsel and the tribunal whose proceedings are delayed, and may sometimes be used for tactical reasons.[74] Proof of prejudice to the moving party is generally required.[75] In

than one ground. The most important grounds for disqualification were as follows: Former clients, 47.8% of decisions; Concurrent clients, 32.6%; Lawyer as Witness 26.1%; Imputation 21.7%; Appearance of impropriety 11.6%. *Id.* at 77, chart 1.

72. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 cmt. i.

73. In *People v. Nozolino*, the Colorado Supreme Court, held that "[d]isqualification of a party's chosen attorney is an extreme remedy and is only appropriate where required to preserve the integrity and fairness of the judicial proceedings." 298 P.3d 915, 919 (Colo. 2013) (citations omitted). The court concluded: "Because disqualification is an extreme remedy, we are loath to disqualify counsel for a potential conflict when the defendant wishes to execute an express waiver. Thus, this factor weighs against disqualification." *Id.* at 921.

74. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 cmt. i provides:

> The costs imposed on a client deprived of a lawyer's services by disqualification can be substantial. At a minimum, the client is forced to incur the cost of finding a new lawyer not burdened by conflict in whom the client has confidence and educating that lawyer about the facts and issues. The costs of delay in the proceeding are borne by that client in part, but also by the tribunal and society. Disqualification is often the most effective sanction for a conflict of interest and will likely continue to be vigorously applied where necessary to protect the integrity of a proceeding or an important interest of the moving party. In applying it, however, tribunals should be vigilant to prevent its use as a tactic by which one party may impose unwarranted delay, costs, and other burdens on another.

Id. See Roy Simon, *Growing Trend Against Motions to Disqualify: Parts I and II*, NYPRR (Nov. 2000 and Jan. 2001), http://www.newyorklegalethics.com/growing-trend-against-motions-to-disqualify-part-1/.

75. In re Ace Real Prop. Invs., LP, No. 09-17-00479-CV, 2018 Tex. App. LEXIS 1258, at *6-7 (Tex. App. Feb. 15, 2018). The court held:

> Because disqualifying a party's attorney results in the party losing its

addition, disqualification is an equitable remedy and is therefore subject to equitable defenses such as estoppel,[76] waiver,[77] and laches.[78]

In deciding disqualification motions, a court must also make a choice-of-law analysis regarding conflicts of interest. *Alzheimer's Institute of America, Inc. v. Avid Radiopharmaceuticals,*[79] illustrates the application of choice of law principles in this type of proceeding. The law firm of Bryan Cave represented the plaintiff, AIA, in a patent infringement case.[80] The University of South Florida Board of Trustees (USF) moved to intervene in the case claiming that a USF employee

> counsel of choice, courts generally review disqualification as a severe remedy, especially when disqualification is based on an attorney's alleged conflict of interest. If the claimed conflict relies merely on allegations of unethical conduct or on evidence showing only a remote possibility that a lawyer has violated a disciplinary rule or ethical rule, courts generally require that a party that files the motion to disqualify to produce evidence demonstrating that the moving party will be actually prejudiced by a decision denying the motion. Even if a lawyer violates a disciplinary rule, the party requesting disqualification must demonstrate that the opposing lawyer's conduct caused actual prejudice that requires disqualification.

Id.

76. For early enunciation of application of the estoppel doctrine to disqualification proceedings, see *Consolidated Theatres, Inc. v. Warner Bros. Circuit Mgt. Corp.*, 216 F.2d 920 (2d Cir. 1954) and ABA Informal Opinion 1323, (April 21, 1975). Another example is *Cleveland v. Cleveland Elec. Illuminating Co.*, finding that "the facts herein catalogued warrant the imposition of the doctrine of equitable estoppel against the City, thereby foreclosing the City from prosecuting its Motion for Disqualification, and it is on this account denied." 440 F. Supp. 193, 205 (N.D. Ohio 1976). *But see* Filippi v. Elmont Union Free Sch. Dist. Bd. of Educ., 722 F. Supp. 2d 295 (E.D.N.Y. 2010) (finding that "plaintiff cites to no cases in which equitable estoppel would be available in the disqualification context nor has plaintiff demonstrated that equitable estoppel is warranted in the instant case").

77. *See Cleveland*, 440 F. Supp. at 193 (finding that waiver barred plaintiff's disqualification motion because, when it retained the law firm, it had full knowledge of the scope and depth of the law firm's representation of defendants).

78. *See* Anderson & Anderson LLP v. N. Am. Foreign Trading Corp., 31 N.Y.S.3d 60 (App. Div. 1st Dept. 2016) (finding that the defendant acted promptly after the facts changed, the motion was timely and therefore not barred by laches).

79. No. 10-6908, 2011 U.S. Dist. LEXIS 140345 (E.D. Pa. Dec. 7, 2011).

80. *Id.* at *2.

had invented the patent, and that USF was therefore the owner of the patent.[81] Different Bryan Cave lawyers represented USF in unrelated patent prosecution and licensing matters.[82] When USF refused to consent to Bryan Cave's continued representation of AIA, the Bryan Cave lawyers representing AIA moved to withdraw.[83]

The court began its choice-of-law analysis by noting the case was a diversity action in which a court applies the choice of law rules of the forum state.[84] The Pennsylvania District Court had adopted the Pennsylvania Rules of Professional Conduct as the rules of conduct applicable in the district court, including Rule 8.5(b) on choice of law.[85] The court held Rule 8.5(b)(1) governed the conflict-of-interest matter before the court: "Because Bryan Cave's motion to withdraw pertains to a proceeding pending in this court and the Pennsylvania Rules of Professional Conduct govern this tribunal, Pennsylvania's Rules of Professional Conduct apply in this case."[86] Rule 8.5(b), which deals with choice of law, provides that the rule applies to the "exercise of the disciplinary authority of this jurisdiction."[87] Although not considered by the court in *Alzheimer's Institute*, it could be argued the rule does not apply because a motion to disqualify is

81. *Id.* at *5.

82. *Id.* at *6.

83. *Id.*

84. *Id.* at *6-7.

85. *Id.* at *7.

86. *Id.* at *11-14. USF argued that the court should apply California Rules of Professional Conduct, which, according to USF, had adopted a rule of per se disqualification when a concurrent conflict of interest exists. USF contended that California rules should apply because the lead Bryan Cave attorney for AIA was admitted to practice in California, and California was Bryan Cave's "home" jurisdiction. The court held, however, that the choice of ethics rule embodied in Pennsylvania Rule 8.5(b)(1) was clear that Pennsylvania Rules of Professional Conduct applied to the conflict-of-interest issue in the case. *See also* Boston Scientific Corp. v. Johnson & Johnson, Inc., 647 F. Supp. 2d 369 (D. Del. 2009) (applying the ethical standards of the court before which the lawyer appears). *But see* Nat'l Oilwell Varco, L.P. v. Omron Oilfield & Marine, 60 F. Supp. 3d 751, 758 (W.D. Tex. 2014) ("local rules alone cannot regulate the parties' rights to counsel of their choice" (relying on In re ProEducation Int'l, Inc., 587 F.3d 296, 299 (5th Cir. 2009))).

87. No. 10-6908, 2011 U.S. Dist. LEXIS 140345, at *8 (E.D. Pa. Dec. 7, 2011).

not a disciplinary proceeding but a civil sanction to protect the integrity of court proceedings. Moreover, as discussed more fully below, the exercise of the power of disqualification rests with the equitable discretion of the court, while disciplinary actions are quasi-criminal in nature.[88] On the other hand, in disqualification motions courts routinely turn to disciplinary rules for the standard to judge the lawyer's conduct, and disqualification is analogous to discipline so it seems appropriate to apply disciplinary rules including the choice-of-law provision.

The court in *Alzheimer's Institute* analyzed the case from two perspectives: application of the ethics rules dealing with conflicts of interest and equitable standards relevant to whether to grant disqualification motions which had been embodied in Pennsylvania District Court local rule 5.01. While the matter before the court was Bryan Cave's motion to withdraw from representation of AIA, the court treated it as a motion for disqualification because, if Bryan Cave had not filed for permission to withdraw, USF would no doubt have moved to disqualify the firm.[89]

With regard to the ethics rules, the court concluded that Bryan Cave's continued representation of AIA violated Rule 1.7, which provides that a lawyer may not undertake or continue representation against another current client, even if the matters are "wholly unrelated," as was the situation in *Alzheimer's Institute*. Comment 6 to Rule 1.7 expresses the rationale for the rule.[90] The client against whom representation the lawyer undertakes representation is "likely to feel betrayed," and the resulting damage to the relationship is likely to impair the lawyer's ability to represent the client effectively.[91] In addition, the client that the lawyer is representing may be concerned that the firm will not be as zealous in its representation against the

88. *See* In re Ruffalo, 390 U.S. 544 (1968).

89. *Alzheimer's Institute*, 2011 U.S. Dist. LEXIS 140345, at *18-19. The court noted that the standards for withdrawal and disqualification were essentially the same, except that in connection with a motion for disqualification (but not a motion for withdrawal) concern exists that the motion for disqualification may be made as a "procedural weapon." *Id.* at *21.

90. *Id.* at *17-18.

91. *Id.* at *16.

other client (The firm may be inclined to "pull its punches," as it is sometimes put).[92] However, the court pointed out, even if a conflict exists, the court may deny a motion to withdraw and order the representation to continue.[93] Pennsylvania Rule of Professional Conduct 1.16(c) states: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."[94]

With regard to the standard for disqualification (as noted previously, the court treated the motion to withdraw as the equivalent of a motion for disqualification), the court also considered the Pennsylvania standard for disqualification.[95] The court noted disqualification is an extreme sanction depriving a party of the counsel of its choice and should not be imposed lightly. Further, disqualification is never automatic.[96]

The court then turned to a balancing of the factors dealing with a motion to withdraw:[97]

(1) *Reason for the withdrawal.* Bryan Cave had a strong reason for filing the motion: It concluded that it was ethically required to withdraw from representing AIA because USF's intervention in the suit meant that Bryan Cave had a concurrent conflict of interest under both Pennsylvania and California rules.[98] Under these rules Bryan Cave could only continue the representation if both AIA and USF consented to its representation of AIA, and USF refused to give its consent. [99]

(2) *Prejudice to AIA.* AIA would suffer substantial prejudice if

92. *Id.* at *17.

93. *Id.* at *18.

94. *Id.*

95. *Id.* at *18-19.

96. *Id.* at *19.

97. These factors were drawn from the local district court rule on withdrawal, but they are the types of factors that a court would consider in exercising equitable discretion to decide whether to grant a motion to disqualify counsel.

98. *Alzheimer's Institute*, 2011 U.S. Dist. LEXIS 140345, at *23.

99. *Id.* at *23. By way of comparison, this case is the opposite of the cases applying the "hot potato doctrine," in which a lawyer drops one client to take on a more favored client. *See* CRYSTAL & GRACE M. GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 114-15 (7th ed. 2020).

Bryan Cave was disqualified.[100] Bryan Cave had represented AIA for two and one-half years in four patent cases pertaining to the issues involved in this case.[101] Marshall, the lead attorney for AIA, and his team spent more than 7,200 hours on these cases and had extensive knowledge of the tens of thousands of pages produced in discovery.[102] The president of AIA testified about the unique relationship he had with Marshall and Bryan Cave and the difficulty to obtain another counsel.[103]

(3) *Prejudice to USF.* USF could not point to any specific harm that would flow from Bryan Cave's continued representation of AIA in the patent infringement litigation, other than a sense of "betrayal" by its counsel and an erosion of confidence that Bryan Cave would continue to represent USF to the best of Bryan Cave's abilities.[104] USF stipulated Bryan Cave had not and would not receive from USF any confidential information that would be relevant or material to AIA's case because the work that Bryan Cave did for USF was unrelated to AIA's matter.[105] In addition, Bryan Cave did not cause the conflict in the case. Almost 20 years earlier AIA had notified USF of its claimed right to the patent that was the subject of the current litigation. At that time USF did not make an ownership claim; instead, it contended it was not subject to suit by AIA based on sovereign immunity. Thus, it was reasonable for AIA to believe there was no conflict with USF over ownership of the patent.[106]

(4) *Potential delay and harm to the administration of justice.* Disqualification of Bryan Cave would delay the case for weeks if not months because of the complexity of the science involved in

100. *Alzheimer's Institute*, 2011 U.S. Dist. LEXIS 140345, at *24-26.

101. *Id.* at *24.

102. *Id.*

103. *Id.* at *26. The president of AIA testified that if AIA was forced to obtain replacement counsel, AIA would have to expend an inordinate amount of time bringing new counsel up to speed about the facts and science of the case. He had contacted seven potential replacement lawyers: five were conflicted out of the case and one had no biology expertise.

104. *Id.* at *26-27.

105. *Id.* at *27-78.

106. *Id.* at *26-30.

the case and the extensive discovery that had been conducted.[107] In addition, delay would harm the administration of justice because cases pending in other jurisdictions were awaiting the outcome of this litigation.[108]

Accordingly, the court denied the motion to withdraw (which it treated as a motion for disqualification) even though Bryan Cave's continued representation would violate conflict-of-interest rules because those rules allow a court to balance all interests and to order that the firm continue its representation.[109]

The balancing-of-factors approach to disqualification motions exhibited by *Alzheimer's Institute* is not the only framework courts can use to decide disqualification issues. Keith Swisher has conducted an extensive analysis of the factors used by U.S. courts to decide disqualification motions.[110] Surprisingly, Swisher found that 11.6% of the decisions relied on the "appearance of impropriety" as a basis for disqualification. This finding is surprising because the ABA Model Rules of Professional Conduct no longer use the appearance of impropriety as an ethical standard.[111] While jurisdictions have not yet adopted a uniform approach to application of the appearance of impropriety in deciding disqualification motions, jurisdictions generally observe one of four approaches:[112] The appearance of impropriety is (1)

107. *Id.* at *30.

108. *Id.*

109. *Id.* at *31.

110. *See* Keith Swisher, *The Practice and Theory of Lawyer Disqualification,* 27 GEO. J. LEGAL ETHICS 71 (2014).

111. By contrast Canon 9 of the ABA Code of Professional Responsibility, the predecessor to the ABA Model Rules of Professional, included the appearance of impropriety as an ethical obligation. *See id.* at 144 n.297.

112. Professor Swisher gives a similar summary:

> Many jurisdictions have rejected the appearance of impropriety basis as outdated or vague (or both), but many more still use this basis for disqualification. The states essentially break into three categories: (1) the appearance of impropriety by itself can constitute the sole basis for disqualification; (2) the appearance of impropriety cannot constitute the sole basis for disqualification, but it can be a factor in considering whether to disqualify the lawyer; and (3) the appearance of impropriety cannot constitute the sole basis for disqualification or even a factor. There is a fourth category of states that have not decisively or clearly addressed the treatment of the appearance of

the sole basis for disqualification; (2) only a factor in disqualification analysis; (3) expressly rejected as both a basis and factor for disqualification; or (4) less influential than the determination of whether the lawyer's conduct undermined the integrity of the proceeding.[113]

C. Civil Liability.

Huber v. Taylor[114] is an excellent example of choice of law in actions for legal malpractice or breach of fiduciary duty. The plaintiffs were asbestos claimants from Pennsylvania, Ohio, and Indiana (referred to in the case as "Northerners").[115] They brought suit in the Western District of Pennsylvania against their attorneys for breach of fiduciary duty.[116] The plaintiffs alleged that their attorneys in asbestos claims suffered from conflicts of interest in that they represented two groups of plaintiffs, the Northerners and plaintiffs from Mississippi and Texas ("Southerners"), under fee agreements with different contingent fee arrangements:[117]

impropriety in disqualification proceedings.

Id. at 85-86. Swisher lists the following 16 as the states in which appearance of impropriety "can be sufficient, by itself, to justify disqualification of a lawyer or law firm": Alaska, Arkansas, Hawaii, Idaho, Kentucky, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Mexico, Pennsylvania, South Dakota, Tennessee, Washington, and West Virginia. *Id.* at 145. Swisher lists the following 20 as the states in which while appearance of impropriety is not "insufficient by itself to warrant disqualification, courts may consider it as a factor weighing in the disqualification balance": Arizona, California, Connecticut, Georgia, Illinois, Iowa, Maryland, Massachusetts, Missouri, Nevada (for public lawyers), North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Utah, Vermont, Virginia, Wisconsin, and Wyoming. *Id.* at 147-48. Swisher lists eight states as having "explicitly rejected the standard": Alabama, Colorado (arguably), Kansas, Mississippi, Nebraska, New Jersey, Oklahoma, and South Carolina. *Id.* at 149-50.

113. *See Board of Education v. Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979) (discussed in Hal R. Liberman, *Disqualification Denied Again: "Amazonas" Case,* NYPRR (July 2001)).

114. 469 F.3d 67 (3d Cir. 2006).

115. *Id.* at 69.

116. *Id.* at 72.

117. *Id.* While the differences in percentages were small, because of the size of the recoveries, the differences in dollar amounts were tens of millions of dollars.

> Plaintiffs allege that Defendants owed them a fiduciary duty as their counsel; that Defendants engaged in an undisclosed, multiple representation; that Defendants had a conflict of interest regarding their multiple representation because of the fee arrangements that gave Defendants a larger percentage of Southerners' recoveries than of Northerners' and that this created an incentive for Defendants to negotiate settlements that paid more for Southerners' claims than for Northerners'; and that Defendants never gave proper disclosure of this conflict of interest or of the full terms of the settlement offers.[118]

The district court denied class certification and granted summary judgment to the defendant attorneys on the ground that the plaintiffs were unable to show that the defendants' conduct caused them any injury.[119] The district court did not engage in a choice-of-law analysis because it concluded that the laws of the relevant states—Ohio, Indiana, and Pennsylvania—were the same.[120] However, the court did not consider Texas law and the parties disagreed on the issue of whether under Texas law (one of the home jurisdictions of the Southerners and the primary locale of the lawyers' practice) a breach of fiduciary duty claim in which the plaintiffs sought disgorgement of attorneys' fees required a showing of actual harm.[121]

The Northerners appealed the summary judgment.[122] The Third Circuit began with the basic principle that a court in a diversity action applies the conflict-of-law rules of the forum state.[123] Before making a choice-of-law analysis, a court must first determine if a conflict of laws exists.[124] With particular reference to Texas law, which the district court had not analyzed, the court found Texas law did not require a showing of harm when the remedy sought for breach of fiduciary duty was

118. *Id.*
119. *Id.*
120. *Id.* at 74.
121. *Id.* at 75.
122. *Id.* at 73.
123. *Id.* at 73 (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)).
124. *Id.* at 74.

disgorgement of fees because the agent's disloyalty (here the lawyers), rather than any resulting harm to the client, is the basis of the recovery.[125]

Analysis of the law of Pennsylvania, Ohio, and Indiana was more complicated because courts there did not always distinguish between malpractice and breach of fiduciary duty claims.[126] The Third Circuit went on to conclude that Pennsylvania, Ohio, and Indiana had not decided whether in a disgorgement action the plaintiff must show actual harm.[127] The courts of these states had required a showing of actual harm in breach of fiduciary duty claims, but they had not faced the precise issue of whether actual harm was required when the plaintiff was seeking fee disgorgement rather than damages. The Third Circuit found the courts of those states might follow the Texas approach.[128] Thus, the court decided while there was not a direct conflict between the laws of the jurisdictions, there was a "potential" conflict, which the court would treat the same as an actual conflict.[129] This conclusion is significant because in many conflict-of-law situations the law of one or more of the jurisdictions may be uncertain; under the court's analysis in case of such uncertainty the court should treat the situation as involving a conflict of laws and therefore engage in the conflict analysis.[130]

The plaintiffs' claims in *Huber* involved not only breach of fiduciary duty and civil conspiracy to breach fiduciary duty but also aiding and abetting breach of fiduciary duty.[131] The Third Circuit engaged in a conflict analysis for each of these claims, but the focus here is only on the breach of fiduciary duty claim.

Pennsylvania applies the "most significant" relationship to determine which jurisdiction's law applies.[132] The court concluded that of the relevant jurisdictions, Texas had by far the most significant relationship:

125. *Id.* at 74, 77.
126. *Id.* at 76.
127. *Id.* at 77.
128. *Id.*
129. *Id.* at 78.
130. *Id.*
131. *Id.* at 72.
132. *Id.* at 79.

> The legal representation of the Plaintiffs (and class members) was conceived of in Texas, solicited from Texas, and primarily controlled by lawyers licensed to practice in Texas. Taylor and Cox are licensed to practice law in Texas, and Texas is the primary locale of their practices. None of the Defendants are licensed to practice law in Ohio, Indiana, and Pennsylvania. As Defendants could not be subject to disciplinary action in those states, it would be odd to then subject them to related fiduciary duties in those jurisdictions when there is another jurisdiction with more significant interests in the matter.
>
> Taylor sought to broaden his asbestos "inventory" by hiring lawyers in Ohio, Indiana, and Pennsylvania to recruit class members and serve as local counsel. Taylor served as lead counsel for all of the Northerners asbestos claims, handled the negotiation of the settlements in question, held himself out as their counsel, and received 95% of their contingent fees. Most of the communication with the Northerners was via Parapro, a Texas corporation headquartered in Houston, Texas, and Taylor's contract with Parapro provided that Texas law would govern that relationship.[133]

In a very interesting portion of the opinion relevant to the discussion in Part III, the court considered the effect of a choice-of-law provision in the agreement between lead counsel and local counsel for the Northerners:

> Finally, Taylor's contracts with Local Counsel required Local Counsel to include provisions in their contingent fee arrangements that Texas law would govern the contracts if suit was not brought in Local Counsel's home state. Local Counsel dutifully complied and included provisions stating "this contract shall be enforced and interpreted pursuant to the laws of Texas" in their retainer agreements with Plaintiffs. Although we generally enforce choice of law clauses, Plaintiffs are not in fact litigating the provisions of the contract in this action. Nonetheless, the fiduciary duty at issue arose under the contracts. It follows then that the duty created by the contracts should be enforced under the law chosen as applicable by the contracts. We would reach the same conclusion without the contractual choice of law provisions, but their existence

133. *Id.* at 79-80.

supports our reasoning.[134]

The court rejected as unconvincing various factors pointed to by defendants in an effort to show that the most significant relationship was with Pennsylvania, Ohio, or Indiana, not Texas.[135] The court also rejected defendants' argument that local counsel, not the defendants, breached fiduciary duties.[136] In a co-counsel relationship all of the co-counsel have fiduciary obligations; the failure of one co-counsel to perform his or her duties does not excuse the other co-counsel.[137]

In *Huber* the court applied the modern "most significant relationship" test for determining the choice of the applicable law.[138] Other courts adhere to the traditional "*lex loci delicti*" (place of the wrong test). In *Rogers v. Lee*[139] the South Carolina Court of Appeals dealt with the law applicable to a legal malpractice action.[140] While the case dealt with negligence rather than conflict of interest, the same analysis would likely be followed in a breach of fiduciary duty claim in a state that applies *lex loci delicti.* In *Rogers*, the client, Malloy, hired attorney Lee to represent him in a worker's compensation claim in North Carolina resulting from a fall from a ladder in North Carolina.[141] Malloy was a resident of South Carolina and Lee was licensed in both North and South Carolina.[142] The case was settled in North Carolina by agreement with the employer and the carrier.[143] Later Malloy, through his guardian ad litem, Rogers, brought a legal malpractice case against Lee.[144] The Court of Appeals held that in a tort action, South Carolina follows the choice of law principle of *lex loci delicti*.[145] Under this principle the law of the

134. *Id.* at 80 (internal citations omitted).
135. *Id.*
136. *Id.* at 81-82
137. *Id.*
138. *Id.* at 79.
139. 777 S.E.2d 402 (S.C. Ct. App. 2015).
140. *Id.* at 403.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 405.

place where the injury occurs controls.[146] In this case the injury occurred in North Carolina where the lawyer's allegedly negligent advice led to the client's acceptance of a settlement before the Industrial Commission in North Carolina.[147] Malloy lost the right to pursue his worker's compensation claim or settle for a greater amount.[148] In applying the principle of *lex loci delicti* the court distinguished between the place of the injury and the place where the results of the injury manifest themselves.[149] The results manifested themselves financially in South Carolina where Malloy resided, but the injury took place in North Carolina.[150] The court specifically rejected the residence of the client as the basis of choice of law.[151] In addition, the contract of representation provided that North Carolina law governed the representation.[152] The court held that the choice of law clause in the contract of representation was enforceable.[153] North Carolina had a four-year statute of repose.[154] Applying that statute the Court of Appeals affirmed the circuit court's decision granting summary judgment for the defendant lawyer.[155] The court also found that application of the North Carolina statute did not violate a fundamental public policy of South Carolina.[156]

PART III: ETHICAL DECISION MAKING UNDER CONDITIONS OF UNCERTAINTY

As Part I has shown, rules dealing with conflicts of interest

146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 406.
151. *Id.* at 407.
152. *Id.* at 403.
153. *Id.* at 406.
154. *Id.* at 403.
155. *Id.* at 408.
156. *Id.* Chief Justice Few, concurring, agreed that North Carolina law governed the claim of malpractice arising from handling of the workers' compensation claim, but other aspects of the relationship might be governed by the substantive law of South Carolina, for example, claims against the ladder manufacturer, the floor installer, or medical providers, some of which were located in South Carolina. *Id.*

vary depending on the jurisdiction—particularly in international matters. Part II established that the approaches used by courts to resolve ethical issues depend on the type of proceeding. This part discussed three important types of proceedings—disciplinary, disqualification, or malpractice—but ethical issues can arise in other settings, such as bankruptcy or international arbitration.

The combination of choice-of-law issues coupled with type of proceeding produces a matrix of possible conflict situations that lawyers and law firms may face. This matrix of situations means that lawyers will often deal with conflict situations

in conditions of uncertainty. To illustrate the level of uncertainty lawyers may face, consider *First Trust, N.A. v. Moses & Singer*,[157] an example of the intersection of choice-of-law and remedial issues involved in multijurisdictional cases in which lawyers are accused of misconduct. *First Trust* involves claims of legal malpractice, one of the main types of proceeding in which conflict of interest issues may be litigated.[158]

Plaintiff First Trust National Association ("First Trust"), a Minnesota corporation, was the indenture trustee for the holders of certain notes issued to finance the construction of two casinos in Mississippi.[159] First Trust hired Moses & Singer ("MS") to represent it as indenture trustee pursuant to the terms of the indenture.[160] First Trust later filed a claim for legal malpractice and related theories against MS in Mississippi federal court.[161] First Trust alleged MS caused First Trust to lose insurance coverage for liens First Trust held related to the casino projects and MS mishandled various leases resulting in First Trust becoming involved in litigation.[162] The law firm of Oppenheimer and Fisco ("OF") represented First Trust in this legal malpractice case.[163]

157. 99 Civ. 1947 (JSM), 2000 U.S. Dist. LEXIS 10957 (S.D.N.Y. Aug. 4, 2000).

158. *Id.* at *3.

159. *Id.* at *4-5.

160. *Id.* at *5.

161. *Id.* at *5-6.

162. *Id.*

163. *Id.* at *6.

After First Trust retained OF, MS (1) filed a motion seeking leave of court to file a third party claim against OF for contribution with respect to First Trust's claim against MS; (2) moved to disqualify OF from representing First Trust in the malpractice case; and (3) moved for leave of court to file a claim for indemnification from the noteholders.[164] Before ruling on any of the pending motions the Mississippi district court transferred the action to the Southern District of New York under 28 U.S.C. 1404(a), providing for change of venue.[165]

With regard to MS's claim to implead OF, the New York federal court stated that under FRCP 14(a)[166] a party may implead a third party if under substantive law the third party may be liable to the defendant—in this case under a theory of contribution.[167] When a federal court has jurisdiction based on diversity of citizenship, the general rule is to apply the substantive law—including the conflict of law rules—of the jurisdiction in which the court sits (in this case, New York law).[168] However, if a case has been transferred, the court must apply the substantive law—including the conflict-of-law rules—of the transferor court (in this case, Mississippi law).[169]

Under Mississippi law the choice-of-law rule depends on the substantive basis of the claim: contract, tort, property, or some other area of law.[170] In this case MS was seeking to implead OF based on liability for legal malpractice, negligence, and negligent misrepresentation, which were tort claims.[171] For tort claims Mississippi follows the "most significant relationship" test of Section 145 of the Restatement (Second) of Conflicts of Laws as its choice-of-law rule.[172] The court had to determine which of three jurisdictions had the "most significant relationship" to the tort claims in the case: (1) New York (where the case was

164. *Id.*
165. *Id.* at *6-7.
166. FED R. CIV. P. 14(a).
167. *First Trust*, 2000 U.S. Dist. LEXIS 10957, at *7-8.
168. *Id.* at *10.
169. *Id.*
170. *Id.* at *11.
171. *Id.*
172. *Id.* at *12.

pending); (2) Mississippi (where the case was originally brought and where the casinos were located); and (3) Minnesota (where the plaintiff, First Trust, was headquartered).[173]

In deciding which jurisdiction had the most significant relationship to the claims, the court looked at the factors set forth in Restatement Section 145.[174] In addition, under the Restatement framework, the court was required to evaluate the policy considerations set forth in Section 6 of the Restatement.[175] In its analysis the court had to consider the significance of the place of injury.[176] The Restatement provides that the place of injury should not be given greater importance than any other factor when the injury did not occur "in a single, clearly ascertainable, state."[177] While prior decisions in the Fifth Circuit had established a presumption in favor of applying the law of the jurisdiction where the injury occurred when the injury was personal or tangible, the court held that this presumption did not apply because the injury in this case was not personal or tangible.[178]

After analyzing the factors set forth in Restatement Section 145 and the policy considerations in Section 6, the court concluded that Minnesota had the most significant relationship to MS's claim for contribution.[179] Because Minnesota law recognizes claims for contribution, the court granted the defendant's motion to file its contribution claim against OF.[180]

The court then turned to MS's motion to disqualify OF, principally on the ground that OF lawyers might need to be witnesses in the case.[181] The court noted that disqualification motions are disfavored because they deprive clients of their choice of counsel and are frequently used for tactical purposes.[182]

173. *Id.* at *12-13.
174. *Id.* at *13.
175. *Id.* at *13-14.
176. *Id.* at *14.
177. *Id.* at *15.
178. *Id.* at *14-15.
179. *Id.* at *18.
180. *Id.*
181. *Id.*
182. *Id.* at *18-19.

The court also noted that a number of other courts had found even if a lawyer might be a witness in a case, the lawyer was not disqualified from handling pretrial matters.[183] Interestingly, the court did not engage in a choice-of-law analysis for the disqualification motion. Also, while the court was required to accept the allegations of the complaint when deciding whether the complaint stated a claim under Minnesota law, it was not required to accept those allegations in reviewing a disqualification motion.[184]

A. Risk Reduction in Claims by Clients Against Their Lawyers.

First Trust involves two types of claims against lawyers: malpractice and disqualification.[185] The first type is a "conventional" malpractice claim brought by First Trust against its "bond counsel," MS. Claims for legal malpractice brought by clients against their lawyers are common and reasonably foreseeable by lawyers. Lawyers have several tools at their disposal to minimize the risk associated with malpractice claims by their clients. The following is a checklist of tools that lawyers can consider to limits their exposure to such claims:

1. Inclusion of choice of law or choice of forum provisions or both in the lawyers' engagement agreements.[186]

2. Provision in the lawyers' engagement for arbitration of all claims related to the lawyer-client relationship, including legal malpractice.[187]

3. Use of prospective waivers of conflicts of interest.[188]

4. Negotiation of limitations of liability for a malpractice claims if the clients are independently represented with regard to

183. *Id.* at *19-20.

184. *Id.* at *19.

185. *Id.* at *3.

186. Francesca Giannoni-Crystal & Nathan M. Crystal, *Choice of Law in Lawyers' Engagement Agreements*, 121 PENN. ST. L. REV. 683 (2017).

187. ABA FORMAL OP. #02-425.

188. NATHAN M. CRYSTAL & GRACE M. GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 241-43 (7th ed. 2020). *See also* Nathan M. Crystal, *Enforceability of Advance Waivers of Conflicts of Interest,* 38 ST. MARY'S L.J. 859 (2007).

the limitation.[189]

5. Review of the adequacy of the firm's system for checking for conflicts of interest. Conflicts of interest fall into several categories: direct adversity,[190] material limitation,[191] concurrent,[192] former,[193] prospective,[194] imputation,[195] migrating lawyers,[196] miscellaneous current client conflicts,[197] and advocate witness.[198] Some jurisdictions, such as New York,[199] and some bar associations have standards for conflict-checking systems.[200]

6. Use of common-interest agreements rather than multiple representation, particularly in criminal cases.[201]

7. For those conflicts that are consentable,[202] compliance with the requirements for "informed consent."[203]

8. Review of the adequacy of the firm's malpractice insurance, and in connection with applications for renewal

189. ABA MODEL RULE 1.8(h)(1). Some jurisdictions may be more restrictive, see NYRPC 1.8(h)(1), which states that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice." The New York rule does not allow a prospective waiver of malpractice liability even if the client is independently represented.

190. ABA MODEL RULE 1.7(a)(1).

191. ABA MODEL RULE 1.7(a)(2).

192. Co-client conflicts involve a combination of Rules 1.7(a)(1) and 1.7(a)(2) and can arise in many settings, including civil litigation, criminal litigation, business practice, and family law. *See* CRYSTAL & GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION at 251-75, 497-509, 520-35.

193. ABA MODEL RULE 1.9(a).

194. ABA MODEL RULE 1.18.

195. ABA MODEL RULE 1.10(a).

196. ABA MODEL RULE 1.10(a)(2).

197. ABA MODEL RULE 1.8.

198. ABA MODEL RULE 3.7.

199. N.Y. RULES OF PROF'L CONDUCT r. 1.10(e).

200. Catherine Reach, *Best Practices for Conflict Checking Systems*, N.C. BAR ASS'N (June 4, 2019), https://www.ncbar.org/2019/06/04/best-practices-for-conflicts-checking-systems/.

201. *See* CRYSTAL & GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION at 272-74.

202. *See id.* at 239-41.

203. ABA MODEL RULE 1.0(e) cmt. 6, 7. *See* CRYSTAL & GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION at 247-49, 254-56.

compliance with disclosure obligations.[204]

The second type of claim involved in *First Trust* was a motion to disqualify counsel.[205] The tools discussed above principally deal with limiting malpractice liability, but what about the risk of a disqualification motion? If the lawyer's representation involves a single current client, a disqualification motion is unlikely. The client would not need to file such a motion because the client can simply fire the lawyer, and the lawyer will be required to withdraw, obtaining court permission if the matter is pending before a tribunal.[206]

Depending on the status of the case, the lawyer might have a fee claim against the client, or successor counsel if the engagement agreement includes a lien on a subsequent judgment or settlement. If the lawyer brings a fee claim against the client, the lawyer should analyze the risk of a counterclaim for malpractice; appropriate use of the tools summarized above should be helpful to the lawyer in analyzing the benefits and costs of a fee claim against the former client.[207]

B. Risk Reduction in Claims by Non-Clients Against Their Lawyers.

Ironically, risk analysis and implementation of protective

204. Nathan M. Crystal, *Malpractice Insurance Applications and Renewals -- Don't Just Say "No",* 27 S. CAR. LAWYER 12 (July 2015).

205. *First Trust*, 2000 U.S. Dist. LEXIS 10957, at *18.

206. ABA MODEL RULE 1.16(a) (mandatory withdrawal).

207. A lawyer might also face a risk of professional discipline. If the attorney has made proper use of one or more of the tools outlined above (The appropriateness and applicability of a tool depends on the particular matter and is a question of professional judgment.) and otherwise complies with the lawyer's professional obligations, the risk of a disciplinary complaint by a client is minimal. Of course, if a lawyer steals client money, the lawyer will be subject to professional discipline regardless of the tool used. However, if the client complains about an excessive fee, clear disclosure of the fee arrangement coupled with the client's consent should protect the lawyer against serious professional discipline (If a disciplinary authority found a fee agreement excessive despite clear client disclosure and consent, it is unlikely that the lawyer would receive more than a reprimand.) In addition, if a client is dissatisfied with the lawyer's services, a prudent lawyer would try to "make the client happy" by some fee adjustment or other mechanism in order to avoid a disciplinary complaint.

measures are—at the same time—both more difficult and easier with claims brought by third parties against lawyers than with claims by clients against lawyers. On the one hand, risk analysis and implementation of protective measures are more difficult because lawyers cannot control by contract claims by third parties to the same extent that they can through engagement agreements with their clients (although as discussed below, some control may be possible). On the other hand, risk analysis is much easier because nonclients do not have a relationship with the lawyer against whom they may make an accusation. Third parties must, therefore, overcome the traditional rule that a lawyer is not liable to a third party who is not in "privity" with the lawyer.[208] A number of courts have recognized exceptions to the privity requirement, particularly in cases involving beneficiaries of wills, but these cases remain the exception, with privity continuing as the general rule.[209] From the perspective of risk control, a lawyer involved in an engagement with a client that can affect the interests of third parties (e.g., affiliates or constituents of clients) should consider including in the engagement agreement provisions stating that the engagement is not intended to create any rights in third parties as third beneficiaries nor to create any attorney-client relationship with a third party. In addition, several of the tools for risk control regarding clients mentioned above would also be applicable to risk control of possible claims by nonclients: e.g., review of the adequacy of the firm's system for checking for conflicts of interest, review of the adequacy of the firm's malpractice insurance, and in connection with applications for renewal of malpractice insurance compliance with disclosure obligations.

It is, of course, possible for a lawyer to be liable to a nonclient on some legal theory other than malpractice. For example, a lawyer may be liable to a nonclient for an intentional tort, such as fraud.[210] Lawyers may also be liable to nonclients for sanctions

208. *See* Nat'l Sav. Bank of D.C. v. Ward, 100 U.S. 195 (1880).

209. *See* Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014) (recognizing tort and contract claims by thir party beneficiaries named in a will).

210. *See* Stiles v. Onorato, 318 S.C. 297, 299-300, 457 S.E.2d 601, 602 (1995) (citing with approval cases from other jurisdictions); Pye v. Fox, 369 S.C. 555, 633 S.E.2d 505 (2006) (recognizing an attorney may be liable for civil conspiracy

in connection with litigation misconduct, such as the filling of frivolous claims[211] or discovery abuse.[212] In *First Trust* the New York District Court, as the transferee court, applied the choice of law rules of Mississippi, the jurisdiction of the transferor court, to conclude that under the "most significant relationship" test applicable in Mississippi, Minnesota rules applied and would recognize a claim for contribution by the defendant law firm against the firm representing the plaintiff in a malpractice action.[213] Needless to say, it would have been very difficult for the plaintiff's firm to foresee and engage in risk avoidance steps regarding this claim for contribution. To the extent such claims involve intentional misconduct, they are probably not insurable. If the client is a commercial entity and has a strong interest in retaining a particular firm, it may be possible to negotiate an indemnification agreement to protect the firm from third party liability.[214]

Disqualification motions brought by a nonclient third party should generally pose relatively little risk to counsel. Most disqualification motions involve claims by current or former clients, not nonclients.[215] In deciding a motion to disqualify brought by a non-client third party, a court would be likely to take into account several factors weighing against the motion: disqualification would deprive the client against whom the motion is made of the counsel of its choice; because the movant is not a current or former client, the movant does not have a loyalty or confidentiality interest in the motion; and the motion is not likely to affect the integrity of the proceeding and may well be

but finding the facts would not support such a claim).

211. *See* FED. R. CIV. P. 11.

212. *See* FED. R. CIV. P. 37.

213. *First Trust*, 2000 U.S. Dist. LEXIS 10957, at *17-18.

214. An agreement in which the client agrees to indemnify the lawyer against future liability to a third party would not seem to violate ethics rule 1.8(h)(1), which prohibits agreements between lawyer and client prospectively limiting the lawyer's liability to the client for malpractice unless the client is independently represented. ABA MODEL RULE 1.8(h)(1). The indemnification provision protects the lawyer from liability to a third party, not the client, and does not limit the lawyer's liability to the client for malpractice.

215. *See* Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 77 chart 1.

brought for tactical reasons.

The two most likely situations to generate a nonclient motions for disqualification are the lawyer-witness conflict[216] and violation of the moving party's interest in confidentiality when the lawyer against whom disqualification is sought has obtained privileged information from a current employee of the moving party.[217] Lawyers can reduce the risk of disqualification in both situations. A lawyer can avoid disqualification due to an advocate-witness conflict in two ways. First, the lawyer can have a nonlawyer in the firm participate in any interviews or investigation to avoid the lawyer becoming a "necessary" witness under the Rule.[218] Second, if the lawyer is a necessary witness, disqualification of the entire firm is not necessary; another lawyer in the firm may act as advocate so long as the lawyer's testimony would not create a conflict of interest.[219]

With regard to disqualification based on improper contacts with employees under Rule 4.2 Comment 7, risk-averse attorneys, particularly in major cases, should avoid contacting a person whose status under the three categories listed in Comment 7 is uncertain. Instead, the attorney should seek court approval of the interview, which is allowed under Rule 4.2, or use interrogatories to identify key witnesses and take their depositions rather than risk a violation of Rule 4.2.

First Trust involved a motion to disqualify plaintiff's counsel under the lawyer-witness rule in addition to defendant's damage

---

216. ABA MODEL RULE 3.7.

217. ABA MODEL RULE 4.2., and in particular Comment 7 which states:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA MODEL RULE 4.2 cmt. 7.

218. CRYSTAL & GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION at 297.

219. ABA MODEL RULE 3.7(b); CRYSTAL & GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION at 295-96.

claim for contribution.[220] The case illustrates two interesting points about disqualification motions brought by nonclient third parties. First, in denying the motion to disqualify, the court relied on several factors discussed above that courts are likely to consider in deciding and denying disqualification motions brought by nonclient third parties.[221] Second, while the court engaged in a significant discussion of choice-of-law principles regarding the defendant's damage claim for contribution, the court without discussion applied New York principles in deciding the defendant's motion to disqualify plaintiff's counsel under the lawyer-witness rule.[222]

As discussed above, malpractice cases by third parties are unlikely to be successful except in limited cases where courts have recognized exceptions to the privity rule. Disciplinary cases brought by third parties are even less likely to occur because, unlike a malpractice case where the third party has the potential of a damage recovery, a damage remedy is not available in disciplinary complaints. In addition, the third party will typically not have loyalty, confidentiality, or financial interests worthy of protection through the disciplinary process. There are, of course, situations in which a lawyer's conduct violates the rights of a third party, and a disciplinary complaint results. For example, prosecutors have been disciplined for *Brady*[223] violations, although such proceedings are rare.[224] In civil litigation lawyers have been subject to discipline for intentional misconduct directed to adverse parties, typically misrepresentation.[225] In terms of risk management, the way to avoid disciplinary proceedings for misconduct directed to third parties is through proper supervisory procedures, both for partners, associates, and

220. *First Trust*, 2000 U.S. Dist. LEXIS 10957 at *6.

221. *Id.* at *7-18.

222. *Id.* at *18-21.

223. Brady v. Maryland, 373 U.S. 83 (1963).

224. *See* CRYSTAL & GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION at 423 (referring to disbarment of the state prosecutor in the "Duke Lacrosse case").

225. *See also* In re Nolan, 419 S.C. 169, 796 S.E.2d 841 (2017) (holding that attorney who was handling an intellectual property investigation was responsible for the conduct of his investigators who posed as customers, made misrepresentations, and engaged in secret tape recording).

nonlawyers.[226]

CONCLUSION

This article has discussed how the rules governing conflicts of interests for lawyers vary among jurisdictions, particularly between international and U.S. jurisdictions (Part I). The article has also shown that choice of law principles also vary depending on the type of proceeding—malpractice, disqualification, or discipline (Part II). However, the case law shows a tendency for the courts to apply the principles of the forum jurisdiction in disqualification and disciplinary cases, while turning to choice-of-law principles in cases of professional malpractice. Finally, the article has offered some risk management guidance for lawyers and law firms with regard to the type of proceeding lawyers may face (Part III).

226. *See* ABA MODEL RULE 5.1, 5.2, 5.3 and CRYSTAL & GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION at 607-15.