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Lawyers Without Borders

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LAWYERS WITHOUT BORDERS

CATHERINE A. ROGERS*

1. INTRODUCTION

Historically, attorney regulation presumed that lawyers practice in the delimited geographical jurisdiction where they are licensed.¹ Most lawyers were sole practitioners and, insofar as they existed, law firms were relatively intimate organizations of partners who all knew each other and primarily serviced local clients on local matters in local courts.² In recent years, this

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¹ See Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015 (2002) (arguing that lawyers are habitually divided into two groups: those who are locally licensed and therefore subject to regulatory power of the local bar, and those who are not).

² As Mary Daly explains:

Until recently, lawyers infrequently practiced in more than one state. Law firms rarely established branch offices, with the possible exception of an office in Washington, D.C. or in a distant city to meet the particular needs of a single client. Consequently, in searching for ethical guidance, lawyers, courts, and disciplinary authorities looked only to the professional standards adopted by a single jurisdiction, the lawyer's state of general admission or the court to which the lawyer had been admitted *pro hac vice*.

localism has given way to globalism.³ The figures measuring this transition are staggering. Prior to World War II, only four U.S. law firms had an overseas office.⁴ By 2004, the number had grown to 381 foreign law offices in seventy-six cities in forty-eight different foreign countries.⁵ Several other data points portray similarly dramatic tales of international expansion,⁶ including gains for smaller and medium-size law firms in the global market for legal services.⁷ Professional regulation of attorneys is still attempting to catch up with these demographic developments, most recently through revisions to Model Rule 8.5 ("Rule 8.5" or the "Rule"). The thesis of this Article is that, while Rule 8.5 is a meaningful

Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 719 (1995). For an insightful analysis of how the term "partner" has become something of a misnomer as U.S. law firms have erupted into large corporate-like structures that sprawl across multiple jurisdictions, see David B. Wilkins, *Partner, Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264 (2007).

³ The intermediate step between the local and the global is multi-jurisdictional domestic practice and the rise of the national law firm. This Article does not directly address this phase, but several other scholars have documented this development and its significance for the legal profession. See generally Gary A. Munneke, *Multijurisdictional Practice of Law: Recent Developments in the National Debate*, 27 J. LEGAL PROF. 91 (2003) (exploring developments in multi-jurisdictional practice and arguing that reform is essential); John F. Sutton, Jr., *Unauthorized Practice of Law by Lawyers: A Post-Seminar Reflection on "Ethics and the Multijurisdictional Practice of Law,"* 36 S. TEX. L. REV. 1027 (1995) (discussing unauthorized practice of law by out-of-state lawyers); Gerard J. Clark, *The Two Faces of Multi-Jurisdictional Practice*, 29 N. KY. L. REV. 251, 273-77 (2002) (entertaining a proposal to eliminate restrictions on interstate practice).

⁴ See Carole Silver, *Winners and Losers in the Globalization of Legal Services: Situating the Market for Foreign Lawyers*, 45 VA. J. INT'L L. 897, 916-17 (2005) (noting the growth of foreign offices backed by U.S. law firms). Notably, these statistics come from a study of only sixty firms, so the overall number is probably higher.

⁵ *Id.*

⁶ For example, as Laurel Terry notes, "six of the world's ten highest-grossing law firms had more than 50% of their lawyers working in countries outside of the firm's home country." Laurel S. Terry, *A "How To" Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course*, 51 ST. LOUIS U. L.J. 1135, 1138 (2007) (quoting *The Global 100*, AM. LAW, Oct. 2006, at 139).

⁷ See Carole Silver, *Regulatory Mismatch in the Market for Legal Services*, 23 NW. J. INT'L L. & BUS. 487, 495 (2003) ("The international label is not claimed only by large law firms; even small firms participate in this specialty."). This phenomenon is a logical counterpart of the increased participation of smaller and medium sized companies in the global economy. See Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 40 (2003) (noting the increase in the number of American law firms that provide arbitration services).

attempt to respond to an obvious need, it ultimately causes more problems than it resolves and must be revised.

The American Bar Association first sought to address attorneys' activities outside the state in which they were licensed by promulgating Model Rule 8.5 in 1983.⁸ Originally, the Rule expressly disavowed any application to transnational (as distinguished from interstate) activities. Instead, it left all questions about conflicting ethical rules abroad to "agreements between jurisdictions or . . . appropriate international law." The problem was that there were no such agreements or rules of international law, which meant international activities of U.S. attorneys, were virtually unregulated.⁹

In later versions, Rule 8.5's limitation to interstate practice was abandoned and it was expressly extended to transnational activities.¹⁰ With respect to advocacy, which is the focus of this Article,¹¹ the text of the Rule—now applicable to international practice—provides that "for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits [shall apply], unless the rules of the tribunal provide otherwise . . ." ¹²

⁸ As Mary Daly has explained, Model Rule 8.5 is not an ethical rule at all, but a choice of law rule. See Daly, *supra* note 2, at 755 (noting that Model Rule 8.5 is "a rule about choosing rules"). The Model Rules have been frequently amended since the American Bar Association adopted them in 1983, with the most recent amendment in 2002.

⁹ Advocates may still be subject to other forms of regulation, such as criminal and civil sanctions, as well as oversight by other administrative agencies. For an extended discussion of the various mechanisms that regulate attorney conduct, see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801 (1992).

¹⁰ Specifically, Comment 7 provides "[t]he choice of law provision [contained in Rule 8.5] applies to lawyers engaged in transnational practice." MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 7 (2002).

¹¹ Unless otherwise indicated, this Article considers only those aspects of Rule 8.5 that apply to advocates, meaning attorneys involved in dispute resolution activities. Other provisions of the Rule pertaining to advisory or transactional work have different choice of law provisions in Rule 8.5. See *infra* note 27, and accompanying text.

¹² MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(1) (2002). The full text of Rule 8.5 is as follows:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services

Currently, eighteen states have adopted Rule 8.5, and another nineteen have adopted similar rules.¹³ The Rule was adopted in response to a request by international attorneys for more guidance, and, for all its flaws, it does bring a measure of certainty. For these reasons, it represents an important development and a meaningful starting point in cross-border regulation of global advocates.¹⁴ At bottom, however, the Rule is a failed experiment as applied to international advocacy and it must be reconsidered.

Rule 8.5's advocacy provisions were meant to provide guidance about which rules to apply when U.S. attorneys are operating in foreign legal systems or before international tribunals. In these contexts, many aspects of U.S. attorneys' conduct may be considered unprofessional, unethical, or even illegal. For example, in most foreign and international tribunals, U.S.-style cross-examination techniques and aggressive litigation tactics are considered unprofessional at least, and sometimes overtly

in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

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

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

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

Id.

¹³ For a chart illustrating the implementation of Rule 8.5, see Am. Bar Ass'n [ABA], *State Implementation of ABA Model Rule 8.5* (2009), available at http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf.

¹⁴ The Council of Law and Bar Societies of Europe ("CCBE") Code of Conduct for European Lawyers has identified the problem, but not offered any real guidance or solution, other than that attorneys inform themselves. Article 2.4 of the CCBE Code provides: "When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity." CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY art. 2.4 (2006). For a more comprehensive overview of recent developments in this area, see Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463, 494 (2005) [hereinafter Terry, *U.S. Legal Ethics*].

unethical. Meanwhile, attorney advertising and contingency fees, both standard practices in the United States, are regarded as ethically contemptuous in most foreign legal systems. In some foreign countries, having a private individual or company serve process is downright illegal, as is the fundamental practice of preparing a witness for upcoming testimony. On the other hand, in contrast to their foreign counterparts, U.S. attorneys are generally bound by more extensive confidentiality obligations, by more restrictive notions of conflicts of interest, and by specific duties to report client perjury to a tribunal.¹⁵ With many of these examples, it would be difficult or impossible for an attorney to abide by both sets of rules, and Rule 8.5 was designed to provide clear guidance about which rules to follow.

The problem, however, is that the current version of Rule 8.5 does not resolve these conflicts. Perhaps even worse, when applied to international tribunals, the Rule almost ensures that U.S. attorneys will be abiding by ethical rules that are different from their opposing counsel's and that are utterly unrelated to the relevant tribunal or its procedures (unless the tribunal has adopted its own rules). One signal that Rule 8.5 misses its mark is that the outcomes it prescribes shocked practitioners who have appeared before the Iran-U.S. Claims Tribunal or the International Court of Justice. Informal survey research reveals that the attorneys had no idea that they were bound by Dutch ethical rules. The reason for this surprise, as discussed in more detail below, is that the physical location of these international tribunals is largely unrelated to their purposes and procedures, or to the expectations of lawyers or presiding judges and arbitrators.¹⁶

Ultimately, Rule 8.5's shortcomings can be traced to its assumptions about territoriality and the historical relationship between the jurisdiction of tribunals and the licensing of attorneys. These assumptions stem from the Rule's original focus on domestic attorneys in a federal system who are licensed in one jurisdiction and occasionally perform professional services in another sister state. International practice was added as something of an

¹⁵ For an overview of these and other the ways that U.S. ethical obligations and procedural practices conflict with those of foreign systems, see Peter C. Kostant, *Sacred Cows or Cash Cows: The Abuse of Rhetoric in Justifying Some Current Norms of Transactional Lawyering*, 36 WAKE FOREST L. REV. 49 (2001); Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002); Terry, *U.S. Legal Ethics*, *supra* note 14.

¹⁶ See *infra* notes 40-47 and accompanying text.

afterthought, but apparently without fully considering the important ways in which conceptions of jurisdiction and territoriality differ in transnational, as opposed to federal, contexts. As I describe in Section 2, superimposing a federal rule to the transnational system produces certain conceptual and terminological problems that make it difficult to apply to global legal advocates.

These problems are exacerbated when the Rule is applied to practical situations. In Section 3, I illustrate the problems caused by some of these applications. Finally, in Section 4, I make affirmative proposals for how to rectify some of the problems that Rule 8.5 leaves unresolved. To that end, I outline an approach to conflict-of-laws analysis that will produce more satisfactory solutions. For international tribunals, I argue that national rules can never provide an adequate substitute for tribunal-specific rules, and call on international tribunals to better articulate and develop their own rules.

Finally, with respect to enforcement, I argue for a coordinated approach that has licensing and regulatory authorities working with foreign and international tribunals and regulatory authorities. In other areas of transnational regulation—such as antitrust, securities, and corruption—international networks have developed to promote transnational regulatory governance.¹⁷ In large part, these networks have been built by international lawyers operating in various capacities, such as government officials, judges, NGO organizers, and client representatives. It is time now for them to turn similar efforts to their own self-regulation.¹⁸

¹⁷ The seminal work on international networks is, of course, ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 20–21 (2004).

¹⁸ Some efforts are underway:

At the 2006 and 2007 ABA Annual Meetings, the E.U.-U.S. Legal Services Summits were co-hosted by the Council of the Bars and Law Societies of Europe (CCBE), and the Asia-U.S. Legal Services Summits included lawyers and bar leaders from Australia, China, India, Indonesia, Japan, Korea, Singapore, and Vietnam. The ITILS Task Force also convened discussions with Latin American bar leaders at the Fall Meetings of the Section of International Law in Houston in 2005 and in Miami in 2006. The ITILS Task Force also communicates regularly with the International Bar Association (IBA), the Union Internationale des Avocats (UIA), the Law Society of England and Wales, and the Law Council of Australia to exchange information, coordinate initiatives, and discuss strategies.

Laurel S. Terry et al., *Transnational Legal Practice*, 42 INT'L LAW. 833, 842 (2008). Many of these developments are being driven by concerns about regulation of

2. REGULATING U.S. ATTORNEYS ABROAD

When U.S. authorities finally attempted to catch ethical regulation up with the global activities of modern lawyers, they borrowed for the international arena a rule that was drafted for domestic multi-jurisdictional practice in a federal system. This Section reviews the textual and conceptual problems that result from that extension.

2.1. *The Drafting of Rule 8.5*

As enacted in 1983, a quick read of Rule 8.5 might have suggested that it *does* apply to U.S. lawyers practicing law outside the United States. As noted above, the 1983 version of the Rule provided that “for conduct in connection with a matter before a tribunal, the rules of the jurisdiction in which the tribunal sits [shall apply], unless the rules of the tribunal provide otherwise”¹⁹ The textual breadth of the Rule was belied by a specific exclusion of international lawyers from the Rule. International lawyers themselves had vigorously fought for this exclusion.²⁰ As a result of their efforts, Comment 6 to the 1983 version of the Rule disavowed any application to transnational or international legal practice²¹ and instead left any conflict-of-laws analysis to nonexistent “agreements between jurisdictions or . . . appropriate international law.”²²

Some years later, U.S. lawyers engaged in international practice apparently concluded that vagaries about which ethical rules apply

legal services in international trade. See Laurel S. Terry, *The GATS and Legal Services in Limerick*, 15 MICH. ST. J. INT’L L. 635 (2007) (addressing recent service-related GATS developments).

¹⁹ MODEL RULES OF PROF’L CONDUCT R. 8.5 (1983).

²⁰ Terry, *U.S. Legal Ethics*, *supra* note 14, at 525 (2005).

²¹ Comment 6 to the original version of the Rule, which provided that it was “not intended to apply to transnational practice,” was deleted in August 2002. See ABA, Ethics 2000 Commission Reporter’s Explanation of Recommendation, Changes to the Rule, in ABA CENTER FOR PROF’L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, 827, 831 (2006) [hereinafter Reporter’s Explanation] (noting that the Commission made this modification because it “believe[d] that lawyers engaged in transnational practice ought to be governed by this Rule’s choice of law provision”).

²² See *supra* note 9 and accompanying text.

could be more perilous than liberating.²³ Accordingly, in 2001, the International Law section of the ABA requested that Rule 8.5 be revised to provide greater choice-of-law guidance to transnational and international practitioners.²⁴

As a result, the 2002 revisions deleted Comment 6 and replaced it with the current Comment 7, which expressly rejected the exclusion, providing instead that the "choice of law provision applies to lawyers engaged in transnational practice."²⁵ The consequence of this change was to make Rule 8.5's general provision—that conduct by attorneys in connection with litigation is governed by the "rules of the jurisdiction in which the tribunal sits"—applicable to activities by U.S. attorneys abroad. Similar to former Comment 6, the new Comment 7 makes reference to "international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions."²⁶ In contrast to the earlier Comment, however, these international sources only become applicable if they produce a different result than the basic choice-of-law provision of Rule 8.5.

Another important change brought by the Ethics 2000 Commission is that the word "tribunal" replaced the earlier version's references to "court." This change was made in recognition of "the increasing use of alternative dispute-resolution processes," and extended the Rule to "binding arbitration and other methods of formally adjudicating the rights of parties."²⁷ As a result of these changes, for those states that have adopted it, Rule 8.5 now purports to provide choice-of-law guidance for U.S. attorneys who appear before foreign courts, international courts and tribunals, and international arbitral tribunals.

As described in more detail below, the current version of Rule 8.5 creates as many problems as it resolves. These problems may have been foreshadowed by the drafting history of the provision, which does not reveal any express consideration of the unique complications involved in international and transnational

²³ See Terry, *U.S. Legal Ethics*, *supra* note 14, at 525 (showing that lawyers are becoming increasingly sensitive to the comparative ethics issues, and possibly liability as well, through the ABA Section of International Law's urged reforms).

²⁴ *Id.*

²⁵ MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 7 (2002).

²⁶ *Id.*

²⁷ Reporter's Explanation, *supra* note 21, at 829-30.

advocacy.²⁸ More fundamentally, the current version of Rule 8.5 proceeds from misconceptions about the nature of international litigation and arbitration, as well as the character and content of foreign ethical regimes. These erroneous underpinnings produce particularly anomalous results when applied to advocates in international practice.

2.2. *Special Provisions for Advocates*

In an acknowledgement that advocacy raises distinct issues from other types of legal representation, Rule 8.5 includes special provisions for advocates. Specifically, it provides that “for conduct in connection with a matter pending before a tribunal, the rules [of professional conduct] of the jurisdiction in which the tribunal sits [shall apply], unless the rules of the tribunal provide otherwise.”²⁹ Rule 8.5’s provisions regarding non-adjudicatory transnational activities admit that “no single test . . . can be applied to determine the appropriate choice-of-law rule in each case.”³⁰ Accordingly, that part of the Rule permits some flexibility for attorneys and disciplinary authorities to assess the appropriateness of ethical rules to particular conduct.³¹ In contrast, the Rule’s provisions for

²⁸ To be fair to the drafters of Rule 8.5, many of these problems are not readily apparent even to international dispute resolution practitioners, and would be difficult to forecast without direct experience in the international proceedings.

²⁹ MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(1) (2002). Specifically, the 1993 version provided that for conduct “in connection with a proceeding in a court before which a lawyer has been admitted to practice . . . the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise.” MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(1) (1993), available at http://www.law.cornell.edu/ethics/aba/2001/ABA_CODE.HTM#Rule_8.5.

³⁰ ABA, REPORT OF THE COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT 397 (2000). Model Rule 8.5(b)(2) addresses transnational transactional and corporate practice, providing

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

MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(2) (2002).

³¹ This flexibility is not without its problems. One member of the committee “filed a statement designated ‘dubitante’ in which he expressed significant due process and equal protection reservations” with the rule. Daly, *supra* note 2, at 757.

advocates contain no such qualifying language, and hence permit no discretionary analysis regarding which rules would be appropriate. The justification for this inflexibility is that the advocate's ethical obligations are firmly tethered to the location of the adjudicatory decisionmaker.

There are good reasons for special choice-of-law rules that apply exclusively to adjudicatory settings, and for linking those rules to the adjudicatory decisionmaker. One of the most pressing reasons for insisting on a clear rule is to avoid the possibility that opposing attorneys in the same proceeding could be subject to different ethical rules. As Detlev Vagts cogently explains:

[I]t would not be workable to allow the counsel for opposing sides in a civil case to enter the courtroom subject to different rules. . . . It would not do to prohibit one lawyer from a civil law jurisdiction from interviewing a witness before the trial while the American lawyer would not only be allowed to do so but "would be guilty of professional negligence if he or she presented an un-interviewed witness."³²

While this equality-of-arms consideration is a powerful reason to regulate attorneys appearing in international and transnational adjudicatory settings,³³ as illustrated below, application of Rule 8.5 fails to ensure the desired result.³⁴ Even worse, in some contexts it may actually increase the likelihood that attorneys in the same adjudication will be abiding by different rules.

Another reason why adjudicatory settings deserve special rules is that presiding tribunals are presumed to have a particularized interest in regulating attorneys appearing before them, as well as

³² Detlev Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 690 (2000).

³³ Impartiality is an attribute of adjudicators, which in turn demands *audi alteram partem*, or equality of the parties. See, e.g., V.S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 16-17 (1980) (discussing the importance of *audi alteram partem* in the formation of procedural rules). As told in the Sanskrit play *Mrichchakatica*, as far back as 485 B.C., courts in India honored this principle by not allowing the fact that a complainant was the king's brother-in-law to influence the court's integrity. *Id.* at 17.

³⁴ See *infra* notes 95-99 and accompanying text (discussing the potential effects Rule 8.5 may have on the proceedings in front of the International Court of Justice).

particular authority over the conduct of those attorneys.³⁵ An ordinary choice-of-law rule based on the weight of territorial contacts, as found in the other provisions of Rule 8.5, might not give adequate deference to the tribunal's interest or procedural authority. While Rule 8.5 ties applicable ethical rules to the tribunal, however, it does not afford them an explicit role in enforcing those rules.³⁶ This oversight is not a direct affront to international tribunals, many of which do not contemplate for themselves an express role in regulating attorneys who appear before them. It is, however, a missed opportunity to help U.S. regulatory authorities in interpreting and enforcing the applicable rules.³⁷

2.3. *Blurry Lines and Built-In Ambiguities*

The stated aim of the current version of Rule 8.5 is to provide for "relatively simple, bright-line rules"³⁸ for attorneys and regulators to determine what ethical rules apply to multijurisdictional, and now also transnational, legal activities.

³⁵ Since Rule 11 went into effect, federal judges have shown a willingness to make use of it to regulate attorneys appearing before them. *See, e.g.,* Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793, 793 (1991) (noting that "[i]n the seven years since Rule 11 was amended, it has generated well over a thousand judicial opinions"). On the other hand, "[t]he majority of Continental rules of civil procedure and those influenced by them impose no direct compulsory sanctions." Rolf Stürner, *Transnational Civil Procedure: Discovery and Sanctions Against Non-Compliance*, 6 UNIFORM L. REV. 871, 877 (2001). France, however, does allow for an "*astreinte*," a type of procedural fine, although the application of this principle is very rare in practice. *Id.*

³⁶ International arbitral tribunals do not necessarily enjoy the competence to enforce national ethical rules. *See infra* notes 78-79 and accompanying text (discussing how international tribunals often lack the rules or jurisdiction to enforce ethical conduct).

³⁷ *See infra* Section 4.4 (discussing how to find the right agent to regulate lawyers internationally).

³⁸ The purpose was specifically to make "as straightforward as possible" which rules apply, a goal that is described by the Comments to the Rule as being "in the best interest of both clients and the profession." ABA COMM. ON ETHICS AND PROF'L RESPONSIBILITY, RECOMMENDATION AND REPORT TO THE HOUSE OF DELEGATES 4 (1993). Professors Geoffrey Hazard and William Hodes have argued that making Rule 8.5 applicable to international law practice was done in response to insistence by French professional regulatory authorities as a condition of their recognition of American lawyers as *conseil juridique*, or "juridical advisors" in English. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 8.5:101 (2d ed. Supp.) (1994). Others have questioned the authority for this justification, which does not appear in the notes or comments. Daly, *supra* note 2, at 757.

While several of the problems of Rule 8.5 only become apparent in its application,³⁹ others are evident from its very wording. These ambiguous references appear to result principally from the fact that the Rule was written against the background of assumptions that apply in domestic contexts. This Section exposes the conceptual and interpretative problems raised by the text of Rule 8.5, whereas Section 3 will take up more generally whether the substantive provisions of the Rule are appropriate for international advocates.

2.3.1. *Geographical Location and Ethical Rules*

A fundamental assumption underlying Rule 8.5 is that there is a meaningful link between the place of adjudication and the decisionmaker's jurisdiction. This assumption is undoubtedly predicated on the fact that such a link is generally present in the domestic U.S. court systems where Rule 8.5 was originally intended to apply. However, no comparable systematic or meaningful link generally exists with international courts and tribunals.

In domestic systems, the jurisdiction of a court, and the identity of advocates who practice before it, are determined by the geographic realities of where it is located. For example, the state courts of New York are located physically in New York, are established under the Constitution of the State of New York, and have jurisdiction that is predicated on (even if not strictly limited by) the geographic boundaries of New York State. In this example, as with all national courts, the identity of the court, its jurisdictional mandate, and its place of operation are inherently interconnected and effectively indivisible. Moreover, unauthorized-practice-of-law rules affirm and reinforce the interrelationship with place by requiring that all attorneys who practice before a New York court are members of the New York Bar, working in association with a lawyer who is a member of the New York Bar or admitted to the New York Bar *pro hoc vice*.⁴⁰ This

³⁹ These problems are discussed *infra* Section 3.

⁴⁰ Specifically, Model Rule 5.5(a) provides: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2002). For a more thorough analysis of the rules restricting practice in states where attorneys are not licensed, see generally Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995).

interconnectedness is a consequence of the fact that national courts are instruments of national sovereignty (or related political subdivisions), which in turn is an inherently territorial-based concept.⁴¹

The same inter-relationship with place does not ordinarily exist with either international courts or other international tribunals. Instead, with public international courts and tribunals, precisely the opposite is true.⁴² The physical location of most international tribunals is either an arbitrary choice produced through historical accident, negotiation, and compromise, or a choice predicated on other non-substantive issues such as convenience.⁴³ As a result, and in contrast to domestic courts, normally the location of an international tribunal is intentionally and systematically unrelated to the tribunal's jurisdiction and procedures, or to the presumptive identity of the lawyers who appear before it.⁴⁴ This detachment from the local procedures of the tribunal's geographic seat is one feature that makes a tribunal "international."⁴⁵ It also means that

⁴¹ See Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871-72, 872 nn.116-20 (1989) (describing relationship between original rules of jurisdiction and rules of territorial sovereignty, and listing early cases that approached jurisdiction based on international law).

⁴² For a discussion of international arbitration tribunals and legal domicile, see *infra* notes 48-54, and accompanying text.

⁴³ For example, the U.S.-Iran Claims Tribunal was located in The Hague because of the ready availability of the Peace Palace, support from the Dutch government, and The Hague's history of neutrality. See Michael I. Kaplan, *Solving the Pitfalls of Impartiality when Arbitrating in China: How the Lessons of the Soviet Union and Iran Can Provide Solutions to Western Parties Arbitrating in China*, 110 PENN ST. L. REV. 769, 801 (2006) (attributing the success of the Tribunal to The Hague's "chronicled history of neutrality").

⁴⁴ There are some instances in which international tribunals have jurisdiction over domestic crimes, which may imply the presence of lawyers from the relevant jurisdiction. For example, the Special Tribunal for Lebanon is a treaty-based Tribunal that was established through a resolution of the U.N. Security Council. It is unique, and somewhat controversial, in that it depends solely on substantive crimes that are defined under domestic Lebanese law. See Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal For Lebanon*, 5 J. INT'L CRIM. JUST. 1125, 1126 (2007) (contrasting the Special Tribunal for Lebanon with tribunals for other nations such as Sierra Leone, Iraq, and Bosnia, among others).

⁴⁵ There are also "hybrid international-domestic tribunals (such as the ad hoc Court for East Timor, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia)." Michael P. Scharf, *Forward: Lessons From The Saddam Trial*, 39 CASE W. RES. J. INTL. L. 1, 1 (2006). Another recent example of a hybrid international-domestic tribunal is the Iraqi High Tribunal (IHT) in Baghdad:

U.S. lawyers practicing before the International Court of Justice or the Iran-U.S. Claims Tribunal in The Hague do not expect to be governed by the ethical rules applicable in local judicial proceedings in The Netherlands.

This disconnect between place, jurisdiction, and legal background of advocates seems to have been acknowledged, at least implicitly, by authorities who might otherwise attempt to regulate attorneys appearing before international tribunals within their jurisdiction. Unauthorized-practice-of-law requirements, which govern appearances in local courts and sometimes apply to domestic arbitrations, most often exempt international arbitrations.⁴⁶ Meanwhile, no State has sought to inject its professional regulation of attorneys into the activities of international tribunals that might be located in their territory.⁴⁷ As

The IHT merits characterization as an internationalized domestic tribunal because its statute and rules of procedure are modeled on the U.N. war crimes tribunals . . . and its statute provides that the IHT is to be guided by the precedent of the U.N. tribunals and that its judges and prosecutors are to be assisted by international experts. But the IHT is not fully international or even international enough to be dubbed a hybrid court, since it is seated in Baghdad, its prosecutor is Iraqi, it uses the Iraqi Criminal Code to supplement the provisions of its statute and rules, and its bench is composed exclusively of Iraqi judges.

Id.

⁴⁶ Even the California Supreme Court case that touched off the firestorm of concern about multijurisdictional practice by finding that New York lawyers in an arbitration in California were engaged in the unauthorized practice of law included a footnote exempting international arbitration from its analysis. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 7 (Cal. 1998) (noting that the California Code of Civil Procedure permits parties to an international commercial dispute to either “appear in person or be represented or assisted by any person of their choice,” regardless of whether that person is licensed to practice law in California or any other jurisdiction).

⁴⁷ In something of a historical oddity, some jurisdictions insist that party representatives in international arbitrations be lawyers and, in some more unusual instances, that they be locally licensed lawyers. This latter requirement can be understood as an assertion of jurisdiction to regulate attorneys appearing in an arbitration within a State’s territory, though today virtually all jurisdictions have eliminated such rules. See Richard A. Eastman, *Commercial Arbitration – Representation by Foreign Counsel – Illegal Practice of Law in California*, 94 AM. J. INT’L LAW 382, 403 (Bernard H. Oxman ed., 2000) (discussing the trend in many countries of “liberalizing the right of representation”). In the United States, several states have prohibited appearances by out-of-state lawyers in in-state arbitrations as the “unauthorized practice of law.” In other cases, they have limited the number of arbitration appearances that are permitted. Somewhat surprisingly, these controversial provisions usually contain exceptions for international arbitration. This exception is odd since outside of international

a result, international tribunals operate as regulatory oases from the perspective of local disciplinary authorities in the territory where they are located. The fact that national regulatory authorities do not actively assert any interest in the operations of international tribunals suggests that these national regulatory authorities, whose rules are supposed to apply, have implicitly rejected the choice of ethical rules selected by Rule 8.5. Moreover, it foreshadows the need for specialized rules for these tribunals and raises implicit doubts about the appropriateness of using territory-based choice-of-law rules as a substitute.

2.3.2. *Where Does a Tribunal "Sit"?*

Another textual ambiguity in Rule 8.5 is its equation of an international tribunal's legal situs with the place where it "sits." Under Rule 8.5, the ethical rules of the place where a tribunal "sits" apply to a U.S. attorney's conduct in connection with proceedings before that tribunal. Within the United States, the term "sits" is uncontroversial because domestic courts only sit, and consequently

arbitration contexts, foreign attorneys are not allowed to perform any other legal activities without being licensed or obtaining permission to practice in the state. See Steven C. Nelson, *American Bar Association Section of International Law and Practice Reports to the House of Delegates*, 24 INT'L LAW. 583 (1990) (discussing claims arising from international sale of goods); George A. Riemer, *A State of Flux: Trends in the Regulation of Multijurisdictional Practice of Law*, 64 OR. ST. B. BULL. 19 (2004) (focusing on the regulations and the possible future trends and problems regarding temporary practice). See also ABA Center for Prof'l Responsibility, *State Implementation of ABA MJP Policies* (Mar. 3, 2009), available at <http://www.abanet.org/cpr/mjp/recommendations.pdf> (providing a reference chart regarding various state rules); Stephen Gillers, *It's an MJP World: Model Rules Revisions Open the Door for Lawyers to Work Outside Their Home Jurisdictions*, 88 A.B.A. J. 51 (Dec. 2002) (describing the revision of ABA Model Rule 8.5 as a response to *Birbrower*). The exception for international arbitrations arguably provides foreign lawyers greater rights than attorneys from sister states, who should presumably be entitled to greater leeway, not less, than foreign attorneys. The international exception essentially permits foreign attorneys to appear in any arbitration (since their participation would almost by definition signal the international character of a case), whereas attorneys from other states can only appear in some cases, namely those that are international. Other states have similar rules. See FLA. BAR REG. R. 1-3.11 cmt. (2009) ("This rule applies to arbitration proceedings held in Florida where 1 or both parties are being represented by a lawyer admitted in another United States jurisdiction or a non-United States jurisdiction However, entire portions of subdivision (d) and subdivision (e) do not apply to international arbitrations.").

have their "seat" or "legal domicile,"⁴⁸ in one place.⁴⁹ With international tribunals, however, there are a diversity of arrangements, which make it difficult to determine where a tribunal "sits" within the meaning of Rule 8.5.

International tribunals may "sit" in one place, but have their "seat" in another. For example, the Statute for the International Tribunal for the Law of the Sea provides that the Tribunal has its "seat" in "the Free and Hanseatic City of Hamburg in the Federal Republic of Germany," but "may sit and exercise its functions elsewhere whenever it considers this desirable."⁵⁰ With international public law tribunals, such as the Tribunal for the Law of the Sea, the separation of the tribunal's seat from the location of actual hearings is rare, although not unheard of. The same is not true of international arbitral tribunals.

The "seat" of an international arbitration is not simply a point on a map, but is instead a legal concept that attaches a host of important consequences to the proceedings and the resulting award. As Gary Born explains, "the procedural law of the arbitration is virtually always the law of the arbitral state, which governs both the 'internal' and 'external' procedural aspects of the arbitration."⁵¹ For these reasons, international arbitration can be said to have a "rootedness" to its seat⁵² that public international tribunals do not generally have. It is relatively common for international arbitral tribunals to hold hearings and meetings in

⁴⁸ 1 GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1240 (2009) (defining "seat" to mean "legal domicile" or "juridical home" and tracing the concept to relevant international conventions and national laws).

⁴⁹ One historical exception is that U.S. Circuit court judges and Supreme Court justices "rode a circuit" from court to court, which is where circuit courts got their name. For a brief history of a circuit riding, see David R. Stras, *Why Supreme Court Justices Should Ride Again*, 91 MINN. L. REV. 1710, 1714-17 (2007).

⁵⁰ United Nations Convention on the Law of the Sea annex VII, Statute of the International Tribunal for the Law of the Sea art. 1, Dec. 10, 1982, 1833 U.N.T.S. 397 (emphasis added).

⁵¹ 1 BORN, *supra* note 48, at 1243. In the absence of party agreement, the law of the seat can impose procedural and evidentiary requirements and prohibitions, as well as provide default rules that act as gap fillers. *Id.* Meanwhile, the courts in the arbitral seat may provide important functions in support of the arbitration, such as facilitating arbitrator appointments (again in the absence of agreement), ruling on arbitrator challenges, issuing interim relief or ordering documentary or testimonial evidence. *See id.*

⁵² *Id.* at 1250.

places other than the legal “seat”⁵³—in a literal sense, to “sit” in a place other than the arbitral “seat.” On some occasions, the “seat” of an arbitration can be implied legally and differ entirely from either the place identified by the parties or the place where the hearings physically take place.⁵⁴ In these (rare) circumstances, the language of Rule 8.5, which refers to the place where tribunal “sits,” raises even more significant ambiguities about how it is intended to be applied in the context of arbitral proceedings.

Ultimately, for reasons that are explained below,⁵⁵ international tribunals must develop their own ethical rules. It seems inevitable that conscripting national ethical rules into service be accepted in the short run as a temporary, second best solution. Even as a temporary solution, however, those rules should not be identified based on the jurisdiction where an international arbitration tribunal “sits,” but instead where it has its “seat.” Otherwise, Rule 8.5 ascribes to the place where an a tribunal sits an importance that was never intended by either the architects of these tribunals or the parties appearing before them.

2.3.3. *What “Rules” of Conduct Apply?*

Another ambiguity revealed through the application of Rule 8.5 is that it designates the “rules” of the place where a tribunal sits. In the domestic context, the term “rules” would seem to refer to the code of attorneys’ professional conduct in a sister state. Arguably, even in the domestic context, this definition would be incomplete. As several scholars have identified, “[t]he rules and institutions

⁵³ *Id.* at 1249. All leading institutional arbitration rules and many arbitration statutes have similar provisions. See, e.g., LONDON CT. INT’L ARBITRATION R., art. 16.2 (1998) (“The Arbitral Tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes.”); United Nations Comm’n on Int’l Trade Law [UNCITRAL], Arbitration Rules, G.A. Res. 31/98, art. 16(2), U.N. Doc. A/31/17 (1976) (“The arbitral tribunal may . . . hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.”).

⁵⁴ For example, an English court recently ruled that the legal seat of an arbitration was England where the parties had provided for the application of English procedural law, notwithstanding the parties’ purported designation in their contract of Scotland as the seat of the arbitration. See *Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Bus. Servs. Ltd.* [2008] EWHC 426 (TCC).

⁵⁵ See *infra* Section 4.4.

controlling lawyers' conduct comprise a complex system"⁵⁶ that embodies not only ethics rules embodied in codes, but also statutes, procedural rules, inherent judicial power, agency law, criminal law, and tort law.⁵⁷ Thus, for example, if the California Bar Court were to determine under Rule 8.5 that Nevada's rules of conduct apply to a particular instance of alleged lack of diligence and competence, it will look not only to the Nevada Rules of Professional Conduct, but also to Nevada's bar association and judicial opinions interpreting and applying those rules, as well as to procedural rules and malpractice standards that give meaning and context to those rules. In other words, identifying the applicable "rules" of another jurisdiction is not as simple as opening a book to the page where its code of conduct is written.⁵⁸

In cross-border contexts, identifying the applicable rules can be much more difficult. As an initial matter, the codification of ethical rules is a relatively recent phenomenon and not all foreign jurisdictions have reduced their standards of conduct to such codes.⁵⁹ Even in countries that have written codes, such as

⁵⁶ See, e.g., Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 797 (2004).

⁵⁷ See Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 174 (1996) (examining strategies of legal ethics courses in law school).

⁵⁸ This observation reveals a larger problem: drafters of Rule 8.5 apparently did not consider how its application to inter-state practice might be different from international or transnational practices. Important differences do exist, however, which have critical implications for regulation of attorney ethics and conduct. The ethical rules of individual U.S. states are relatively homogenous because the ethical rules of most individual states are predicated on the ABA's Model Rules. As a result, there are only isolated, even if occasionally significant, differences between the ethical rules of state regulatory authorities. More importantly, because they are borne out of the same legal culture and operate in largely similar legal systems, generally no one is really offended, for example, if an attorney abides by Florida confidentiality rules instead of Alabama rules.

⁵⁸ By contrast, the ethical rules among various nations, and the national legal frameworks in which they exist, are considerably more variable than among the ethical regimes of individual U.S. jurisdictions. As a result of these differences, regulatory authorities in different national jurisdictions may be profoundly concerned if foreign attorneys violate local ethical norms, as illustrated by the criminalization of, and diplomatic protests against, certain activities by foreign lawyers, such as serving process or taking depositions. See *supra* note 15 and accompanying text.

⁵⁹ "In most countries the rules governing lawyers are set by statute." PIETER H.F. BEKKER ET AL., AM. SOC'Y OF INT'L L., REPORT OF THE ASIL TASK FORCE ON INT'L PROF'L RESPONSIBILITY 7 & n.19 (2007), available at <http://www.asil.org/pdfs>

England, there remain “many unwritten rules of professional conduct.”⁶⁰ It is unclear what role, if any, “unwritten rules” should have if, for example, a U.S. bar were applying English ethical rules under Rule 8.5.

Even when a foreign jurisdiction has a written code of conduct, there are complex and delicate questions about how to establish or “prove” the precise content or interpretation of those rules. When foreign substantive law governs a particular issue in U.S. litigation, it cannot simply be researched by the court, particularly if the law is in a different language.⁶¹ As a result, it is often presented through experts,⁶² potentially multiple experts, who may disagree. Ethics is an area where difficulties of proof are potentially even more complicated than substantive law. In the United States, even with respect to purely local practice, there are multiple, often overlapping or inconsistent bodies of rules that purport to regulate particular attorney conduct.⁶³ When the rules are foreign, written in a foreign language, interpreted through foreign precedents, and potentially introduced through competing experts, the room for confusion and uncertainty may be considerable. At least one drafter of Rule 8.5 expressed apprehension about the due process implications of ambiguities regarding which rules apply.⁶⁴

/taskforcereport.pdf (citing Law No. 71-1130 of Dec. 31, 1971, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Dec. 31, 1971, p. 167, the *Bundesanzwaltsordnung* [Federal Rules of Procedure], Jan. 15, 1959 *BGBI. I* at 565 (F.R.G.), and the *Practicing Attorneys Act*, Law No. 205 of 1949 (Japan)).

⁶⁰ Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 *CONN. J. INT'L L.* 185, 196 (1994).

⁶¹ See Louise Ellen Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in U.S. Courts*, 34 *J. MAR. L. & COM.* 97, 111 (2003) (“The problem is exacerbated when the foreign law is in another language, and the court must either rely on a treatise in English or a translation of a foreign treatise.”).

⁶² See *id.* at 107 (“The testimony of experts allowed to offer opinions under the Federal Rules of Evidence often forms the basis for a court’s determination of the foreign law.”).

⁶³ As one joint committee by the ALI and the ABA concluded, “No area of local rulemaking has been more fragmented than local rules governing attorney conduct.” American Law Institute–American Bar Association, *Excerpts From Special Study Conference of Federal Rules Governing Attorney Conduct Los Angeles, California January 9-10, 1996*, Q247 A.L.I.–A.B.A. CONTINUING LEGAL EDUC. 311, 333 (1996). As a result, the same report explains, ambiguities raised by the existence of ambiguous and multiple bodies of overlapping rules has “led to due process and ‘void for vagueness’ challenges in increasing numbers.” *Id.* at 343.

⁶⁴ Letter from David B. Isbell to Stephen Gillers (December 2, 1992), in Susanna Felleman, *Ethical Dilemmas and the Multistate Lawyer: A Proposed*

Apart from the potential problems of identifying and interpreting rules governing particular conduct, there are also questions about the role of social and customary practices that can often alter the essential meaning of a rule. Consider, for example, two recent empirical studies that investigated professional conduct in the United States and England. The studies evaluated levels of compliance with conflict of interest rules among American lawyers and English solicitors.⁶⁵ Both systems operate in the same language and originate from the same legal tradition, and apparently have relatively similar detailed written rules regarding such conflicts. When the results of the two studies are compared, however, they seem to suggest that textual similarity conceals significant divergences in their applications.⁶⁶ Apparently, U.S. attorneys are more fastidious in their efforts to comply with conflict rules, even when such adherence is contrary to their business interests. English solicitors, on the other hand, appear to be more willing to bypass rules that are obsolescent or counterproductive.

Various hypotheses may account for these disparate rates of compliance, including differences in enforcement mechanisms,⁶⁷ in the likelihood of negative social sanctions, in client tolerance, in the competitive structure of the legal services market, or in perceptions of the possibility of genuine harm. Regardless of why these differences exist, however, they raise important questions about the complexities about how the regulatory authorities of one nation can apply the "rules" of another. Could or should a U.S. state supreme court or regulatory authority account for the social

Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct, 95 COLUM. L. REV. 1500, 1515 n.116 (1995) (explaining that an amendment to Rule 8.5 would "set out a relatively clear and simple set of choice of law rules" which would "be of considerable practical value to practitioners").

⁶⁵ See Nancy J. Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the "Mega Firm,"* 18 GEO. J. LEGAL ETHICS 521 (2005) (comparing JANINE GRIFFITHS-BAKER, *SERVING TWO MASTERS: CONFLICTS OF INTEREST IN THE MODERN LAW FIRM* (2002), with SUSAN SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* (2002)).

⁶⁶ See *id.*

⁶⁷ In the United States, departure from the rule is likely to draw a disqualification motion from opposing counsel. The United States is nearly unique in permitting opposing counsel to raise motions for disqualification, and certainly unique in allowing the disqualification process to rise to the level of litigation strategy. See GRIFFITHS-BAKER, *supra* note 65, at 77-78 (noting that disqualification actions by attorneys grew in Europe with the arrival of U.S. law firms).

context and institutional functions of the authorities that would apply the relevant foreign ethical rules? For example, in applying English conflict of interest rules, should a U.S. regulatory authority take account of the fact that English attorneys are not actually punished for certain types of violations? The underlying justification for Rule 8.5 seems to be that a U.S. advocate appearing in proceedings in a foreign jurisdiction should be regulated as an attorney from that jurisdiction. Literal application of foreign ethical rules, without regard to how they are interpreted and applied by the national regulatory bodies, would alter—sometimes dramatically—the nature and meaning of those rules.⁶⁸ These complications in interpreting and applying foreign ethical rules make it difficult for U.S. attorneys to accurately understand the rules against which their conduct will be measured.

2.3.4. *What is a “Matter”?*

The advocacy provisions of Rule 8.5 are predicated on a model that assumes that there is a single “matter” pending before one “tribunal” for any particular dispute. While this may be a dubious proposition in any large, complex domestic case, it is certainly faulty with regards to sizable international disputes. Various legal, procedural, and strategic differences between national systems create even more powerful incentives for parties to forum shop in international cases than in purely domestic cases.⁶⁹ As a result, parties to the same international dispute often seek to litigate simultaneously in the courts of two or more countries.⁷⁰ Moreover, in the absence of transfer, consolidation, shared jurisdictional precepts, and any international equivalent to the Full Faith and Credit Clause for enforcement of judgments, a transnational case is more likely to be litigated in multiple courts than a purely domestic case. Even within a single case, judicial cooperation is often necessary, for example, to obtain discovery from foreign sources or to enforce a final judgment in a foreign jurisdiction.

⁶⁸ As David Wilkins has persuasively demonstrated, when domestic U.S. institutions apply rules, they necessarily impose a “substantive tilt” that is the product of their own institutional history and objectives, as well as conceptual and cultural biases. Wilkins, *supra* note 9, at 851. The force of this observation is amplified when the cultural and historical traditions of those institutions span national and linguistic boundaries.

⁶⁹ GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 521 (4th ed. 2007).

⁷⁰ *See id.*

This potential for multiple courts to be involved in a single case challenges the underlying model on which Rule 8.5 is based, which contemplates a single "matter" that is "pending before" one tribunal. An earlier version of the Rule had referred to the more delimited term "proceeding" (instead of "matter").⁷¹ The purpose of the new language, according to the Ethics 2000 Commission Reporter's Explanation of Recommendation, was to extend the Rule so that it "control[s] from the moment the matter can be said to be before a tribunal (typically the date the case is filed), even if no specific 'proceeding' is pending at the time the conduct occurs."⁷² Although the Reporter's Explanation goes on to state that "[n]o change in substance is intended,"⁷³ the new formulation appears to create an ambiguity in international cases.

Consider, for example, a case that is pending before the federal district court in the Southern District of New York, but which requires that a deposition be taken before (in effect taken by) a judicial officer in Germany or Brazil. In international cases litigated in U.S. courts, Rule 8.5 would require that the professional conduct of attorneys abroad is subject only to evaluation under a relevant state's ethical rules as long as that conduct was "in connection with" a case pending in a U.S. court. As noted in the introduction, however, like many other countries Germany and Brazil both ethically and legally prohibit attorneys from taking a deposition of a witness.⁷⁴ The judicially administered deposition in Germany or Brazil would not be considered a "proceeding" under

⁷¹ Although the term "proceeding" is not defined in the Model Rules, the Canons of Judicial Ethics define a "pending proceeding" as a process that will reach a "final disposition." See MODEL CODE OF JUD. CONDUCT Canon 3(B)(9) cmt. (2003) (defining the phrase "pending proceeding"). This definition comports with other common definitions of "proceedings" as roughly equivalent to "adjudication." See BLACK'S LAW DICTIONARY 45, 1251 (8th ed. 2004) (defining the terms "proceedings" and "adjudication").

⁷² Reporter's Explanation, *supra* note 21, at 830.

⁷³ *Id.*

⁷⁴ According to the U.S. Department of State:

The Government of Brazil asserts that, under Brazilian Constitutional Law, only Brazilian judicial authorities are competent to perform acts of a judicial nature in Brazil. Brazil has advised it would deem taking depositions in Brazil by foreign persons to be a violation of Brazil's judicial sovereignty. Such action potentially could result in the arrest, detention, expulsion, or deportation of the American attorney or other American participants.

U.S. Dep't of State, *Brazil Judicial Assistance* (2009), available at http://travel.state.gov/law/info/judicial/judicial_672.html.

the former version of the Rule, which would make it easy to determine that New York rules apply. Under the newly broadened terminology, however, the deposition would arguably be a “matter”⁷⁵ that is “pending” in the German court,⁷⁶ and as a result there would be two “matters” that are “pending” and the activities of the lawyer in Germany could be said to be “in connection with” either or both of them.

By using the term “matter,” Rule 8.5 does not succeed in clearly indicating a single set of ethical rules that apply to given conduct. Instead, it raises the possibility that the rules of more than one jurisdiction may be applied.⁷⁷ The resulting confusion undermines the brightline guidance that Rule 8.5 was supposed to bring, even if, as argued below, the very goal of a single brightline rule for any particular case may itself be a flawed objective.

2.4. Conclusion

For activities before international tribunals, many of the interpretive problems of Rule 8.5(b)(1) could be avoided if those tribunals had their own ethical rules, which would then apply under Rule 8.5(b)(2). Unfortunately, while the need for such rules seems palpable, only a few international tribunals have created them. The International Criminal Tribunal for the former Yugoslavia (“ICTY”), and more recently the International Criminal Court, have adopted codes for professional conduct for attorneys appearing before them. The WTO Appellate Body and the International Court of Justice have declined to take this step, while

⁷⁵ The Model Rules do not define the term “matter.” Some rules do. For example, the District of Columbia Bar’s Rule of Professional Conduct 1.0(h) defines “matter” to mean “any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule.” Under this definition, the German court-supervised deposition would apparently constitute a “matter.” D.C. BAR R. OF PROF’L CONDUCT 1.0(h), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/rule_one/rule01_00.cfm.

⁷⁶ Note that the text of Rule 8.5 leaves uncertainty about which ethical rules apply does not suggest that there should only be rules from a single jurisdiction that governs an advocate’s conduct.

⁷⁷ Since the Reporter’s Explanation indicates that the change in terminology was not intended to result in a substantive change, this Article sets aside this ambiguity raised by the term “matter” and instead treats the current text as effectively synonymous with the earlier version of Rule 8.5.

international arbitral tribunals and arbitral institutions (which promulgate the rules that govern arbitral proceedings) do not formally articulate any standards of professional responsibility for counsel.⁷⁸ To the contrary, on some occasions arbitral tribunals have affirmatively disclaimed responsibility for doing so on the grounds that professional regulation is non-arbitrable or beyond the jurisdictional power of the tribunal.⁷⁹ The next Part explores in more detail the problems associated with applying national ethical rules in international proceedings, as well as some of the problems with the current choice of law approach to regulating attorneys involved in transnational litigation.

3. FROM DRAFTING DEFECTS TO AWKWARD APPLICATIONS

The focus until now has been on ambiguities and conceptual problems in the text of Rule 8.5. This Section takes up the more substantive problems that arise when Rule 8.5 is applied in specific contexts. As expected, the conceptual problems manifested in the text are amplified in application of the Rule.

3.1. *National Courts*

There is only one instance in which Rule 8.5 actually clarifies the obligations of an attorney. That is in the relatively peripheral example of dual-licensed attorneys whose primary legal education and licensing is in a foreign country, but who also hold an LL.M.

⁷⁸ As this Author has argued elsewhere, despite the formal absence of ethical regulation of attorneys in international arbitration, such regulation inevitably occurs:

Even if they remain unspoken, such perceptions of apparent misconduct (or ineptitude) inevitably affect arbitrators' decisions on the merits, computations of damage awards, and assessments of costs and fees. . . . These informal sanctions violate the most fundamental notions of procedural fairness by imposing punishments for violations of unknown rules and without any opportunity to be heard. Such reactions to perceived attorney misconduct might also be sanctioning an innocent party. Clients pay substantive awards, costs, and fees, but the misconduct may belong wholly to the attorney.

Rogers, *supra* note 15, at 376-77.

⁷⁹ *Award in ICC Case No. 8879*, in HORACIO A. GRIGERA NAON, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION, 289 RECUEIL DES COURS 9, 159 (2001) (affirming that even if claims asserted against counsel for one party for ethical violations were within scope of arbitration clause, they would be non-arbitrable, because they concern "the criminal consequences of alleged advocate misconduct").

degree from a U.S. law school and a secondary bar admission in a U.S. jurisdiction that permits admission for foreign-educated applicants.⁸⁰ It is estimated that most of these foreign-educated lawyers work either on the transactional side of multi-national law firms, or return to their own country of origin, using the U.S. bar admission as a credential (not unlike the LL.M. degree itself).⁸¹ In the latter instance, these attorneys may be appearing before the national courts of their home jurisdictions. Under Rule 8.5, these attorneys would not be responsible for abiding by the ethical rules of the U.S. jurisdiction from which they obtained their bar-admission-cum-credential. In this limited example, Rule 8.5 seems to have its truly desired effect of eliminating application of a set of ethical rules that have little or no relevance to particular legal activities. In other situations, the Rule effectively excuses global advocates from exercising professional discretion regarding what ethical rules to follow.

3.1.1. *Ethical Discretion in Abiding by Foreign Ethical Rules*

One of the defining features of global advocates is that they routinely engage in regulatory arbitrage.⁸² This process requires them to evaluate the inter-relative effects of particular rules in determining which ones can or should apply to a particular situation. This is a unique and valuable skill. When it comes to conflicting codes of ethics, however, Rule 8.5 excuses attorneys

⁸⁰ See Howard A. Levine, *The Regulation Of Foreign-Educated Lawyers in New York: The Past, Present, and Future of New York's Role in the Regulation of the International Practice of Law*, 47 N.Y.L. SCH. L. REV. 631 (2003). While not the primary target of Rule 8.5, this group is not insignificant. The number and size of LL.M. programs have expanded in recent years, and as a result the number of foreign-educated lawyers sitting for U.S. bar exams has increased. In 1992, 972 foreign-educated lawyers sat for the New York bar examination, while in 2006, the number had grown to 3630. Compare 1992 Bar Examination Statistics, B. EXAMINER, May 1993, at 23, 26, available at http://www.ncbex.org/fileadmin/mediadownload/Bar_Admissions/1992stats.pdf (detailing the total number of 1992 bar examinations taken by source of legal education), with 2006 Statistics, B. EXAMINER May 2007, at 6, 9 available at http://www.ncbex.org/fileadmin/mediadownload/Bar_Admissions/2006stats.pdf (detailing the total number of 2006 bar examinations taken and passed by source of legal education).

⁸¹ See Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L. J. 1039, 1050, 1078 (2002) (describing the post-U.S. bar examination career trends amongst foreign-educated lawyers).

⁸² See *infra* Section 4.2.

from using this skill or from exercising any professional discretion regarding what rules apply to their conduct.

Apart from dual-licensed attorneys with a foreign primary law degree, as described above, U.S.-licensed attorneys rarely appear *as advocates* in foreign legal matters. The most likely situation in which they take part in a foreign proceeding is not as advocates, but as experts on foreign law or other *sui generis* roles. For example, U.S.-licensed attorneys might participate in a deposition taken before a foreign judicial officer, as described above, in proceedings to request interim relief in a U.S. matter made to a foreign tribunal, or in proceedings to enforce a U.S. judgment abroad. In any of these situations, the fact that these activities are undertaken "in connection with" a U.S. legal proceeding would appear to mean, under Rule 8.5, that U.S. ethical rules would be applied in any disciplinary action brought by a U.S. regulatory authority. Since the conflict of laws rule in 8.5(b)(1) does not admit any exception, it seems to instruct authorities to disregard violations of foreign ethical rules that may occur in these situations.⁸³

Even though Rule 8.5 would only subject U.S. attorneys to U.S. rules when activities are connected to U.S. proceedings, it would not preclude an ethical "double jeopardy" or "double deontology" problem if a foreign regulatory authority, such as the German or Brazilian disciplinary authority in the example above, decided to assert jurisdiction over a particular activity.⁸⁴ In that instance, the German bar would not apply Rule 8.5 and would more likely directly apply German ethical rules to activities before a German judge in a German court room, even if the activity was undertaken

⁸³ As described in more detail below, attorneys may still be accountable for violations of foreign law under Rule 8.4. *See infra* Section 3.1.2. Larger questions about how and when U.S. lawyers should be ethically permitted or required to violate foreign law are beyond the scope of this Article and will be taken up in a forthcoming companion article, *The Global Advocate*.

⁸⁴ The doctrine of double jeopardy only formally applies with respect to criminal proceedings within the United States. The fundamental concern underlying the doctrine – that an individual should not be subject to prosecution by multiple authorities for the same underlying conduct – has an exception when separate sovereigns are applying the sanctions. *See United States v. Lanza*, 260 U.S. 377, 382 (1922) (applying the constitutional practice of double jeopardy). The activities of global advocates, almost by definition, are subject to review by separate sovereigns. Thus, while the doctrine does not formally apply, the same underlying concern is present.

in connection with a U.S. proceeding or “matter.”⁸⁵ Apart from the fact that disciplinary action by foreign bars has not yet materialized, U.S. attorneys have other reasons to conform to foreign ethical rules, such as avoiding possible foreign criminal prosecution or possible risks to the success of the legal activity itself.⁸⁶ This exercise of professional judgment, which experienced global advocates inevitably already undertake, is currently obscured and obviated by Rule 8.5. While U.S. attorneys should be encouraged to consider and comply with foreign ethical rules, they are instead ethically excused from even considering other potentially relevant ethical rules whenever they can claim the “cover” of an overarching U.S. “matter” that occasioned their overseas activities. Under this interpretation, even the advertising and direct solicitation by U.S. attorneys of Bhopal victims in flagrant contravention of Indian ethical rules would presumably be defensible to the extent those actions are permitted by U.S. ethical rules.⁸⁷

3.1.2. *Criminal Acts and Prejudice to the Administration of Justice*

Even though Rule 8.5 appears to permit a U.S. attorney to violate foreign law and professional conduct rules, that conclusion does not necessarily end the analysis. Model Rule 8.4(b) defines

⁸⁵ As noted above, regulatory authorities per se have not to date asserted such interest, though some nations have imposed sanctions through their criminal laws. See *supra* notes 46–47, and accompanying text.

⁸⁶ For example, a German judge might not complete a judicially supervised deposition if it is learned that U.S. counsel was improperly speaking to the witness.

⁸⁷ Some activities by attorneys in Bhopal, most particularly direct solicitation in the days after the disaster, appear to also violate U.S. ethical rules. See David T. Austern, *Is Lawyer Solicitation of Bhopal Clients Ethical?*, LEGAL TIMES, Jan. 21, 1985, at 16 (“One Washington, D.C., lawyer claimed to have signed contingency fee agreements with more than 7,000 plaintiffs within five working days of the gas leak—approximately one agreement every 60 seconds.”). To the extent that the ambiguous reach of state bar jurisdiction at the time of the disaster prevented formal disciplinary action, Rule 8.5 provides a welcome mechanism for monitoring and prosecuting such abuses. The more delicate question is what consequences should flow from attorney advertising in India that is prohibited under Indian law, but permitted under U.S. ethical rules. Rule 8.5 would seem to suggest that, as long as advertising is undertaken in connection with a U.S. “matter,” attorneys should not be concerned about being disciplined for violating Indian ethical rules. This outcome does not appear to be consistent with the spirit or intent of Rule 8.5.

"professional misconduct" to include the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."⁸⁸ Meanwhile, Rule 8.4(d) provides that any "conduct that is prejudicial to the administration of justice" is also professional misconduct.⁸⁹ If we asked the drafters of Rule 8.4 whether they intended the terms "criminal acts" and "the administration of justice" to include foreign law and systems, they would probably reject the notion. Rule 8.4, after all, was drafted when ethical regulation, including Rule 8.5, was still limited to domestic practice. The extension of Rule 8.5 to transnational practice requires consideration of whether and how to apply these provisions beyond the U.S. system.

If Rule 8.4 were not interpreted to preclude attorneys from violating foreign law, then Rule 8.5 would seem to ethically excuse violations of foreign law and foreign ethical rules when undertaken in connection with a U.S. matter.⁹⁰ Moreover, if these provisions of Rule 8.4 do not apply to foreign and international law, then U.S. ethical rules raise important questions about international judicial comity and attorneys' ethical obligation to obey the law and contribute to the rule of law. Rule 8.5 would transform a violation of foreign law from an unintended mishap by an "accidental legal tourist"⁹¹ into conduct that is considered

⁸⁸ MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2002).

⁸⁹ MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2002).

⁹⁰ This interpretation finds an analogue in Section 307 of the Sarbanes-Oxley Act, which imposes reporting obligations on attorneys whenever they have credible evidence of a "material violation of law." 15 U.S.C. § 7245. But "material violation" is defined to mean a violation of "applicable U.S. federal or state securities law . . . [a] fiduciary duty arising under federal or state statutory or common law, or a similar . . . U.S. or state law. A violation of foreign law is not considered a 'material violation.'" Stanley Keller, *Implementing the SEC's Standards of Professional Conduct for Attorneys*, SP018 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 675 (2008). The complex issues of an attorney's obligations to obey international and foreign law are beyond the scope of this Article, and will be taken up instead in a future companion article, *The Global Advocate*.

⁹¹ Global advocates can be considered "accidental tourists" because, for the most part, U.S. law schools do not adequately prepare graduates to handle international and transnational cases. The internationalization of the U.S. law school curriculum is a relatively recent phenomenon. While there has been significant innovation in this area, there remain doubts about how well U.S. law schools are preparing students for international or global practice. See Carole Silver, *Adventures in Comparative Legal Studies: Studying Singapore*, 51 J. LEGAL EDUC. 75, 78 (2001) ("[D]espite the attention to internationalization and the increased presence of international and comparative courses in the curriculum,

ethically acceptable or at least irrelevant to U.S. regulatory authorities. This outcome seems to do as much harm to the perceived integrity of the U.S. lawyers as the underlying violations themselves.

Notwithstanding the ambiguities, it seems more likely that Rule 8.4's provisions extend, at least *prima facie*, to foreign law and foreign judicial systems. State regulatory authorities have applied Rule 8.4(b) to everything from driving under the influence of alcohol, to acts of domestic violence, to willful failure to file an income tax form, to sexually inappropriate behavior, to drug possession.⁹² Commentators have suggested that the gravity of the offense is less important when it is related to the practice of law.⁹³ Under this reasoning, it seems unlikely that global advocates' activities would be precluded from the purview of Rule 8.4 simply because they implicate foreign laws. After all, their ability to operate outside the U.S. legal system is the primary skill that global advocates market to their clients. Under this analysis, if Rule 8.4's provisions are extended to international and foreign law and foreign systems, then they appear to resurrect many of the conflicts that Rule 8.5 sought to put to rest.

3.2. *Public International Law Tribunals*

Rule 8.5(b)(1) is equally pernicious when applied to conduct connected to international tribunals as it is when applied to international cases in national courts. Reference to "tribunals" was

there remains doubt that sufficient numbers of U.S. law students are enrolling in international and comparative law courses"). Law schools in most other countries make international law a mandatory course. See Liliana Obregon, *The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law from Latin America*, 23 WIS. INT'L L.J. 145, 150-51 & n.20 (2005) (comparing the role of international law in law school curricula in Latin America, Europe, and the United States).

⁹² See, e.g., *People v. Meier*, 954 P.2d 1068, 1071 (Colo. 1998) (concluding that "any practicing attorney would know" that asking a prospective and obviously vulnerable divorce client about the size of her breasts would "adversely reflect on the lawyer's fitness to practice law"); *Lawyer Disciplinary Actions*, ARK. LAW., Summer 2001, at 40 (2001) (attorney disbarred for violation of 8.4(b) for conviction of two violations of Freedom of Access to Clinic Entrances Act ("FACE Act")); *Lawyer Disciplinary Actions*, ARK. LAW., Summer 1997, at 37 (1997) ("use and possession of illegal drugs constituted "a criminal act that reflects adversely on [a] lawyer's . . . fitness as a lawyer" in violation of Model rule 8.4(b)").

⁹³ See Thomas H. Moore, *Can Prosecutors Lie?* 17 GEO. J. LEGAL ETHICS 961, 971-72 (2004) (suggesting that various jurisdictions have approached this matter in different ways).

specifically intended to extend the Rule to non-judicial settings, such as international arbitral tribunals.⁹⁴ Obliging U.S. attorneys who appear before international courts, international tribunals, or international arbitration tribunals to adhere to the rules of the place where such tribunals "sit" virtually ensures that U.S. attorneys will be bound by rules that are different from those applicable to opposing counsel and wholly unrelated to the proceedings themselves.

Consider, for example, what effect Rule 8.5 would have on proceedings before the International Court of Justice, which sits in The Hague. This location was chosen because the Netherlands is a neutral jurisdiction and a facility was made available to the Court by the Carnegie Foundation, which owns and administers the Peace Palace. None of the members of the Tribunal are necessarily Dutch.⁹⁵ Neither Dutch law, nor Dutch procedure, nor the Dutch bar, nor even the Dutch language has any consistent relationship with, or even relevance to, proceedings before the Court.⁹⁶ Under Rule 8.5, however, an American attorney appearing before the ICJ would be charged with understanding and abiding by Dutch ethical rules, which are written in Dutch (though also available in English)⁹⁷ and designed to apply in Dutch domestic legal proceedings. Moreover, this result is only half of the problem. Non-lawyer representatives are permitted to appear, but would

⁹⁴ See *supra* note 27 and accompanying text.

⁹⁵ The Court is composed of fifteen judges, who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council. Although some Dutch judges have served, it is neither required nor common for a small country like the Netherlands to have a judge on the court. See Statute of the International Court of Justice, Chapter I: Organization of the Court art. 2-33, June 20, 1945, 59 Stat. 1062, 33 U.N.T.S. 993, available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_I (explaining that judges are elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration).

⁹⁶ The official languages of the ICJ are English and French. *Id.* art. 39. It is possible that, on occasion Dutch lawyers appear before the ICJ, just as Dutch judges may be appointed to it, though their appearance is a matter of coincidence rather than part of an established or systemic relationship. See, e.g., Mark S. Ellis, *The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 949, 959 (2003) (describing the high-profile trial of Dusko Tadic and how, "Professor Michail Wladimiroff, one of the Netherlands' most respected criminal lawyers was assigned as lead counsel for Mr. Tadic").

⁹⁷ Netherlands Bar Ass'n, *Legislation, Rules and Regulations*, available at <http://www.advocatenorde.nl/english/legislation/vademecum.asp>.

not be required to abide by Dutch ethical rules.⁹⁸ Similarly, attorneys who are licensed in some jurisdiction other than the United States, where there is no Rule 8.5, would not be bound by Dutch ethical rules.⁹⁹

As this example demonstrates, application of Rule 8.5 to international tribunals has the pernicious effect of injecting a third, wholly unrelated set of ethical obligations into international proceedings, thus further splintering the existing ethical divide. Meanwhile, for all the reasons analyzed above, U.S. regulatory authority will encounter considerable difficulty in interpreting Dutch ethical rules, or applying them in proceedings before the ICJ, where they were not intended to apply.

3.3. *International Arbitration*

As noted above, Rule 8.5 means that U.S. attorneys appearing in an international arbitration are bound by the ethical rules of the jurisdiction in which the arbitral tribunal “sits.” Even if the terminological problem of “sit” and “seat” is satisfactorily addressed through interpretation, there remain questions about whether it makes sense to bind attorneys, and as described below, arbitrators, by the ethical rules of the arbitral seat, and whether national regulatory authorities are the institutions best suited to regulate professional conduct in international arbitration settings. The former set of questions will be addressed in this Section, whereas the latter set of questions will be taken up in Section 4.

3.3.1. *Unevening the Playing Field and Pre-Empting Client Prerogatives*

Some of the oddities involved in applying the ethical rules of the seat of public international tribunals also apply to the international arbitration context and, at this point, it is worth taking a closer look at some of their implications. One of the consequences of linking ethical regulation to the seat (or where a

⁹⁸ See Cesare P.R. Romano, *The Americanization of International Litigation*, 19 OHIO ST. J. ON DISP. RESOL. 89, 115 (2003) (noting that the ICJ does not require party representatives to be licensed attorneys and referring to “the stateless community of public international law lawyers”).

⁹⁹ For example, the applicable CCBE rule is more limited. See CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY art. 4.1 (2006). (“A lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal.”)

tribunal “sits”) is that it virtually guarantees that opposing counsel in the same proceeding will be abiding by different rules since other regulatory authorities do not have similar conflict of law rules. For example, in a proceeding seated in Texas between an American and a Mexican party, the U.S. attorney would be subject to strict U.S. rules regarding conflicts of interest, but the Mexican attorney would not be. The Mexican attorney instead would likely operate under a presumed obligation (or a professional instinct)¹⁰⁰ to abide by Mexican conflict of interest rules.

On the other hand, if the arbitration were seated in Mexico, under Rule 8.5 Mexican conflict rules would apply to the U.S. attorney. Although not entirely clear from my own research, it appears that Mexican conflict of interest rules would permit many types of representation that U.S. rules would deem to be impermissibly conflicted.¹⁰¹ As a result, a U.S. attorney appearing in an arbitration seated in Mexico would apparently be “liberated” from U.S. conflicts of interest arising from that representation, perhaps to the surprise of an unsuspecting client or former client. Under those rules, the U.S. attorney is apparently permitted to engage in representation that would be considered conflicted representation under U.S. rules, and would give rise to related concerns about protections of confidential information. The injury from the conflict and potential disclosures or misuse of confidential information will likely be borne by a U.S. client, even though that party likely entered the original representation with expectations that U.S. ethical rules would continue to protect its interests into the future and presumably never consented to the conflicted representation.

3.3.2. *Regulating Arbitrators Below the Radar*

Buried in the third note of the Reporters’ Explanation of Rule 8.5 (“Note 3”) is yet another extension of the Rule that so far seems to have been overlooked by attorneys and commentators. Specifically, Note 3 of the Reporter’s Explanation provides that:

¹⁰⁰ Even if Mexican ethical rules do not purport to apply directly in international arbitrations seated in Mexico, an attorney licensed there will generally comport her conduct to those standards by which she ordinarily abides.

¹⁰¹ For an analysis of why the United States has what are regarded as uniquely “persnickety” rules regarding attorney conflicts of interest, see Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT’L L. 53, 63 (2005).

Lawyers who participate in [arbitration and other methods of formally adjudicating the rights of parties], *whether as neutrals or as party representatives*, should be bound by the Rules of Professional Conduct of the jurisdiction in which the tribunal sits or by the rules of the tribunal itself if they otherwise provide.¹⁰²

Although this provision is not part of the actual text of the Rule, or even of the official Comments, it suggests a rather radical extension of Model Rule 8.5 to activities of attorneys when they act as arbitrators.

This extension has two important implications, which are dealt with in turn below. First, at a procedural level, Note 3 subjects attorneys' conduct when they act as arbitrators to oversight by the bar that licensed them as attorneys. Second, at a substantive level Note 3 implies that the rules that will be applied to their activities as arbitrators are the same rules that apply to them when they act as attorneys. Both of these assumptions are questionable, and raise significant concerns for international arbitration practice.

The apparent rationale for Note 3 is that when attorneys act as arbitrators, they do not cease to be licensed by the relevant regulatory authority, and they should therefore still be bound by its ethical obligations and subject to its disciplinary jurisdiction. There are some reasons for this linkage. Even if acting as arbitrators, attorneys are arguably providing a form of "legal services." Moreover, the ethical obligations of arbitrators and attorneys seem to bear at least a superficial resemblance to each other. Attorneys must be free from conflicts of interest, just as arbitrators must be free from bias. Attorneys must conduct "conflict checks" before accepting representation, just as arbitrators have a "duty to investigate" before accepting an appointment.

Despite this superficial resemblance, however, the role of advocate is fundamentally different from the role of arbitrator, even if both roles can be performed by the same person. As Carrie Menkel-Meadow points out, "[o]ur conventional rules of ethics are particularly inapposite when lawyers serve in quasi-judicial roles as arbitrators"¹⁰³ Attorney ethics were developed to guide and

¹⁰² Reporter's Explanation, *supra* note 21, at 830 (emphasis added).

¹⁰³ Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 162 (1999); see also Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 71 (2002) ("When the purpose of the lawyer's work is to facilitate an agreement that

regulate conduct of individuals acting as advocates on behalf of clients. Applying them directly to other activities can only lead to confusion.¹⁰⁴ Attorney ethical rules do not apply when attorneys serve in roles such as Little League umpires, law school lecturers, governmental officials, and perhaps most tellingly, judges. Instead, there are specialized rules to regulate their activities in those roles, just as special rules have been developed to guide and regulate arbitrators.¹⁰⁵

Even if it is agreed that the content of attorney ethical rules should not be superimposed over arbitrators' activities, there is still a separate question of whether regulatory authorities may nevertheless be an appropriate regulatory body to enforce the rules that are applicable. Perhaps the most forceful argument in favor of having regulatory authorities perform this function is that currently there is no regulatory body that purports to be able to regulate, or provide ethical oversight for, arbitrators. As one scholar has wryly noted, "barbers and taxidermists are subject to far greater regulation than [arbitrators]."¹⁰⁶ When arbitral institutions and courts preside over challenges to arbitrators or (in the latter case) allegedly bias-tainted awards, they assess the effects of alleged misconduct and provide a remedy to potentially aggrieved parties.¹⁰⁷ They do not, however, directly regulate the arbitrators themselves. The fact that arbitrators also generally

is acceptable to all parties rather than to attempt to maximize the individual client's interest, conventional lawyer ethics rules have scant relevance.").

¹⁰⁴ Nevertheless, some courts and commentators have unwisely attempted just that. See *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994) (tying an arbitrator's obligation to investigate possible conflicts of interest to her status and ethical obligations as an attorney); Geoffrey C. Hazard, Jr., *When ADR Is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Dec. 1994, at 147 ("Applying this rule [regarding conflicts of interest] to [mediation], a law firm engaging in ADR practice must observe the rules of ethics—particularly the rules concerning conflict of interest—in the ADR work and the other practice, considering them as a single practice.").

¹⁰⁵ See Catherine A. Rogers, *The Ethics of International Arbitrators*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION (Lawrence W. Newman & Richard D. Hill eds., 2008) (giving an overview of the "proliferation of specialized codes of ethics and rules intended to guide and govern arbitrators' conduct").

¹⁰⁶ Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1013 (2000).

¹⁰⁷ However, review of arbitral awards is not only an indirect assessment of alleged arbitrator misconduct, but also a particularly anemic one.

enjoy immunity from civil liability for misconduct¹⁰⁸ means that arbitrators are insulated from virtually all mechanisms that formally regulate lawyers, other than reputational sanctions and related market consequences.¹⁰⁹

Some might argue that this regulatory vacuum should be filled by national bar associations, even if they are not applying the same rules that apply to attorneys. This rationale is clearly what led to the development of the proposed Model Rule of Professional Conduct of the Lawyer as Third Party Neutral,¹¹⁰ which if adopted would provide that special set of rules. While this effort should clearly be applauded as a useful development in regulating domestic arbitrators, its utility in regulating international arbitrators remains dubious. This point is illustrated by the fact that other domestic efforts at regulating arbitrators usually exempt international arbitrators.¹¹¹

Unlike domestic arbitration, there are numerous, multi-cultural and overlapping sources that may affect the nature of arbitral proceedings and hence the function and professional obligations of international arbitrators. If national regulatory authorities become the primary interpreters and enforcers of these various sources,

¹⁰⁸ Arbitrators generally enjoy some level of immunity from civil claims arising from their role as an arbitrator. The scope and extent of that immunity may vary between countries and arbitral institutions. See Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1 (2000); 2 BORN, *supra* note 48, at 1652-61.

¹⁰⁹ Clearly, the threats of professional embarrassment and negative publicity have an effect on arbitrator conduct. Most ethics commentators agree, however, that reputational sanctions, particularly in a rapidly growing field, are not sufficient to regulate professional conduct. Cf. Larry E. Ribstein, *Ethics Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1726-27 (1998) ("Though these rules may not give rise to civil liability, the threat of disciplinary action and the possibility that ethical rules may provide standards of conduct in liability actions give ample incentives for lawyers to adhere to ethical rules.").

¹¹⁰ The proposed Model Rule is a product of a joint undertaking by the Center for Public Resources and the Georgetown University Law Center, which was drafted for adoption into the Model Rules for Professional Conduct. CPR-GEORGETOWN COMM'N ON ETHICS AND STANDARDS IN ADR, MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL (2002), available at <http://www.cpradr.org/Portals/0/CPRGeorge-ModelRule.pdf>.

¹¹¹ Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 1014-15 (2005) (discussing various efforts to regulate domestic arbitrators and the problems of extending those regulations to international arbitrators).

just as they are with attorneys,¹¹² the risk is that enforcement efforts will lead to greater fragmentation and incoherence instead of coherence and consensus, undermining the efficacy of international arbitration.

4. REGULATING ATTORNEYS IN TRANSNATIONAL DISPUTE RESOLUTION

The first Sections of this Article have examined challenges inherent in regulating global advocates and the limitations of Rule 8.5 and other current attempts. This final Section considers broader and more prescriptive questions of how global advocates should be regulated. To that end, this Section challenges the basic approach and underlying assumptions of Rule 8.5. In Section 4.1, I argue against an omnibus choice-of-law rule, such as Rule 8.5, in favor of rules that prescribe different choice-of-law solutions for different types of attorney conduct. Recognizing that limitations will exist even with more refined choice-of-law provisions, Section 4.2 emphasizes the need to leave room for a measure of attorney discretion in cases where violations of foreign law or ethical rules may be justified. I explain in Section 4.3 that conflict-of-laws stopgaps like Rule 8.5 cannot provide a final alternative because they leave open important questions about how to define attorneys' ethical roles and obligations when they are detached from any particular legal system. Section 4.4 argues against application of national rules in proceedings before international tribunals and urges that such tribunals adopt their own ethical rules. Finally, in Section 4.5, with respect to enforcement, I argue that home licensing authorities are not institutionally adept to enforce unfamiliar ethical rules applied to activities that occur in far off and distant proceedings. I propose instead that these authorities work in cooperation with their foreign counterparts and international tribunals to effectuate discipline identified by those bodies under applicable rules.

4.1. *Moving Beyond One-Size-Fits-All Analysis*

Conventionally, conflict-of-laws analysis seeks to identify a single legal rule that applies to specific conduct, based on an evaluation of the contacts of the actors involved and the competing interests of the relevant sovereigns whose territory is implicated in

¹¹² See *supra* Section 2.3.3.

those contacts.¹¹³ To that end, conflict-of-laws analysis usually begins by classifying a specific factual situation under “the appropriate legal categories and specific rules of law.”¹¹⁴ Rule 8.5 defies this analysis. Instead, the Rule replaces a specific factual situation or event with the broad category of “advocacy before a tribunal.”¹¹⁵ Rather than parse out individual rules, Rule 8.5 prescribes substitution of an entire, monolithic code of legal ethics that is determined by the physical location where that tribunal is located.

Apart from being anomalous to traditional conflict-of-laws analysis, this approach leads to disturbing results because not all ethical rules that would be substituted out by application of Rule 8.5 are limited in their effect to the immediate proceedings. For example, as noted above, Dutch ethical rules would apply in a proceeding before the Iran-U.S. Claims Tribunal.¹¹⁶ These rules would permit a U.S. attorney to engage in what would be considered conflicted representation before an arbitration seated in Mexico, even though the brunt of the conflict would be borne by another client who is not party to the current proceedings or who entered the representation agreement without understanding that the ethical protections existing at that time could be substituted out. Conversely, as noted above, the Rule also implicitly authorizes continued violations of foreign ethical rules whenever they are connected to a U.S. matter. Under Rule 8.5, therefore, attorney advertising in Bhopal and pre-testimonial communication with German deposition witnesses would still be permitted despite being unethical (and potentially illegal) in the host countries.¹¹⁷

In related areas, other conflict-of-laws regimes have taken a more careful and constructive approach. For example, in the context of judicial procedures, conflict-of-laws analysis separates out individual procedural events and specific activities, each of which receives its own particularized analysis regarding which legal rules should be applied. Under this approach, the provision

¹¹³ See, e.g., EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 2.1 (4th ed. 2004); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 1-3 (3d ed. 2002). There are of course other schools that diverge from this more conventional approach, arguing that choice of law should not be jurisdiction-selecting.

¹¹⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 cmt. b (1971).

¹¹⁵ MODEL RULES OF PROF'L CONDUCT R. 8.5 (2002).

¹¹⁶ See *supra* note 16 and accompanying text.

¹¹⁷ See *supra* note 83 and accompanying text.

of notice, the exchange of pleadings, the trial itself, and—within trial proceedings—even burden of proof and questions of witness competence and credibility, each receive their own separate analysis regarding which system's rules apply.¹¹⁸ This individualized analysis is necessary because for each procedural stage, the factors relevant to selection of an applicable rule may have different weight, depending on the purpose of a particular rule and the interests affected by the activity.¹¹⁹

This approach is not inevitable in legal ethics, as demonstrated by the U.K. corollary to Rule 8.5, the Solicitors Regulation Authority's ("SRA's") Rule 15 regarding "overseas practice."¹²⁰ In place of Rule 8.5's terse directive, SRA Rule 15 has an extensive preface that explains how its various provisions apply. It then slogs through the each of the rules in the Solicitor's Code of Conduct, providing individualized guidance about the application of each to activity abroad. Notably, U.K. confidentiality and conflict of interest obligations continue to apply to activities abroad, but the U.K. prohibition against contingency fees does not apply to representation in foreign jurisdictions. As a result, SRA Rule 15 ends up with much more salient results than Rule 8.5, particularly regarding rules that protect clients and third parties who are not directly involved in the relevant "matter." As Rule 8.5

¹¹⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 123–139 (1971) (highlighting the variety of different issues that require choice-of-law determination).

¹¹⁹ Section 6 of the Restatement (Second) of Conflict of Laws provides a good summary of the factors that are generally considered in determining which rules should be considered to determine the applicable rule of law:

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

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

¹²⁰ See SOLICITORS REGULATION AUTHORITY [SRA] CODE OF CONDUCT R. 15 (2007) (providing the rules regarding overseas practice, ranging from conflicts of laws to fee practices).

is reconsidered, at a minimum, its application should be more carefully modulated and tailored to fit specific ethical rules.

4.2. *Regulatory Arbitrage and Professional Discretion*

Another unpleasant side effect of Rule 8.5's omnibus approach to conflict of laws is that it completely obviates the need for attorneys to exercise any professional judgment or discretion in selecting applicable rules. Rule 8.5 implicitly authorizes attorneys to violate—with ethical impunity—foreign law (at least under one possible interpretation)¹²¹ and ethical rules.¹²² They are granted this free pass to disregard foreign provisions without any obligation that they spend even a moment of professional reflection to assess the value of the activity to the case or the relative importance of the foreign law or ethical rule being violated. To be sure, attorneys may sometimes be justified in violating foreign law, particularly if the foreign law would significantly impede or prevent a just result in a legal proceeding that is not exclusively subject to that nation's laws.¹²³ While a violation can sometimes be justified, exercise of discretion is necessary to determine its propriety in an individual case. Notably, both SRA Rule 15 and Rule 2.4 of the CCBE use language that suggests that attorneys can and should engage in some evaluative process.¹²⁴

¹²¹ See *supra* Section 3.1.2. (suggesting that one interpretation of Rule 8.5 would ethically excuse violations of foreign law and foreign ethical rules when undertaken in connection with a U.S. matter, and noting the harmful effects on U.S. attorneys' perceived integrity).

¹²² As noted above, this is because in any U.S. matter, U.S. ethical rules would apply. This interpretation assumes that other ethical rules, such as Rule 8.4, do not separately impose an obligation to abide by foreign law or ethical rules. For a discussion of Rule 8.4, see Section 3.1.2.

¹²³ Cf. *Telenor Mobile Commc'ns AS v. Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007) (reasoning that it was far from clear that New York had a public policy against compelling individuals to violate foreign law, in this case a foreign injunction against enforcing an arbitration award). The extent to which attorneys can or should be able to violate foreign law is beyond the scope of this Article and will be taken up in a future article, *The Global Advocate*.

¹²⁴ Specifically, Article 2.4 of the CCBE, entitled "Respect for the Rules of Other Bars and Law Societies," provides:

When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity. Member organisations of the CCBE are obliged to deposit their codes of conduct

Another failing of the omnibus approach of Rule 8.5 is that in cases like the Bhopal disaster, Indian law and ethical rules prohibiting advertising or solicitation could be, and arguably should be applied, despite the fact that the adjudication is located in New York. Similarly, putting aside for the moment ambiguities about the definition of "matter" described above, German ethical rules prohibiting pre-testimonial communication could apply to a deposition being taken in Berlin for use in a case pending in California. Rule 8.5 would apply to make the same body of ethical rules apply to all these areas, in apparent disregard of Indian and German interests.¹²⁵ Such an indiscriminate approach is not necessary.

SRA Rule 15, in contrast to Rule 8.5, includes a provision to allow solicitors to comply with local law. Specifically, it provides that "if compliance with any provision of these rules would result in your breaching local law, you may disregard that provision to the extent necessary to comply with that local law."¹²⁶ This rule does more than simply reject Rule 8.5's tacit approval of violations of foreign ethics and law. By using the word "may," SRA Rule 15 appears to permit attorney discretion in resolving conflicts between the SRA Code of Conduct and foreign local law. In a similar vein, though in a different framework, Federal Rule of Civil Procedure 4 permits, under certain circumstances, service of process in violation of foreign law, but only after a judge has evaluated whether such action is justified.¹²⁷ Judicial supervision over intentional violations of foreign laws or ethical rules may be an alternative way to ensure that such violations are duly considered and justified.

at the Secretariat of the CCBE so that any lawyer can get hold of the copy of the current code from the Secretariat.

CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY, art. 2.4 (2006).

¹²⁵ Notably, India, Germany and other countries are still able to prohibit these activities and prosecute attorneys who are caught violating these prohibitions. Within national systems, however, violations of law and rules, particularly those related to law practice and the integrity of the justice system, are usually also regarded as ethical violations as provided in Rule 8.4.

¹²⁶ SRA CODE OF CONDUCT R. 15.01(2)(c) (2007).

¹²⁷ Those circumstances, most notably, include an order from a Federal District Court judge directing such service. See FED. R. CIV. P. 4(f)(3) (stating that service may be effected in a place not within any judicial district of the United States by other means not prohibited by international agreement as may be directed by the court).

In determining whether violation of a foreign rule is justified, one of the most important considerations under traditional conflict-of-laws analysis would be whether the two rules are simply inconsistent or whether they directly conflict. Conflicting rules exist when the rule from one system requires what the other system forbids, raising problems that are distinct from those raised by rules that are merely inconsistent. The problem here is that an attorney is compelled by one system to do something that another system prohibits. The conflict, in other words, creates an inescapable double deontology problem that entails an unavoidable risk of professional discipline, though not necessarily in the attorney's home jurisdiction. By way of a concrete example, consider a letter by a French attorney to a U.S. attorney that is marked confidential, but explains the conditions under which her client would agree to settle. Under French ethical rules, an attorney receiving such a communication would be prohibited from sharing the letter with her client, but under the U.S. ethical rules, a receiving attorney would be required to communicate the letter to her client because it contains a settlement offer.¹²⁸ It is impossible for the attorney to comply with both rules because they directly conflict. In that instance, allowing or even requiring the attorney to violate the foreign ethical rule can arguably be justified.

With rules that are merely inconsistent, where there is no direct conflict, permitting violations of foreign rules or law may be less justifiable. With inconsistent rules, one system permits (but does not require) what the other system prohibits. In that situation, the attorney is not facing a Catch-22, but rather a potentially strategic opportunity for regulatory arbitrage. Given a choice, the attorney would typically prefer the rule that permits, or even requires, conduct that is most advantageous for the client. For example, in a deposition in Germany for a U.S. litigation, the U.S. attorney would likely prefer to abide by U.S. rules that permit pre-testimonial communications, particularly if the other side's counsel were bound by the German prohibitions against such prohibitions and the judge did not find out. In its current form, Rule 8.5 could be read as relieving the U.S. attorney from any obligation to even consider whether such pre-testimonial communication violates German law or represents an affront to a German sense of

¹²⁸ See MODEL RULES OF PROF'L CONDUCT R. 1.4 & cmt. (2002) (establishing the U.S. requirement for client participation in the receipt of any and all settlement communications).

procedural fairness. But with this and other examples of inconsistent rules, an attorney could comply with both rules at the same time. Accordingly, it is not clear why, in the absence of some compelling circumstance, violation of a foreign rule should be countenanced under Rule 8.5. To the extent that a violation of foreign ethical rules or law can be justified, the process of justification should require the exercise of discretion, or as suggested above, judicial oversight, to evaluate the need for a particular procedure against other factors, such as the interests of the State whose laws or rules will be violated.

4.3. Ethics in International Proceedings

The quandary underlying the ethics of attorneys who appear before international tribunals is not so much about double deontology or finding which set of national rules should govern. Instead, it is about matching the ethical rules to the attorney's particularized role in that context, and freeing her from otherwise conflicting national rules.

International tribunals alter the roles of the advocates who appear before them.¹²⁹ In performing these new roles, the national ethical rules of those attorneys may become obsolete, if not inapposite.¹³⁰ The pull of national ethical obligations remains strong, however, because the attorneys arrive with preconceived notions of their role that were shaped through an amalgam of elements from their national systems.¹³¹ Meanwhile, many of the formants that shape attorneys' national conceptions of their role simply do not exist, or do not exist to the same extent, in international contexts.

¹²⁹ See, e.g., Rogers, *supra* note 15, at 407 ("[T]he interrelational functional roles of actors in the international arbitration system . . . are assigned by the procedural arrangements of international arbitration and . . . reflect the underlying cultural values of the international arbitration system.").

¹³⁰ See generally Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997) (providing an overview on the difficulties of applying the ethics rules meant to govern lawyers in adversarial contests in the alternative dispute resolution context).

¹³¹ Cf. Judith A. McMorro, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT'L & COMP. L. REV. 139, 146 (2007) (describing how legal education, malpractice standards, market and informal social controls, and applicable mechanisms of self-regulation shape the ethical obligations of attorneys in domestic contexts).

As described above, international tribunals are detached from any one national legal system. As a result, these tribunals do not have their own cultural traditions and established malpractice standards in the same sense that these features exist in national systems. They have procedures and customary practices, but these procedures are much newer (and in most cases less developed) than equivalent procedures in national courts.¹³² For these reasons, some commentators have argued that international tribunals do not need (or cannot have) their own ethical rules, but should instead rely on choice-of-law principles to determine which national ethical rules should apply.¹³³ While a conflict-of-laws approach has the appeal of tapping into well-established and institutionally grounded rules, national legal ethics cannot provide meaningful guidance when the essential role of an advocate has changed because they are operating in a significantly different procedural and cultural context. Instead, what is needed for attorneys to fully appreciate and function in their new role is retraining or re-acculturation into the relevant international system, and pertinent ethical rules to guide and facilitate that process.

Some international tribunals have developed their own ethical rules through a combination of pragmatism and re-acculturation. Practice before international tribunals is a distinctive “blend of international and domestic concepts and procedures, requiring unique skills, experience, knowledge, strategic sense and training”¹³⁴ Since national legal training does not generally prepare attorneys for practice before international tribunals,¹³⁵ professional

¹³² This observation is most true with respect to certain so-called public international law tribunals, but less true with respect to international arbitration, which is often touted as contributing to the development of international procedures. See John R. Crook, *Fact-Finding in the Fog: Determining the Facts of Upheavals and Wars in Inter-State Disputes*, in *THE FUTURE OF INVESTMENT ARBITRATION* 313 (Catherine A. Rogers & Roger P. Alford eds., 2009).

¹³³ See e.g., Kirsten Weisenberger, *Peace is Not the Absence of Conflict: A Response to Professor Rogers’s Article ‘Fit And Function In Legal Ethics,’* 25 *WIS. INT’L L.J.* 89 (2007) (arguing that extant rules of conducts are adequate for the purpose of regulating international arbitrations, and a conflicts of laws approach is the best option).

¹³⁴ Richard J. Wilson, *Assigned Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach*, 2 *INT’L CRIM. L. REV.* 145, 147 (2002).

¹³⁵ This is less true today with the proliferation of international moot court competitions to accompany the proliferation of international tribunals themselves. While the Jessup Moot is the oldest moot, the new investment arbitration, and the

competence often requires re-acculturation and re-training that reshape an attorney's perception of their role as a domestic attorney into their distinct role as a global advocate.

One of the most prominent examples of re-acculturation and its relation to ethical norms is the ICTY. The ICTY is made of twenty-five judges from twenty-three different countries and "[t]he defense bar of the ICTY has 257 members, drawn from multiple legal traditions, with roughly half of the defense bar from the former Yugoslavia. . . ." ¹³⁶ As part of their participation in ICTY proceedings, attorneys are explicitly re-trained and culturally re-orientated in order to develop professional and social norms that are essential to performing the role assigned to them by the ICTY. As a shorthand, this retraining can be summarized as taking "[c]ivil and common law lawyers" and reorienting them to the "new hybrid trial model [of the ICTY] and their role within that model." ¹³⁷ All attorneys at the ICTY undergo this re-orientation. It has been particularly important, however, with respect to Soviet-era trained lawyers, who viewed the role of the criminal defense lawyer as an enemy of the state. ¹³⁸

Once the role of attorneys before the ICTY was established, new ethical norms appropriate to the new role were developed and

International Criminal Court Moot also offer students opportunities not only to address international arguments under international procedures, but also to argue against law students from other countries. For example, the Vis International Arbitration Moot draws over 200 teams from around the world to Vienna, and sixty-five teams to Hong Kong for the Vis East. See Fifteenth Annual Willem C. Vis International Commercial Arbitration Moot 2007-2008 Registered Teams, <http://www.cisg.law.pace.edu/cisg/moot/participants15.html> (last visited Apr. 10, 2009); Sixth Annual Willem C. Vis International Commercial Arbitration Moot (East) 2008-2009 Registered Teams, <http://www.cisgmoot.org/ParticipatingTeams.pdf> (last visited Apr. 10, 2009). "[P]articipation in the annual Willem C. Vis International Commercial Arbitration Moot Court as a student is a way of 'marking' oneself to the seasoned members of international commercial arbitration as destined for greatness in the field." Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, 14 AM. REV. INT'L ARB. 461, 516 (2003); see also THE VIS BOOK: A PARTICIPANT'S GUIDE TO THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT (Janet Walker ed., 2008) (demonstrating that international moot court experiences have become so popular as to support a commercially available guide for participants).

¹³⁶ McMorrow, *supra* note 131, at 148.

¹³⁷ *Id.*

¹³⁸ Mark S. Ellis, *supra* note 96, at 957 (2003) ("Many of the 'qualified' non-western attorneys were trained in the communist/socialist era, in a system that is antithetical to the Tribunal's substantive and procedural laws.").

eventually codified.¹³⁹ All this occurred despite the fact that “[t]here was no shared history, background, or culture to help determine the best course of action.”¹⁴⁰ Despite this re-acculturation and related new ethical rules, attorneys at the ICTY still remain reluctant to engage in conduct that violates their home ethical norms. The reason is that most national ethical rules do not provide guidance similar to Rule 8.5 so that attorneys are (or believe they are) still bound by their home ethical rules when appearing before the ICTY.¹⁴¹

A similar process of professional socialization and re-orientation has occurred in international arbitration. For example, when U.S. attorneys first began appearing in international arbitration, they often engaged in systematic *ex parte* communications with their party-appointed arbitrators. This practice, *e.g.*, was considered acceptable in domestic U.S. arbitration¹⁴²

¹³⁹ See *id.* at 966–68 (outlining the development of the ICTY Code of Professional Conduct).

¹⁴⁰ See McMorrow, *supra* note 131, at 148.

¹⁴¹ See *id.* at 142–43 (noting that the tension between home and ICTY ethical rules is alleviated in practice by providing two or more defense counsel who can assign tasks among themselves based on their home jurisdiction rules); see also Ellis, *supra* note 96, at 959 (noting the strategic “pairing” of defense counsel).

¹⁴² See, *e.g.*, *Lifecare Int’l, Inc. v. CD Medical, Inc.*, 68 F.3d 429 (11th Cir. 1995) (holding that an arbitration award, which was based on arbitrators’ determination that parties had entered into binding settlement agreement even before agreement was reduced to writing, was not “arbitrary and capricious.”); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 760 (11th Cir. 1993) (finding no misconduct despite finding that party-arbitrator met with representatives and witnesses of appointing party before arbitration to plan strategy); *Drexel Burnham Lambert Inc. v. Pyles*, 701 F. Supp. 217, 220 (N.D. Ga. 1988) (“The appearance of impropriety alone is insufficient; a party seeking to vacate the award must establish facts that create a reasonable impression of partiality.”). These cases involved domestic U.S. arbitrations, which means that these objections did not arise because of conflicting cultural perspectives on *ex parte* communication. It should be noted that even in the United States, these practices have met with significant criticism. See, *e.g.*, James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for “Non Neutrals,”* 11 AM. REV. INT’L ARB. 295 (2000) (discussing non-neutral party-appointed arbitrators vis-à-vis neutral party-appointed arbitrators); Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution: What’s Happening and What’s Not*, 56 U. MIAMI L. REV. 949 (2002) (reviewing the ethical issues in arbitration); Andreas F. Lowenfeld, *The Party Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT’L L. J. 59, 60 (1995) (noting that such partisanship among arbitrators is not the norm in international arbitration). Recently, in response to this problem, some institutions have clarified their arbitral rules to reflect that all arbitrators are expected to act as “neutrals.” See, *e.g.*, LONDON CT. INT’L ARBITRATION ARBITRAL R., art. 5.2 (“All arbitrators conducting an arbitration under

and in some other countries, but rather abhorrent in international arbitration practice generally, which deems permissible only limited communication on procedural matters.¹⁴³ Through a process of social re-orientation within the arbitration community, an ethical norm against most forms of *ex parte* communication has emerged. This norm is followed in most cases and is now incorporated into various arbitral rules and codes of ethics.¹⁴⁴

In another example, there was a notable gap in perceptions and practices about extensive pre-testimonial preparation of witnesses in international arbitration, as with the ICTY.¹⁴⁵ Skepticism about pre-testimonial communication is most pronounced among lawyers from civil law traditions. For example, German attorneys are generally prohibited from engaging in pre-testimonial communications with witnesses in German judicial proceedings. German attorneys in international arbitration practice, however, have professionally re-oriented and developed a new norm of

these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party.”).

¹⁴³ See INT'L BAR ASS'N [IBA] R. OF ETHICS FOR INT'L ARBITRATORS, art. 5.3 (stating arbitrators should avoid “any unilateral communications regarding the case” and to inform the other party of its substance if it occurs). For extended discussion of *ex parte* communication in international arbitration, see W. LAURENCE CRAIG, WILLIAM W. PARK, & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 13.07 (2d ed. 1990); M. Scott Donahey, *The Independence and Neutrality of Arbitrators*, 9 J. INT'L ARB. 31, 41–42 (1992).

¹⁴⁴ AMERICAN ARBITRATION ASS'N [AAA]/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canons III(B)(1) (permitting *ex parte* communications with any member of the arbitral tribunal concerning such matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings); *Id.* Canon III(B)(1)(b) (permitting *ex parte* communications by party-appointed arbitrators as long as general disclosure is made); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 225–26 (1991) (noting that “it is not unusual for there to be discussions with just one of the parties in respect of procedural matters such as availability for future hearings”).

¹⁴⁵ See Nicolas C. Ulmer, *Ethics and Effectiveness: Doing Well by Doing Good*, in THE COMMERCIAL WAY TO JUSTICE: THE 1996 INTERNATIONAL CONFERENCE OF THE CHARTERED INSTITUTE OF ARBITRATORS 167, 171 & n.8 (Geoffrey M. Beresford Hartnell ed., 1996) (noting that it is not an uncommon practice for one arbitrator to communicate with the appointing party); Ambassador Malcolm Wilkey, *The Practicalities of Cross-Cultural Arbitration*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 79, 86 (Stefan N. Frommel & Barry A. K. Rider eds., 1999) (“Contacts *ex parte* after all arbitrators have been selected and assumed their duties should be forbidden. But sometimes they are not.”).

professional conduct that treats such communications as ethically permissible in the international arbitration context.¹⁴⁶

These developments signal that professional norms for international tribunals are not only possible, but also critically important to the fair and efficient functioning of proceedings. In the absence of formally developed and codified codes, such norms are emerging on an informal and ad hoc basis. While this appears to be a positive development, it is not without problems. Attorneys' home ethical rules continue to cast a "shadow" that "is omnipresent for the lawyers and judges,"¹⁴⁷ in part because the prevalence of international rules over national rules is not well understood.

While these ethical "improvisations" may provide an essential stopgap before formal international ethical rules are codified, they also have some serious drawbacks. Most importantly, they can mask continued or new divisions, and they can evade established enforcement mechanisms. For example, the new, unwritten ethical norm permitting German attorneys to engage in pre-testimonial communication in international arbitration does not prescribe any limitations on this new enterprise, and it has not been formally acknowledged or regulated by German bar authorities.

Without any express new rule to substitute for the rule that has been displaced, the German attorney arguably has *more* latitude than the American attorney in pre-testimonial communications. An American attorney is still bound by U.S. ethical rules that establish the limits of proper witness preparation,¹⁴⁸ even if those limits can be "permeated by ethical uncertainty."¹⁴⁹ Those U.S. ethical limitations, however, may not be obvious. A German lawyer, originally shocked by pre-testimonial communications,

¹⁴⁶ See Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, in CONFLICTING LEGAL CULTURES, *supra* note 145, at 147 (suggesting that arbitrators must distinguish the cultural background of parties in order to effectively preside over proceedings to which parties come with differing approaches to pre-testimonial communication with witnesses); Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, 16 INT'L ARB. REP. 37, 42 (2001) (suggesting that while some consensus has emerged about the possibility of preliminary communication with witnesses, there remains conflict as to the extent permitted).

¹⁴⁷ McMorrow, *supra* note 131, at 142.

¹⁴⁸ See Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829 (2002) (providing an overview of witness preparation in the United States).

¹⁴⁹ John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 281 (1989).

might reasonably infer that U.S. attorneys operate with no limits whatsoever in pre-testimonial communications.

This assumption would find considerable reinforcement in popular portrayals of U.S. attorneys. For example, in the 1958 film *Anatomy of a Murder*, a congenial but cynical defense attorney played by Jimmy Stewart describes the legal defense to murder to his client in such a way that his client is inspired to "recall" the facts consistent with that defense.¹⁵⁰ While it makes for good cinema, talking to "a witness about the law or about desired testimony before seeking the witness' own version of events comes dangerously near [criminal] subornation of perjury,"¹⁵¹ and is generally considered a transgression of U.S. ethical rules.¹⁵² The German attorney, however, has no reason to know about these limitations and no obligation to abide by them. As a result, even with this ethical innovation designed to level the playing field, attorneys in the same proceedings may still operate under different rules. Making matters worse, these clashes may be even more concealed and more difficult to discover than when the differences were between formal, express and written rules. Finally, these new, unwritten rules are, by design, outside of formal national enforcement regimes. This escape hatch raises separate and important questions about who should enforce applicable ethical rules, which is the topic of the next Section.

Rule 8.5, and arguably also Article 2.4 of the CCBE Code, acknowledge the importance of international tribunals having their own ethical rules that trump otherwise applicable national ethical rules. These concessions, however, have had limited value because to date few international tribunals have actually enacted codes of ethics for the lawyers who practice before them. In the meantime, the tug of national ethical rules has collided with the very practical need for international ethical rules.

¹⁵⁰ For a critique of Jimmy Stewart's technique, see Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715, 781-82 (1998).

¹⁵¹ CHARLES WOLFRAM, MODERN LEGAL ETHICS § 12.4.3 (1986).

¹⁵² See Peter A. Joy & Kevin C. McMunigal, *Witness Preparation: When Does It Cross The Line?* 17 CRIM. JUST. 48, 49 (2002) ("At the same time that the lawyer is required to thoroughly investigate and persuasively present the facts on behalf of his or her client, both the criminal law and ethical rules prohibit the lawyer from presenting false testimony.").

4.4. *Who Should Regulate Global Advocates?*¹⁵³

The assumption underlying Rule 8.5 is that, wherever in the world a global advocate operates and whatever rules apply, the bar association that originally licensed the attorney should be the primary, if not sole, authority that regulates her. This conclusion is based on two assumptions. The first assumption is that the bar association that has licensed the attorney has the greatest stake in ensuring the attorney's professional conduct. The licensing association clearly has a direct interest in enforcing the rules it has promulgated and upholding the integrity of those professionals it has licensed. The force of these interests, however, may be diminished when the misconduct occurred overseas and in violation of foreign ethical rules and foreign law. A second assumption is that only the licensing bar has the power to impose professional sanctions, including disbarment. Particularly in light of some of the problems described above,¹⁵⁴ however, there are reasons to question whether national regulatory authorities are particularly competent to perform this task.

Apart from the conceptual difficulties in interpreting and applying foreign ethical rules, there are also practical and procedural problems. How can local regulatory authorities conduct disciplinary proceedings and factually assess whether misconduct is present when the relevant events occurred physically, culturally, and politically far away? While licensing authorities should not be excluded from regulating global advocates, this Section argues that they should not be the front line regulators. Instead, they should work in coordinated efforts with international and foreign tribunals to assess and enforce penalties for ethical transgressions that are identified and evaluated with foreign and international tribunal and regulatory authorities.

National regulatory authorities exist and operate in domestic political and legal contexts. This national orientation inevitably affects their ability to apply foreign or international ethical rules, whose content may be both difficult to discern and contrary to regulatory authorities' own institutional sense of proper attorney conduct. For example, would U.S. disciplinary authorities be inclined to punish a U.S. attorney for "improperly" preparing a

¹⁵³ This title is borrowed from David B. Wilkins' seminal work: *Who Should Regulate Lawyers?* See Wilkins, *supra* note 9.

¹⁵⁴ See *supra* Section 2.3.4.

witness when French ethical rules are deemed to apply under Rule 8.5, even though such conduct would otherwise be ethically permissible or required under U.S. rules? Would U.S. authorities condemn a U.S. attorney for disclosing information to a client that was unequivocally valuable to that client, but which a foreign system required be maintained as "confidential"? Alternatively, is it possible to imagine a French bar association disciplining a French attorney for unethically withholding discoverable documents when no such offense exists in France and France has a historical tradition of being hostile to the very notion of discovery?¹⁵⁵

Regulatory authorities are not all-purpose machines into which a set of ethical rules can be input at one end and a disinterested disciplinary decision applying those rules is produced at the other end. Like the lawyers they administer, the individuals who staff regulatory authorities are products of a local legal culture.¹⁵⁶ Their legal history, background, and training necessarily color their perceptions about the propriety of attorney conduct and their interpretation of rules applied to such conduct.¹⁵⁷ When filtered through national regulatory authorities, international and foreign legal ethical rules will be refracted through these national perspectives. The ambiguities inherent in legal translation described above¹⁵⁸ will increase the potential for distortion. A similar phenomenon has already been observed as substantive

¹⁵⁵ France, Germany, the Netherlands, Norway, Belgium, Sweden, and Canada have all enacted blocking statutes that forbid their citizens from complying with certain U.S. discovery requests. See William S. Dodge, *Extraterritoriality and Conflicts-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 164 & n.357 (1998) ("The extraterritorial application of U.S. antitrust laws has led a number of other countries to enact retaliatory legislation in the form of blocking and clawback statutes.").

¹⁵⁶ There are international sections to state regulatory authorities, but they play no role in discipline. Their functions are limited to organizing research, networking opportunities, and symposia on issues of international law and practice. SRA CODE OF CONDUCT R. 15 (2007).

¹⁵⁷ Cf. Wilkins, *supra* note 9, at 810-11 (noting that, since enforcement officials invariably exercise a certain amount of discretionary authority over the content of professional norms when they apply ethical rules in particular cases, "conferring enforcement authority is tantamount to empowering a particular set of actors to place their own interpretation on these ambiguous professional norms").

¹⁵⁸ See *supra* Section 2.3.4.

international and foreign law have been distorted when interpreted by national courts.¹⁵⁹

An equally important, and ultimately related, issue is that any adjudicatory tribunal must have the ability to sanction and control the behavior of attorneys appearing before them. The ability to apply rules implies the ability to develop and refine their content. International tribunals and their rules of conduct cannot, as one commentator has suggested, be held "captive to out-of-state disciplinary authorities."¹⁶⁰ The ICTY, which is the international tribunal that has most directly engaged issues of ethical conduct and regulation, has an established record of assessing alleged misconduct by attorneys and issuing sanctions for contempt of court. Some tribunals seem reticent to exercise any disciplinary role, while other tribunals, particularly international arbitration tribunals, seem to doubt their own power to do so (or face legal impediments to doing so). The power to resolve important international and transnational legal issues must be understood as being accompanied by a power to control and regulate the attorneys who participate in those proceedings.¹⁶¹

5. CONCLUSION

Many of the world's most urgent issues of transnational regulation are increasingly being funneled into international and transnational adjudications. These adjudications are brought and managed by advocates whose ties and commitments to any particular legal system are often partial and tangential. The response to resulting ambiguities about what ethical rules apply to their conduct has primarily been a reliance on choice-of-law rules

¹⁵⁹ See Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 160-75 (1993) (discussing reasons that prompt most national courts to approach international norms apprehensively and limit their application within national legal systems).

¹⁶⁰ Daly, *supra* note 2, at 778. Daly refers to domestic U.S. courts being held captive to the regulatory authorities of a different state, but the problem she identifies is equally applicable in the international context.

¹⁶¹ This power may not be as acceptable in some other systems that do not give judicial officers a role in domestic contexts. For example, in France, professional regulations are enforced locally by the *conseil de l'ordre*, which is the only organ that has the power to sanction members for violations of rules of conduct. See CHRISTINA DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* 120 (2d ed. 1996) ("[The *conseil*] has disciplinary powers and can sanction professional faults or infringements of rules of conduct.").

that designate particular national ethical rules. There is an emerging realization, however, of the inadequacy of national ethical rules, which were designed to apply to domestic practices in domestic procedural contexts, in regulating global advocacy. Moreover, regulatory authorities are limited in their ability to apply foreign ethical rules or effectively evaluate conduct before foreign tribunals through conventional modes of regulation.

The current version of Rule 8.5 was an important mechanism for bringing these issues to light. Now, however, additional systematic analysis is needed to provide more meaningful rules. Those rules must be implemented not in isolation, but through developed international networks and perhaps even eventually an international regulatory body.