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# Private International Law Implications in Conflicts of Interest for Lawyers Licensed in Multiple Countries

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Résumé de l'article

La question des conflits d'intérêts est l'un des enjeux juridiques les plus compliqués auxquels les avocats et les cabinets sont confrontés au quotidien. Or, cette question se complexifie davantage lorsqu'un avocat est membre de plus d'un barreau, puisqu'il devient concurremment assujetti à plusieurs régimes déontologiques. Cet article examine quels sont les devoirs et règles applicables aux juristes membres de plusieurs barreaux et quelles solutions s'offrent à eux lorsque les différents codes déontologiques auxquels ils sont assujettis divergent ou sont en conflit. En s'appuyant sur une étude des règles ayant trait aux conflits d'intérêts au Canada et aux États-Unis, l'auteur préconise un test de « droit approprié » en deux étapes afin de déterminer quel code de déontologie devrait s'appliquer dans une situation donnée.

# PRIVATE INTERNATIONAL LAW IMPLICATIONS IN CONFLICTS OF INTEREST FOR LAWYERS LICENSED IN MULTIPLE COUNTRIES

*Barrett Schitka*[*]

Conflicts of interest issues are one of the most complicated areas of the law that lawyers and law firms face on a day-to-day basis. These issues are further complicated when lawyers are licensed in more than one jurisdiction and become subject to multiple ethical regimes. This article investigates what rules and duties are applicable to lawyers licensed in multiple jurisdictions, and what solutions are available to the lawyer when the law governing lawyers from different jurisdictions diverges or conflicts. Through a discussion of the Canadian and United States rules on conflicts of interest, this article advocates for a two-step "proper law" approach to determine which jurisdiction's ethical rules should be applied.

La question des conflits d'intérêts est l'un des enjeux juridiques les plus compliqués auxquels les avocats et les cabinets sont confrontés au quotidien. Or, cette question se complexifie davantage lorsqu'un avocat est membre de plus d'un barreau, puisqu'il devient concurremment assujetti à plusieurs régimes déontologiques. Cet article examine quels sont les devoirs et règles applicables aux juristes membres de plusieurs barreaux et quelles solutions s'offrent à eux lorsque les différents codes déontologiques auxquels ils sont assujettis divergent ou sont en conflit. En s'appuyant sur une étude des règles ayant trait aux conflits d'intérêts au Canada et aux États-Unis, l'auteur préconise un test de « droit approprié » en deux étapes afin de déterminer quel code de déontologie devrait s'appliquer dans une situation donnée.

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## Introduction

"[No] area of the law governing lawyers consumes more lawyer time, creates more confusion and frustration, or causes lawyers more difficulty in their practices, than the rules governing conflicts of interest."[1] Yet lawyers inescapably have to address conflicts issues; in recent years the number of law firm mergers,[2] implosions,[3] and lateral hiring of attorneys has dramatically increased.[4] When lawyers join new firms and potentially bring clients or confidential client information with them, conflicts of in-

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1 Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham, Ont: LexisNexis, 2011) at 215. See also Alice Woolley et al, *Lawyers' Ethics and Professional Regulation*, 2nd ed (Markham, Ont: LexisNexis, 2012) at 276; Monroe H Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 4th ed (New Providence, NJ: LexisNexis, 2010) at 255; Lisa G Lerman & Philip G Schrag, *Ethical Problems in the Practice of Law*, 2nd ed (New York: Aspen, 2008) at 354–56 (providing nine different reasons why conflict of laws is a difficult area for students, lawyers, and firms to get right).

2 See Julius Melnitzer, "U.S. Law Firms Merging at Record Rate", *Financial Post* (11 July 2013), online: <www.business.financialpost.com/legal-post/u-s-law-firms-merging-at-record-rate>; Drew Hasselback, "Norton Rose Makes U.S. Breakthrough with Fulbright Merger", *Financial Post* (14 November 2012), online: <www.business.financialpost.com/legal-post/norton-rose-to-merge-with-u-s-firm-fulbright-and-jaworski>; Drew Hasselback, "FMC to Link with SNR Denton and Salans to Create New International Law Firm", *Financial Post* (7 November 2012), online: <www.business.financialpost.com/legal-post/fmc-named-in-potential-three-way-merger-with-snr-denton-and-salans>; Julius Melnitzer, "Baker & McKenzie Peru Expansion Targets Mining Clients", *Financial Post* (8 October 2012), online: <www.business.financialpost.com/legal-post/baker-mckenzie-peru-expansion-targets-mining-clients>.

3 See Jeff Gray & Sophie Cousineau, "Death of a Law Firm: Behind the Collapse of Heenan Blaikie", *The Globe and Mail* (7 February 2014), online: <www.theglobeandmail.com/report-on-business/industry-news/the-law-page/heenan-blaikie-death-of-a-law-firm/article16759901/?page=all>; Sandro Contenta, "How the Heenan Blaikie Law Firm Collapsed", *The Toronto Star* (8 February 2014), online: <www.thestar.com/news/insight/2014/02/08/how_the_heenan_blaikie_law_firm_collapsed.html>; James B Stewart, "The Collapse: How a Top Legal Firm Destroyed Itself", *The New Yorker* 89:32 (14 October 2013), online: <www.newyorker.com/magazine/2013/10/14/the-collapse-2>; Erin Fuchs, "The Eight Most Crushing Law Firm Implosions in the Nation's History", *Business Insider* (24 June 2012), online: <www.businessinsider.com/the-eight-most-spectacular-law-firm-collapses-in-history-2012-6>.

4 See Julie Savarino, "Successful Lateral Integration for Law Firms", *Bloomberg Law* (9 July 2013), online: <www.bna.com/successful-lateral-integration-for-law-firms/>; NALP, "Lateral Hiring on the Rise Again After Two Years of Decline", *NALP Bulletin* (April 2011), online: <www.nalp.org/april2011_lateral_hiring>; James M Fischer, "Large Law Firm Lateral Hire Conflicts Checking: Professional Duty Meets Actual Practice" (2012) 36:1 J Leg Prof 167 at 168. See also Robert W Hillman, *Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups*, 2nd ed (New York: Wolters Kluwer, 1998) (loose-leaf 2014 supplement), ch 1.1. But see NALP, "Lateral Hiring Slows Down for the Second Year in a Row", *NALP Bulletin* (March 2014), online: <www.nalp.org/0314research>.

terest arise and must be resolved.[5] Resolving these issues in the case of a single jurisdiction is no easy task, especially where multiple lawyers are implicated. For example, the recent dissolution of Canadian law firm Heenan Blaikie caused hundreds of partners and associates to look for new firms to join.[6] Those lawyers who choose to join other firms may have limited options of potential firms to join because of conflicts of interest rules. Firms looking to bring in rainmakers or star associates may be unable to hire who they want because the new lawyer's previous work may be in conflict with the work of an existing firm's client. Any time a new lawyer is hired or a new client is brought on, there exists a possibility of a conflict. Sometimes this even means that lucrative business must be sacrificed because of the existing presence of a minor retainer.[7] Every time a conflict check is run, firms must decide whether a conflict arises and whether it can be cured. This task is further complicated by complex rules and unique facts.

Having said that, and despite the difficulty that may be encountered in hiring lawyers as a result of the Heenan Blaikie situation, any concerns that may be raised over conflicts of interest are ultimately confined in scope and complexity when they arise in a single jurisdiction or country. This is because a uniform rule is applied. For example, when a Canadian law firm merges or dissolves, the same rule applies regardless of whether the lawyer is joining a new firm in British Columbia, Alberta, or Ontario.[8]

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5 See Fischer, *supra* note 4 at 169; "Disclosure of Conflicts Information When Lawyers Move Between Law Firms", Formal Opinion 09-455 (Chicago: American Bar Association Standing Committee on Ethics and Professional Responsibility, 2009) at 1 ("When a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest"). See also Paul R Tremblay, "Migrating Lawyers and the Ethics of Conflict Checking" (2006) 19:2 Geo J Leg Ethics 489.

6 See e.g. Don Butler, "Jean Chrétien Lands at Dentons Canada Law Firm After Implosion of Heenan Blaikie", *Ottawa Citizen* (10 February 2014), online: <www.ottawacitizen.com/news/local-news/jean-chretien-lands-at-dentons-canada-law-firm-after-implosion-of-heenan-blaikie>. See generally Gray & Cousineau, *supra* note 3; Contenta, *supra* note 3; Monique Muise, "Heenan Blaikie Collapse a Lesson for Other Law Firms, Expert Says", *The Montreal Gazette* (6 February 2014), online: <cached.newslookup.com/cached.php?ref_id=125&siteid=2117&id=4737583&t=1391727962>; Drew Hasselback, "Heenan Blaikie's Lesson for Bay Street: Change or Die", *Financial Post* (8 February 2014), online: <www.business.financialpost.com/legal-post/heenan-blaikies-lesson-for-bay-street-change-or-die>.

7 See e.g. *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39, [2013] 2 SCR 649 [*McKercher*].

8 This is because of the unitary court structure of Canada, the ethical rules articulated by the Supreme Court of Canada, and the similarity of rules in each of the provincial codes of conduct. See Paul M Perell, *Conflicts of Interest in the Legal Profession* (Markham, Ont: Butterworths, 1995) at 4; Woolley, *supra* note 1 at 5, 6, 12, 14. See generally the

But in a world of increasing globalization and law firm expansion, the situations that give rise to conflicts of interest problems are not always confined to one jurisdiction or country. Consider the following scenario:

> Mary is a finance partner who works primarily out of Firm A's Toronto office. She spends some of her time working out of Firm A's New York office and is licensed to practice in both Ontario and New York. She has been hired by BorderCo, which is looking to build a pipeline across the Canada—United States border. As part of its development strategy, BorderCo wishes to acquire TexCo, a company specializing in pipeline design and construction. BorderCo is incorporated in and maintains its head office in New York. TexCo's head office is in Texas but the company is incorporated in Delaware. Midway through the deal, a large national firm dissolves and Mary's firm has an opportunity to hire Chad, an industry expert in oil and gas acquisitions and divestitures. Chad has a big book of business and would be a great addition to the firm. He has worked for most of his career in Texas, but is also licensed to practice in Alberta. Mary's firm would like to hire Chad in its Alberta office to do some work for some clients in the oil sands industry. However, on a previous transaction, Chad worked for TexCo on a pipeline development project in the Marcellus Shale in Pennsylvania although the retainer has since been terminated. BorderCo plans to tie in TexCo's existing Pennsylvania pipeline into BorderCo's Ontario pipeline networks. TexCo is unwilling to waive conflicts.

Can the Alberta office of Mary's firm hire Chad? Which jurisdiction's conflicts of interest rules should apply to determine whether Chad may join Mary's firm?

If Canadian or Delaware law applies, Chad is free to join Mary's firm, subject to appropriate institutional mechanisms such as ethical screens so as to prevent the dissemination of TexCo's confidential information to

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following Supreme Court of Canada cases: *MacDonald Estate v Martin*, [1990] 3 SCR 1235, 77 DLR (4th) 249 [*MacDonald Estate* cited to SCR]; *R v Neil*, 2002 SCC 70, [2002] 3 SCR 631 [*Neil*] (originating in Alberta); *Strother v 3464920 Canada Inc*, 2007 SCC 24, [2007] 2 SCR 177 [*Strother*] (originating in British Columbia). While it is open for each province to promulgate different rules of professional conduct, most provinces have substantially adhered to the Federation of Law Societies of Canada's *Model Code of Professional Conduct*. See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2012, ch 3.4-1 [FLSC CPC]. In the specific context of conflicts of interest, Canada experiences a largely uniform rule, unlike the stark division experienced in the United States where there are no binding rules that are applied across all states. In Canada, the Supreme Court jurisprudence on conflicts of interest binds all courts in the country, and the provincial codes of conduct all have adjusted their language to match the doctrines as articulated by the nation's highest court. The Federation's *Model Code* helps achieve this uniformity by providing model language for the provinces to use or adopt.

other members of Mary's firm.[9] If New York or Texas law applies, ethical screens cannot be applied to cure the conflict and Chad would be prohibited from joining Mary's firm due to the conflict of interest.[10]

Unfortunately, the current state of the law regarding conflicts of interest in both Canada and the United States does not resolve this problem. No uniformly accepted choice of law rule applies to the law governing lawyers;[11] both lawyers and their law firms have little direction as to how to resolve conflicts of interest problems when multiple jurisdictions and different law-governing-lawyers frameworks are implicated.[12] Every day, modern law firms face new conflicts of interest problems as lawyers move and new clients or matters are taken on. Each time a firm runs a conflicts check that involves another jurisdiction, the question of which laws apply and govern must be addressed, yet lawyers have no guidance as to how to undertake this task.

This paper seeks to address this problem. It attempts to answer the question: when multiple jurisdictions are implicated as a result of multiple licences, which jurisdiction's law governing lawyers should apply?

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9 See *MacDonald Estate*, *supra* note 8 at 1259–60, 1262; Delaware Supreme Court, *Delaware Lawyers' Rules of Professional Conduct*, Wilmington, Del: Delaware Supreme Court, 2010, ch 1.10 [Del RPC]; Law Society of Alberta, *Code of Conduct*, 2013, ch 2.04(8), commentary [Alta CPC].

10 See State Bar of Texas, *Texas Disciplinary Rules of Professional Conduct*, Austin, Tex: State Bar of Texas, 1989, ch 1.06, 1.09 [Tex RPC]; New York State Unified Court System, *Part 1200: Rules of Professional Conduct*, New York: New York State Unified Court System, 2013, ch 1.6, 1.9 [NY RPC].

11 This article distinguishes between "ethical rules" and the "law governing lawyers." The former is a narrower set of obligations, and is used to denote the obligations imposed on lawyers by virtue of the individual provincial or state codes of professional conduct. The term "law governing lawyers" encompasses a much broader realm of obligations resulting from ethical rules, statutory obligations, fiduciary duty obligations, as well as those that find their genesis in contract and tort law.

12 See Memorandum from ABA Commission on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest to ABA Entities et al (18 January 2011), "Issues Paper: Choice of Law in Cross-Border Practice" [ABA Rule 8.5 Paper]; ABA Commission on Ethics 20/20, "Revised Draft Resolutions for Comment: Model Rule 1.7", *American Bar Association* (11 July 2012), online: <www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120711_third_draft_resolutions_and_report_conflicts_and_choice_of_law.authcheckdam.pdf> [ABA Rule 1.7 July Paper]; ABA Commission on Ethics 20/20, "Draft for Comment: Model Rule 1.7 Conflict of Interest," *American Bar Association* (18 September 2012), online: <www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_choice_of_rule_model_rule_1_7_comment_draft_final_posting.authcheckdam.pdf> [ABA Rule 1.7 September Paper]; ABA Commission on Ethics 20/20 et al, "Report to the House of Delegates," *American Bar Association* (February 2013), online: <www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_choice_of_rule_resolution_and_report_final.authcheckdam.pdf> [ABA Rule 8.5 Resolution].

Part I investigates the three separate issues that arise when a lawyer or law firm has a potential conflict of interest and analyzes them in the context of jurisdiction and extraterritoriality. Part II examines both Canadian and American law dealing with conflicts of interest, noting the commonalities and differences between them. Part III evaluates whether the current choice of law rules for agency or contract may apply as is to the law governing lawyers. Part IV proposes a principled approach, based in the "proper law," to determine which rule should apply when faced with conflicting rules in the law governing lawyers. Part V applies the proposed framework to the conflicts of interest test scenario above.

## I. The Tripartite Conflicts of Interest Problem—Resolving Issues of Jurisdiction and Extraterritoriality

When a conflict of interest issue arises, three separate concerns must be addressed. First, the lawyer or firm may face a motion for disqualification, preventing further representation of a client on the transaction or dispute.[13] Second, the individual lawyer might be subject to disciplinary proceedings in front of a provincial law society or state bar.[14] Third, the client may sue the lawyer or firm for breach of fiduciary duty.[15] Each of these scenarios raises different considerations regarding jurisdiction, extraterritoriality, and ultimately, choice of law. Questions of jurisdiction and extraterritoriality must be addressed before considering choice of law. If a tribunal[16] does not have jurisdiction over either the matter or the parties, then no conflict of laws problem arises—a tribunal without jurisdiction may not affect substantive rights. Thus, in the context of conflicts of interest, without proper jurisdiction, the court cannot disqualify counsel, nor can a disciplinary panel sanction a lawyer. If the laws or rules governing the lawyer's conduct do not apply extraterritorially, no problem of

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13 See e.g. *McKercher*, *supra* note 7; *MacDonald Estate*, *supra* note 8; *Brookville Carriers Flatbed GP Inc v Blackjack Transport Ltd*, 2008 NSCA 22, 263 NSR (2d) 272; *De Beers Canada Inc v Shore Gold Inc*, 2006 SKQB 101, 278 Sask R 171; *Westinghouse Electric Corp v Kerr-McGee Corp*, 580 F (2d) 1311 (7th Cir 1978), cert denied 439 US 955 (1978) [*Westinghouse*]; *Fiandaca v Cunningham*, 827 F (2d) 825 (1st Cir 1987).

14 See e.g. *Law Society of Alberta v Belzil*, [2008] LSDD No 167 (QL) (Alta Law Society) [*Belzil*]; *Nova Scotia Barristers' Society v Langille*, [2002] LSDD No 8 (QL) (NS Barristers' Society) [*Langille*]; *In re Banks*, 584 P (2d) 284 (Or Sup Ct 1978) [*Banks*]; Geoffrey C Hazard Jr et al, *The Law and Ethics of Lawyering*, 4th ed (New York: Foundation Press, 2005) at 429. See also Charles W Wolfram, *Modern Legal Ethics* (St Paul, Minn: West, 1986) at para 7.1.7; Perell, *supra* note 8 at 1.

15 See e.g. *Strother*, *supra* note 8; *Woodruff v Tomlin*, 616 F (2d) 924 (6th Cir 1980); Perell, *supra* note 8 at 1; Hazard Jr et al, *supra* note 14 at 429.

16 "Tribunal" is used in this article to refer to either a provincial law society, a state supreme court, or a trial or motions court where a disqualification motion may be heard.

competing rules or dual obligations arises because the lawyer only has to comply with the law of the jurisdiction in which the lawyer is located.

This article analyzes the first and second scenarios as the most prevalent and raising the most uncertainty when it comes to conflict of laws and inter-jurisdictional practice. The third scenario (breach of fiduciary duty) only arises if in fact the conflict of interest resulted in the lawyer or firm failing to fulfill fiduciary duties to the client, and is ultimately addressed by existing choice of law rules for tort and unjust enrichment.[17]

### *A. Motions for Disqualification*

A motion for disqualification as a result of a conflict of interest may arise in litigation or in the context of a transaction. Courts resolve questions of jurisdiction, extraterritoriality, and choice of law differently depending on the circumstances in which the disqualification motion arises, taking into account applicable common law principles.[18] A court's decision may also be informed by the codes of professional conduct, but a court is not bound by them.[19]

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[17] See Woolley, *supra* note 1 at 219; Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters, 2012) at 1270 (identifying breach of fiduciary duty as a cause of action in tort); Peter Hay, Patrick J Borchers & Symeon C Symeonides, *Conflict of Laws*, 5th ed (St Paul, Minn: Thomson Reuters, 2010), ss 32.1, 35.5, 35.8 (providing the choice of law rules in unjust enrichment and tort); *Tolofson v Jensen*, [1994] 3 SCR 1022, 120 DLR (4th) 289. See also *Strother*, *supra* note 8 (prescribing the equitable remedy of disgorgement of profits for breach of certain fiduciary duties); *Meyers v Livingston*, 87 A (3d) 534 (Conn Sup Ct 2014) (finding a breach of fiduciary duty to be a claim in tort); *Zastrow v Journal Communications*, 718 NW (2d) 51 (Wis Sup Ct 2006) (finding breach of the duty of loyalty to be an intentional tort). But see *BKL v British Columbia*, 2001 BCCA 221, 197 DLR (4th) 431 (treating breach of fiduciary duty to be independent of a right of action in tort); *M(K) v M(H),* [1992] 3 SCR 6, 96 DLR (4th) 289 (also treating fiduciary duty as separate from tort).

[18] See *McKercher*, *supra* note 7 at paras 13–16, 61 (discussing the supervisory role of the courts, the principles applied in adjudicating the administration of justice, and the relationship between the courts and the law societies). See e.g. *Arkansas Valley State Bank v Phillips*, 2007 OK 78 at paras 17, 23, 171 P (3d) 899 [*Arkansas Valley*] (ability of a court to disqualify counsel for ethical breaches arises from concern for the integrity of the adversarial process); *Lowe v Experian*, 328 F Supp (2d) 1122 at 1125, 2004 US Dist LEXIS 15217 (D Kan 19 May 2004) [*Lowe*] (noting that the court can disqualify counsel to protect the integrity of the adversary, or judicial, process).

[19] See *McKercher*, *supra* note 7 ("[n]or are courts in their supervisory role bound by the letter of law society rules" at para 16). See e.g. *National Medical Enterprises Inc v Godbey*, 924 SW (2d) 123 at 132, 1996 Tex LEXIS 65 (Tex Sup Ct 6 June 1996) ("[t]he Texas Disciplinary Rules of Professional Conduct do not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations"). See also John F Sutton Jr, "Introduction to Conflicts of Interest Symposium:

### 1. Litigation

The motion for disqualification based on conflicts of interest most frequently arises in the context of litigation.[20] In this situation, the court is already seized of a dispute and is adjudicating the matter between the parties before it.[21] The court's power to disqualify counsel arises from its inherent power to control the matters before it—to ensure the fair administration of justice.[22] Because the court exercises jurisdiction over the administration of justice, traditional conflict of laws questions of jurisdiction and extraterritoriality need not be raised. This is because the question of jurisdiction over the parties will have already been resolved—the dispute is already ongoing before the court and thus the court will already have determined that it has the necessary personal jurisdiction over the parties (and therefore the lawyers) before it. The jurisdiction exercised in the disqualification motion is over the administration of justice itself (i.e., the fairness of the proceeding) and thus is not affected by extraterritoriality or choice of law concerns given the proceeding's inherent connections to the forum.[23] In this situation the disqualification of a lawyer or law firm occurs because the court is ensuring that the proceedings do not impugn the integrity of the legal system as a whole—the court is concerned with how it and the justice system is perceived in the eyes of the public. In comparison to the transactional situation discussed below, the protection of the client becomes almost a secondary focus. The primary motivation for the disqualification of the lawyer is the maintenance of fairness and integrity of the judicial process. Thus, in the context of litigation-based disqualification motions, no conflict of laws concerns regarding jurisdiction or extra-

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Ethics, Law, and Remedies" (1997) 16:3 Rev Litig 491 at 493–94 (analyzing the impact of codes of conduct on disqualification motions).

20 There is only one reported Canadian case where counsel was disqualified in a transactional setting and a proportionately similar paucity of reported cases in the United States. See *Chapters Inc v Davies, Ward & Beck LLP* (2001), 52 OR (3d) 566, 10 BLR (3d) 104 (CA) [*Chapters* cited to OR]; *Maritrans v Pepper, Hamilton & Scheetz*, 602 A (2d) 1277 (Pa Sup Ct 1992) [*Maritrans*]; *Hyman Companies, Inc v Brozost*, 119 F Supp (2d) 499 (Dist Ct Pa 2000) amending 964 F Supp 168 (ED Pa 1997) [*Hyman*]. The vast majority of cases where counsel are disqualified for conflicts of interest occur in the context of litigation.

21 See e.g. *McKercher*, *supra* note 7; *MacDonald Estate*, *supra* note 8; *Westinghouse*, *supra* note 13.

22 See sources cited at note 18.

23 This is because of the dual impact on the procedural nature involved in controlling the adversarial process and the exclusion of foreign law because it conflicts with the fundamental values of the forum. See Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 30, 224; *Boardwalk Regency Corp v Maalouf* (1992), 6 OR (3d) 737 at 748, 88 DLR (4th) 612; *Society of Lloyd's v Meinzer* (2001), 55 OR (3d) 688 at paras 48–49, 210 DLR (4th) 519 (Ont CA); *Loucks v Standard Oil Co*, 120 NE 198 at 202 (NY CA 1918) (requiring some violation of fundamental justice).

territorial application of laws are raised because ultimately the court will apply its own law (the *lex fori*) following the long established principle of private international law that "procedure" is governed by the law of the forum.[24]

### 2. Transactions

The situation is different in a transactional setting. Unlike the litigation context, the court is not already seized of a matter and as such the motion for disqualification must be brought before it by way of originating an application or complaint. The aggrieved client requests that the court disqualify the lawyer or law firm.[25] Because this is a new proceeding and not an interlocutory motion, the court must determine whether it may assume jurisdiction over the parties (i.e., the law firm or lawyer).[26] In most contexts this is easily done, as both parties are present in the jurisdiction;[27] however, in an inter-jurisdictional context, the court must satisfy

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[24] In this case, "procedure" is used to denote the control of the proceedings before the court itself. In many ways it is similar to how courts will apply their own rules of evidence as "procedure" despite evidence being its own substantive body of law. For a fuller discussion of the procedural versus substantive law in the context of the administration of justice, see Brandon Kain, "Solicitor-Client Privilege and the Conflict of Laws" (2011) 90:2 Can Bar Rev 243. See also Pitel & Rafferty, *supra* note 23 at 224–34 (discussing how the forum will always apply its own procedural law).

[25] See e.g. *Chapters*, *supra* note 20; *Maritrans*, *supra* note 20; *Hyman*, *supra* note 20.

[26] Assumed jurisdiction occurs when the court or adjudicative body reaches out and takes jurisdiction over a defendant who is not present in the forum State. (Throughout this article "State" is used to denote an international actor while "state" is used to denote the American political subdivision.) See Pitel & Rafferty, *supra* note 23 at 68–70; Nicholas Rafferty et al, eds, *Private International Law in Common Law Canada: Cases, Text and Materials*, 3rd ed (Toronto: Emond Montgomery, 2010) at 207–208; *Moran v Pyle National (Canada) Ltd*, [1975] 1 SCR 393 at 397, 43 DLR (3d) 239; *Muscutt v Courcelles* (2002), 60 OR (3d) 20, 213 DLR (4th) 577 (Ont CA) [*Muscutt*].

[27] This is known as territorial jurisdiction. See e.g. *Maharanee of Baroda v Wildenstein*, [1972] 2 QB 283, [1972] 2 All ER 689 (CA); *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1094, 76 DLR (4th) 256 [*Morguard*]; *R v Hape*, 2007 SCC 26 at para 59, [2007] 2 SCR 292 [*Hape*]; Rafferty et al, *supra* note 26 at 204; Pitel & Rafferty, *supra* note 23 at 53, 58–63; *Case of the SS "Lotus" (France v Turkey)* (1927), PCIJ (Ser A) No 10 at 20–23 [*Lotus*] (establishing territorial sovereignty and territorial jurisdiction as powers of the State in public international law); Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008) at 42, 55–74 (discussing territorial jurisdiction in general and also within the specific contexts of the United Kingdom and the United States). States can assert jurisdiction over individuals on a number of grounds: territorial jurisdiction; nationality jurisdiction; passive personality or nationality principle; protective or security jurisdiction; and universal jurisdiction: see Stephen Coughlan et al, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6 CJLT 29 at 31–32; Simon Zucker, "Extraterritoriality and Canadian Criminal Law" (1975) 17 Crim LQ 146 at 151–76; Ian

itself that the constitutional requirements for assumed jurisdiction are met.[28] Only then may it assume jurisdiction over the dispute.

The assumption of personal jurisdiction over the parties is important in the transactional context and ultimately has significant implications for the law it will apply to determine whether the law firm or lawyer must be disqualified. In the litigation context, the court focuses on the administration of justice for the matter before it, concerned with the public's perception of its fairness.[29] In the transactional context, the heart of the dispute is the relationship between the client and the law firm and so the primary concern becomes protecting the client from potential harm resulting from the lawyer's actions.[30] Most disqualification motions are governed by forum law (because no other law or jurisdiction is implicated), but in the situation where a lawyer is licensed in multiple jurisdictions, the court may have to determine which law governs the dispute.[31] In the litigation context the law of the forum dictates the substantive law applied because the court is concerned about the administration of justice—how it will be perceived in the eyes of the public if it allows this alleged conflict to continue.[32] In a transaction the court may find that the law of another jurisdiction should apply instead of the forum's law—a determination it is free to make because the focus of the inquiry is less on the appearance of fairness in the forum, and more on protection of the rights of

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Brownlie, *Principles of Public International Law*, 6th ed (New York: Oxford University Press, 2003) at 299–303.

28 See *Morguard*, *supra* note 27 at 1106 (requiring a "real and substantial connection" between the defendant and the forum); *Muscutt*, *supra* note 26 at 47–50 (holding that the rules for service *ex juris* did not confer jurisdiction on the courts); *United States Satellite Broadcasting, Inc v WIC Premium Television Ltd*, 2000 ABCA 233, [2001] 2 WWR 431 at paras 5–7 (Alta CA) (applying *Morguard* to determine jurisdiction); Pitel & Rafferty, *supra* note 23 at 68–83; *International Shoe Co v Washington*, 326 US 310 (1945), 66 S Ct 154 [*International Shoe*] (requiring minimum contact with the forum state so as not to offend traditional notions of fairness and thereby infringe on the due process clause); *J McIntyre Machinery Ltd v Nicastro*, 131 S Ct 2780, 180 L Ed (2d) 765 (2011); Hay, Borchers & Symeonides, *supra* note 17, § 5.10 at 359–64 (discussing specific jurisdiction).

29 See e.g. *McKercher*, *supra* note 7 at para 16 (concerned with the proper administration of justice); *MacDonald Estate*, *supra* note 8 at 1263 (requiring that justice be seen to be done and that the appearance of impropriety is enough to impugn the administration of justice); *Chapters*, *supra* note 20 at para 20 (considering the impact on the public's faith in the justice system); *Arkansas Valley*, *supra* note 18 at paras 17, 23 (concerned with the administration of justice); *Lowe*, *supra* note 18 at 1125 (concerned about maintaining credibility and fairness in the adversarial process).

30 See e.g. *Chapters*, *supra* note 20; *Maritrans*, *supra* note 20; *Hyman*, *supra* note 20.

31 See Pitel & Rafferty, *supra* note 23 at 206–209.

32 See sources cited at note 26.

the client.[33] Concerns over the administration of justice may still factor into the court's analysis,[34] but ultimately the court will likely look to the law governing the lawyer-client relationship, as this is the law at the heart of the dispute and therefore the mechanism by which the matter is brought before the court.[35]

For example, if a Michigan company chooses to file a disqualification application in an Ontario court because the company's former lawyer is now acting for an Ontario business in a transaction where the Ontario business takes an adverse legal position to the Michigan company, the Ontario court will face the application of two possible rules: the Michigan rule or the Ontario rule. The only way to determine which law should apply is through a choice of law rule[36]—a rule that this article argues should be informed in the transactional context by an evaluation of which jurisdiction has the closest connection to the relationship between the lawyer and the client.

### *B. Disciplinary Proceedings*

Law societies and state supreme courts may discipline a lawyer for breaching his or her duty to avoid conflicts of interest.[37] While prosecutions for conflicts of interest breaches are rare, the possibility of discipline provides a context in which to evaluate conflict of laws issues as they relate to professional discipline in general. In a professional discipline case, the disciplinary body is concerned with the actions of the individual lawyer,[38] and as such the questions of jurisdiction and extraterritoriality are different than those posed by the disqualification motion. In a disciplinary proceeding the disciplinary body applies the rules of professional conduct

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[33] See e.g. *Chapters*, *supra* note 20 at paras 29–37 (analyzing the nature of the relationship between Davies and Chapters); *Maritrans*, *supra* note 20 at 1286–88 (looking at the confidential information possessed by the lawyers and analyzing them using Pennsylvania law); *Hyman*, *supra* note 20 at 505 (looking at the elements of the relationship between Hyman and Brozost).

[34] See generally *Chapters*, *supra* note 20 at paras 18–23 (discussing the importance of protecting the client in maintaining the integrity of the administration of justice); *Maritrans*, *supra* note 20 at 1282.

[35] See sources cited at note 26.

[36] See Part III.C, *below*.

[37] See e.g. *Belzil*, *supra* note 14; *Langille*, *supra* note 14; *Banks*, *supra* note 14.

[38] See *McKercher*, *supra* note 7 at para 15. See also Woolley, *supra* note 1 at 12–13 (discussing lawyer discipline); Lerman & Schrag, *supra* note 1 at 75–86.

to determine whether the lawyer has violated the obligation to avoid conflicts of interest.[39]

It is trite law that an adjudicative tribunal may only determine the rights of a person subject to the tribunal's jurisdiction.[40] In the context of lawyer discipline, the jurisdiction of the law society or state supreme courts arises from the lawyer's law licence.[41] Thus, a Canadian law society may not discipline a lawyer licensed only in the United States for conduct occurring in Canada and vice versa.[42] However, when a lawyer is licensed in two jurisdictions (for example, Ontario and New York), the lawyer, by virtue of his or her membership, submits to the jurisdiction of both the law society and the state bar.[43] This creates a potential conflict of laws problem.

The dually licensed lawyer is now subject to two rules of professional conduct. One will always apply extraterritorially, proscribing the manner in which the lawyer must act.[44] For example, a lawyer who is licensed in both Ontario and New York is subject to the rules promulgated by the Law Society of Upper Canada (LSUC) and the New York State Court of Appeals (New York's highest court). If the lawyer lives in New York, then

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39 See e.g. *Belzil*, *supra* note 14; *Langille*, *supra* note 14; *Banks*, *supra* note 14.

40 See e.g. *Pennoyer v Neff*, 95 US 714, 1877 WL 18188 [*Pennoyer*] (where the court was not able to adjudicate a claim over the defendant because it had no jurisdiction over him).

41 This is a result of the reciprocal obligation imposed by the State in exchange for permitting the lawyer to practice law. See *Nottebohm Case (Liechtenstein v Guatemala)*, [1955] ICJ Rep 4, cited in Brownlie, *supra* note 27 at 375 (providing that "[n]ationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State" at 20–21). See also WE Beckett, "The Exercise of Criminal Jurisdiction over Foreigners" (1925) 6 Brit YB Intl L 44 ("feudalism subjected every man to the jurisdiction of the lord to whom he owed allegiance in return for the protection to which he was entitled. Jurisdiction was then founded upon allegiance" at 51). As a practical example, the application for enrolment as a member of the Law Society of Alberta contains a provision that may have the effect of consenting to the jurisdiction of the Law Society by virtue of a promise to perform obligations arising under the *Legal Profession Act*, RSA 2000, c L-8, the rules of the Law Society, and any code of conduct. See e.g. Law Society of Alberta, *Application for Admission as a Student-at-Law*, Form 2-1 at art 23 (June 2012), online: <www.lawsociety.ab.ca/docs/default-source/forms/form_2-1_jun2015.pdf>.

42 I refer only to the context of professional discipline, not to the criminal offense of unlicensed practice of law, which the State would be able to enforce on those practicing law without a local licence or permission by the State.

43 See the text accompanying note 38.

44 See e.g. *Legal Profession Act*, *supra* note 41, s 49 (permitting the law society to sanction members for their conduct regardless of whether the conduct occurs within Alberta).

the Ontario rules apply extraterritorially. Under textbook private and public international law, the laws of one nation may not apply within the borders of another nation.[45] To do so would infringe on the State sovereignty of the other nation.[46] Because of this principle, Canadian and American constitutional principles limit the ability of provinces and states to legislate extraterritorially.[47] Thus, it appears that Ontario would not be permitted to proscribe the conduct of the lawyer living in New York.

However, this is not the case. Nations do infringe on the sovereignty of other nations.[48] In most cases, so long as the infringement on sovereignty is slight, and is not an exercise of a nation's enforcement power, the ag-

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[45] One of these most fundamental principles of international law is that all states are equal. States exercise exclusive jurisdiction over their territory, and opposing States have a duty of non-intervention in the area of exclusive jurisdiction of other States. See Brownlie, *supra* note 27 at 287; *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 2(1); *Corfu Channel Case, Merits (United Kingdom v Albania)*, [1949] ICJ Rep 4 at 35; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*, [1986] ICJ Rep 14 at 106; *Island of Palmas Case (Netherlands v United States)* (1928), 2 RIAA 829 at 838–39 (Permanent Court of Arbitration); *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, 25th Sess, Supp No 18, UN Doc A/8082 (1970) 121 at 122; *Draft Declaration on Rights and Duties of States*, UNILC, 1st Sess, Annex, ILC Report, A/925 (1949), art 3; *Hape*, *supra* note 27 at paras 40–44.

[46] Given the fundamental rule of non-intervention, the Supreme Court's comments in *Morguard* regarding the importance of comity in the exercise of extraterritorial powers must be viewed with significant weight and authority. See *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 at 844, 84 DLR (4th) 438; *United States v Dynar*, [1997] 2 SCR 462 at 514, 517, 147 DLR (4th) 399; *R v Zingre*, [1981] 2 SCR 392 at 401, 127 DLR (3d) 223; *R v Libman*, [1985] 2 SCR 178 at 183–84, 21 DLR (4th) 174.

[47] See *Statute of Westminster, 1931* (UK), 22 George V, c 4, s 3, reprinted in RSC 1985, Appendix II, No 27 (stating that "the Parliament of a Dominion has full power to make laws having extra-territorial operation"); *Croft v Dunphy* (1932), 59 CCC 141 at 144, [1933] 1 DLR 225 (PC); *Hunt v T&N PLC*, [1993] 4 SCR 289 at 328, 109 DLR (4th) 16 ("Parliament is expressly permitted by our Constitution to legislate with international extraterritorial effect"); Zucker, *supra* note 27 at 146, 150; Stephen Coughlan et al, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6 CJLT 29 at 33. See also *Edgar v MITE Corp*, 102 S Ct 2629 (1982), 73 L Ed (2d) 269 (striking down an Illinois statute that had more than an incidental effect outside of the state); *Healy v Beer Institute*, 109 S Ct 2491 (1989), 105 L Ed (2d) 275 (putting much weight on the analysis as to whether the "practical effect ... is to control conduct beyond the boundaries of the State" at 2499); Katherine Florey, "State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation" (2009) 84:3 Notre Dame L Rev 1057 at 1084–87.

[48] See e.g. *Foreign Corrupt Practices Act*, 15 USC §§ 78dd-1 (1977) (expanding the reach to any transaction with a United States connection); *Criminal Code*, RSC 1985, c C-46, s 7 ("commits an act or omission in or outside Canada ... shall be deemed to have committed that act or omission in Canada").

grieved State will not be offended by the infringement.[49] Thus, in reality, and despite the constitutional and international law limitations on extraterritorial application of laws, provinces and states are able to regulate the conduct of member lawyers outside of their borders. This is permitted because the enforcement of the proscriptive rules occurs within the forum State (of which the lawyer is a member) and the adjudication affects only the licence granted by that State. Thus, the LSUC is permitted to discipline the dually licensed lawyer for her New York conduct, because the disciplinary proceeding only affects her Ontario licence.[50] While this addresses the questions of jurisdiction and extraterritoriality, a problem arises if the two applicable rules are in conflict with or diverge from each other.[51] The lawyer in this situation faces a dilemma: compliance with one rule means breaching the other. Without further guidance the lawyer is uncertain of how to act and which obligations to uphold. Choice of law rules provide a measure of certainty for dually licensed lawyers, helping to identify which rules will apply in a disciplinary proceeding.

## II. The Multijurisdictional Dilemma for Conflicts of Interest

While determining when conflicts arise may be difficult for the individual lawyer (and is often the focal point discussed by academic commentary on conflicts of interest),[52] the difficulties increase when it comes to performing conflicts of interest analysis for law firms with transborder or international practices.[53] As the practice of law becomes increasingly in-

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49 In the case of law society disciplinary hearings or disqualification motions, the enforcement is carried out within the State's own territory, so the risk of offending another State is lessened. See *Hape*, *supra* note 27 at para 64.

50 See the text accompanying notes 38–41.

51 Compare Alta CPC, *supra* note 9, ch 2.03(1), 2.03(3) (not permitting disclosure of confidential information in the case of imminent threat of financial harm) with New Jersey Supreme Court, *New Jersey Disciplinary Rules of Professional Conduct*, ch 1.6 (requiring disclosure of confidential information in order to prevent imminent and serious financial harm).

52 See e.g. Freedman & Smith, *supra* note 1 at 269–70 (analyzing *United States v Schwarz*, 283 F (3d) 76 (2d Cir 2002)); Woolley et al, *supra* note 1 at 307 (posing an analytical problem involving a single lawyer based on *Greater Vancouver (Regional District) v Melville*, 2007 BCCA 410, [2007] 9 WWR 451, leave to appeal to SCC refused, 32294 (24 January 2008).

53 This is because of the imputation of knowledge to other members of the firm, the fact that the firm is potentially operating in many parts of the country or the world, and to the continuing globalization of the modern marketplace. See John S Dzienkowski, "Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims" (1995) 36 S Tex L Rev 967 at 996–97 (identifying the concerns of international firms with conflicts of interest). Most major law firms have now incorpo-

ternational, and as law firms continue to expand, open new offices, merge with other law firms, and most importantly, cross jurisdictional borders, broader and more difficult conflicts of interest issues arise.[54] When lawyers and law firms enter into new jurisdictions, they become subject to the new forum's conflicts of interest rules.[55] These rules may be substantially different than the rules of their home jurisdiction and have the potential to create serious problems—disqualification as counsel, disciplinary action, or civil suits.[56]

This section explores the rules for both current and past conflicts as applied in Canada and the United States. It notes that despite seemingly stark differences between the concurrent conflicts rules, the Canadian and American rules are substantially in agreement. The rules regarding past clients are potentially more disparate depending on whether the individual state in question has adopted the 2009 amendments to ABA Model Rule 1.10.

### *A. Current Clients—Substantial Uniformity*

Both Canada and the United States generally prohibit representing two clients with adverse interests at the same time.[57] This comes as no

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rated an ethical infrastructure with a devoted ethics team or ethics advisor to help deal with these issues. See e.g. Elizabeth Chambliss & David B Wilkins, "The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms" (2002) 44 Ariz L Rev 559; Elizabeth Chambliss & David B Wilkins, "Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting" (2002) 30:3 Hofstra L Rev 691.

54 See *MacDonald Estate*, *supra* note 8 at 1243–44 (noting the impact of mergers and the movement of lawyers as creating conflicts of interest problems); Woolley et al, *supra* note 1 at 276.

55 This is because of the forum's ability to assert personal jurisdiction over the individual lawyer and the firm by virtue of their presence in the forum State. The basis of this jurisdiction derives from an application of the State's territorial sovereignty. See *Morguard*, *supra* note 27 at 1104 (preserving the traditional grounds of jurisdiction and providing that jurisdiction is validly asserted when the defendant is within the jurisdiction at the time of the action); *Incorporated Broadcasters Ltd v Canwest Global Communications Corp* (2003), 63 OR (3d) 431 at para 29, 223 DLR (4th) 627 (CA) (stating that the real and substantial connection test is used to extend jurisdiction to those outside of the province and it is not necessary for defendants who are present in the jurisdiction); *Burnham v Superior Court of California*, 495 US 604, 110 S Ct 2105 (1990) (where *in personam* jurisdiction was found based on service of the defendant in the forum); *Barrell v Benjamin*, 15 Mass 354 at 358, 1819 WL 1408; *Restatement (Second) of Conflict of Laws* § 28 (1971) [*Conflict of Laws*].

56 See sources cited at notes 12–14.

57 See e.g. Canadian Bar Association, *Code of Professional Conduct*, Ottawa: CBA, 2009, ch V, s 1 [CBA CPC]; FLSC CPC, *supra* note 8, ch 3.4-1; Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: LSUC, 2000, ch 2.04(2) [LSUC RPC]; Alta CPC,

surprise given that such a representation would cause a lawyer to breach his or her fiduciary duty to one if not both of the clients.[58] On a first reading, it appears that the Canadian and American rules diverge, but a deeper analysis of the two rules indicates that in application, the rules are substantially the same.

The Canadian view on the prohibition on representing concurrent clients with adverse interests is expressed in the cases of *R v. Neil*, *Strother v. 3464920 Canada Inc.*, and *McKercher v. Canadian National Railway*. The Supreme Court of Canada identified a bright line rule, which states that

> a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client—*even if the two mandates are unrelated*—unless both clients consent after receiving full disclosure ... and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.[59]

This rule has been incorporated into the various provincial codes of conduct as well as into the Federation of Law Societies of Canada's Model Rules of Professional conduct.[60]

The American rule regarding concurrent client conflicts is found in ABA Model Rule 1.7 and section 128 of the Restatement of the Law Gov-

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*supra* note 9, ch 2.04(2); American Bar Association, *Model Rules of Professional Conduct*, Chicago: ABA, 2013, ch 1.7 [ABA Model Rules]; NY RPC, *supra* note 10, ch 1.7; Supreme Court of Michigan, *Michigan Rules of Professional Conduct*, Lansing, MI: State Bar of Michigan, 2013, ch 1.7 [Mich RPC]; Tex RPC, *supra* note 10, ch 1.06. See also Woolley, *supra* note 1 at 233, 257–59; Lerman & Schrag, *supra* note 1 at 359–62; Freedman & Smith, *supra* note 1 at 259–60.

58 See *Neil*, *supra* note 8 at para 24; *Ramrakha v Zinner* (1994), 157 AR 279 at para 73, 24 Alta LR (3d) 240 (stating "[a] solicitor is in a fiduciary relationship to his client and must avoid situations where he has, or potentially may, develop a conflict of interests ... The logic behind this is cogent in that a solicitor must be able to provide his client with complete and undivided loyalty, dedication, full disclosure, and good faith, all of which may be jeopardized if more than one interest is represented"); *TC Theatre Corp v Warner Bros Pictures*, 113 F Supp 265 at 268 (D NY 1953) [*TC Theatre*]; Woolley et al, *supra* note 1 at 275 (identifying the root of conflicts issues in the duty of loyalty). See generally Michael K McChrystal, "Lawyers and Loyalty" (1992) 33 Wm & Mary L Rev 367; Charles W Wolfram, *Modern Legal Ethics* (St Paul, Minn: West, 1986) at 146.

59 *Neil*, *supra* note 8 at para 29 [emphasis in original].

60 See CBA CPC, *supra* note 57, ch V, rr 1–2; FLSC CPC, *supra* note 8, ch 3.4-1 comment 6; Alta CPC, *supra* note 9, ch 2.04(1), commentary; The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, Vancouver: LSBC, 2013, ch 3.4-1, commentaries 6–7, ch 3.4-2, 3.4-4 [LSBC CPC]; LSUC RPC, supra note 57, ch 2.04(1), (3). The Federation of Law Societies revised its Model Code of Professional Conduct, effective 1 October 2014, to reflect more fully the Supreme Court's decision in *McKercher*.

erning Lawyers.[61] Both provide that there is a concurrent conflict of interest if:

> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.[62]

On first impression it appears that there are distinct differences between the two rules—most notably the inclusion of "immediate" in the Canadian rule, and the absence of an explicit material limitation as seen in section 128 of the Restatement.[63] However, in reality these two rules are virtually identical. First, what impact does the inclusion of "immediate" have on the bright line rule? While the Supreme Court of Canada has included it in the test, the Court has provided no context as to how it is to be interpreted or applied. It is possible that the inclusion of "immediate" in the test is superfluous, as any conflict of interest between two current clients cannot be anything but immediate.[64] Consider the following example: Sam is representing and has an ongoing retainer with Company A. Company B approaches Sam about doing some legal work for them that is directly adverse to, and potentially undermining the legal work Sam is performing for Company A. Because Sam has an ongoing retainer with Company A, any adverse work that Sam does by Company B would be immediately in conflict with Company A's legal position. It would then fall within the realm of the concurrent client rule articulated in *Neil*.[65] Moreover, if Sam's retainer with Company A was only for a fixed period of time, and has expired by the time Company B approaches Sam to do adverse legal work, Sam's conduct is governed by the rule regarding conflicts be-

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61 ABA Model Rules, *supra* note 57, ch 1.7; *Restatement (Third) of the Law Governing Lawyers* § 128 (2000) [*Law Governing Lawyers*]. I have limited this to the civil context, but the rules are largely the same for the criminal and non-litigation contexts: see e.g. *ibid*, §§ 129–31.

62 ABA Model Rules, *supra* note 57, ch 1.7.

63 Compare *Neil*, *supra* note 8 at para 29, Alta CPC, *supra* note 9, ch 2.04(1), commentary, and FLSC CPC, *supra* note 8, ch 3.4-1 comment 6 with *Law Governing Lawyers*, *supra* note 61, § 128, and ABA Model Rules, *supra* note 57, ch 1.7.

64 In *McKercher*, the Supreme Court of Canada seemed to make a point of deliberately including "immediate" within the rule (see *ibid* at paras 26, 33, 41); however, the Court provided no further guidance. Some academics have suggested that it may have been included to address speculative conflicts, but this seems improbable, as a speculative conflict would likely be immaterial. See UCalgary Law, "A Panel Discussion in Legal Ethics: After McKercher" (24 March 2014), online: YouTube <www.youtube.com/watch?v=lQq0QC_QIDo> at 00h:40m:00s, 00h:50m:30s.

65 See *supra* note 8 at para 29.

tween past and present clients.[66] Thus, in any situation of concurrent retainers, any adverse legal positions between two clients will result in an immediate conflict.

Second, in *Neil*, Justice Binnie adopted the Restatement's definition of "conflict," which applies when the bright line rule is inapplicable.[67] In doing so he incorporated the "material limitation" concept from § 128 of the Restatement and Model Rule 1.7 into the Canadian law on conflicts of interest. While the Court's articulation in *McKercher* uses the words "substantial risk"[68] and ABA Model Rule 1.7 uses "significant risk," it is unlikely that there is a true distinction between these two adjectives.[69] Moreover, the Restatement uses "substantial risk" to evaluate conflicts of interest—yet another indication of the similarities between the two rules.[70]

Third, Comment 6 to ABA Model Rule 1.7 clearly indicates that the directly adverse prohibition includes matters that are wholly unrelated to each other, thereby matching yet another perceived discrepancy between the two articulations of the rule.[71] The Supreme Court of Canada has also confirmed that the bright line rule only applies to a client's "legal" interests,[72] not to its economic interests, a distinction echoed in Comment 6 to ABA Model Rule 1.7.[73]

Thus, it appears that the Canadian and American rules are in agreement for concurrent client conflicts. It must be noted, however, that the recent decision of the Supreme Court of Canada in *McKercher* has confirmed an exception regarding "professional litigants" that is not currently present in the American rule:[74] "the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law

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66 See below, Part III.A.2.

67 See *supra* note 8 at para 31. See also *McKercher*, *supra* note 7 at para 8 (detailing an application of the substantial risk test when the bright line rule is inapplicable). See generally *Law Governing Lawyers*, *supra* note 61, § 121.

68 *Supra* note 7 at para 38.

69 "Substantial" is defined as being "of real importance or value" and "significant" as being "of great importance or consequence": see *Canadian Oxford Dictionary*, 2nd ed (Toronto: Oxford University Press, 2004) *sub verbis* "significant", "substantial". There is negligible difference between these two definitions.

70 See *Law Governing Lawyers*, *supra* note 61, § 128.

71 See ABA Model Rules, *supra* note 57, ch 1.7, comment 6.

72 *McKercher*, *supra* note 7 at para 35 [emphasis omitted].

73 See FLSC CPC, *supra* note 8, ch 3.4-1, commentary; ABA Model Rules, *supra* note 57, ch 1.7, comment 6.

74 See *McKercher*, *supra* note 7 at para 37 (identifying governments and chartered banks as possible professional litigants).

firm will not act against it in unrelated matters."[75] The Court noted that only exceptional cases will fall within the professional litigants category, and courts must consider them on a case-by-case basis.[76] It itself offered no example of the sort of case that would do so and concluded that, on the facts, the exception was not applicable. It did so despite the fact that the applicant, Canadian National Railway, had numerous files with numerous lawyers and had been viewed as a professional litigant by the Saskatchewan Court of Appeal. Thus, while the professional litigants exception exists as an area of divergence between the Canadian and American rules, and accordingly, creates a possible area of conflicting obligations, the nature and extent of this divergence is not especially clear and seems unlikely to be particularly significant. As a consequence, and despite this one area of divergence, the two sets of rules on concurrent client conflicts are substantially the same.[77]

### *B. Past Clients: The Canadian Rule*—MacDonald Estate v. Martin

In *MacDonald Estate v. Martin*, the Supreme Court established the rules governing the conflicts of interest analysis for past clients or past matters. Its approach has been incorporated into the various professional codes of conduct.[78] In *MacDonald Estate*, Justice Sopinka held that Canadian courts should apply a test based upon the possibility of mischief (i.e., the potential misuse of confidential client information) and traced the rule to the duty of loyalty and the idea that "the public represented by the reasonably informed person would [need to] be satisfied that no use of confidential information would occur."[79] Thus, when evaluating potential conflicts of interest regarding past clients, if

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[75] *Ibid*. While the court quotes from *Neil* and uses the language of implied consent, some ethics scholars believe that *McKercher* has done away with the notion of implied consent in the context of professional litigants and removed them from the protections of the bright line rule altogether. See Malcolm Mercer, "A Bright Line Rule of Limited Scope", *Slaw* (11 September 2013), online: <www.slaw.ca/2013/09/11/a-bright-line-rule-of-limited-scope/>. But see FLSC CPC, *supra* note 8, ch 3.4-2, comment 6 (referring to implied client conflicts).

[76] See *McKercher*, *supra* note 7 at para 37.

[77] As of the time of writing the author is not aware of any major decisions in either Canada or the United States that would have reached a different outcome had they been decided in the other country.

[78] See Alta CPC, *supra* note 9, ch 2.04(1), 2.04(4)–(9), commentaries; LSUC RPC, *supra* note 57, ch 2.04(1), (3)–(5), 2.05, commentaries; LSBC CPC, *supra* note 57, ch 3.4-1, 3.4-10–4-11, 3.4-17–4-26, commentaries; FLSC CPC, *supra* note 8, ch 3.4-1, 10–11, 17–20, 23–24, 26, commentaries; CBA CPC, *supra* note 57, ch V, commentaries 4, 12–15, 20–40.

[79] *MacDonald Estate*, *supra* note 8 at 1260.

> there exist[s] a previous relationship which is sufficiently related to the [new] retainer ... the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant.[80]

A rebuttable presumption is created, and it is for the lawyer (or law firm) to prove "on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the 'tainted' lawyer to the member or members of the firm who are engaged against the former client."[81]

In sum, in Canada courts and law societies presume that confidential knowledge will be shared with other members of the firm; however, firms may use institutional mechanisms such as ethical screens to rebut the presumption of sharing confidential client information.[82] While each of the law societies, as noted, have incorporated the rule in *McDonald Estate* into their respective codes of conduct,[83] the Federation of Law Societies Model Code has perhaps the most comprehensive overview of the *MacDonald Estate* rule. The Model Code also discusses the rule's implications for law firms hoping to use institutional mechanisms to avoid imputation of confidential information.[84] The Model Code's guidelines call for a purposive analysis in determining whether the institutional mechanisms are sufficient.[85] At the heart of the investigation lies the determination of whether the confidential client information has been protected and isolated from those who might be in a position to improperly use it. These guidelines include prophylactic suggestions which include: physically iso-

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[80] *Ibid*. This presumption operates assuming that no client consent has been obtained. If written informed consent is obtained then the rule does not apply and the conflict is waived. See Woolley, *supra* note 1 at 227–31 (discussing informed consent). Despite having a fused bar, many Canadian lawyers preserve the distinction between barristers and solicitors, as opposed to their American counterparts, which use the singular term attorney regardless of whether the lawyer is a litigator or a transactional attorney. Any lawyer called to the bar in Canada is capable of acting in both capacities. For example, candidates in Ontario will write both a barristers' exam and a solicitors' exam. Licensing requires passing both exams. See Law Society of Upper Canada, *Licensing Examinations,* online: <www.lsuc.on.ca/LicensingExaminations/>.

[81] *Macdonald Estate*, *supra* note 8 at 1262.

[82] See *ibid*.

[83] See Alta CPC, *supra* note 9, ch 2.04(1), 2.04(4)–(9), commentaries; LSUC RPC, *supra* note 57, ch 2.04(1), (3)–(5), 2.05, commentaries; LSBC CPC, *supra* note 57, ch 3.4-1, 3.4-10–4-11, 3.4-17–4-26, commentaries; FLSC CPC, *supra* note 8, ch 3.4-1, 3.4-10–4-11, 3.4-17–4-20, 3.4-23–4.24, 3.4-26, commentaries; CBA CPC, *supra* note 57, ch V, commentaries 4, 12–15, 20–40.

[84] See FLSC CPC, *supra* note 8, ch 3.4-1, 3.4-10–4-11, 3.4-17–4-20, 3.4-23–4.24, 3.4-26, commentaries.

[85] See *ibid*.

lating and restricting the tainted lawyer's access to files; not discussing the new matter with those who are not directly involved; physically placing the tainted lawyer and the lawyer's work station in a different area than the lawyers working on the new matter; using different associates and support staff; signing affidavits and undertakings; and distributing the matter if possible to a different office.[86]

### *C. Past Clients: The U.S. Rules–Imputation and the Onset of ABA Model Rule 1.10*

The rules regarding past client conflicts of interest in the United States are much more disparate than the Canadian rule.[87] This is because not every state has adopted the current version of ABA Model Rule 1.10; certain states use the pre-2009 version of ABA Model Rule 1.10 (or the state's functional equivalent).[88] Thus two scenarios arise: states that have adopted current ABA Model Rule 1.10 and states that employ the "historical" American past conflicts of interest rule.[89]

Current ABA Model Rule 1.10 (and the courts that follow it) allows firms to avoid the imputation of confidential information to other lawyers within a firm so long as the firm has preemptively employed screening mechanisms to ensure that the tainted lawyer does not share or have access to confidential client information that would result in a conflict of interest.[90] This article refers to this rule as the "presumptive rule." In this

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86 See *ibid*, ch 3.4-26, commentary.

87 Compare Del RPC, *supra* note 9, ch 1.10 with Tex RPC, *supra* note 10, ch 1.09; NY RPC, *supra* note 10, ch 1.10, and *Macdonald Estate*, *supra* note 8 at 1260.

88 See American Bar Association, "State Adoption of Lateral Screening Rule" (25 July 2012), online: <www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.authcheckdam.pdf> [ABA Adoption Chart]; American Bar Association, CPR Policy Implementation Committee, "Variations of the ABA Model Rules of Professional Conduct: Rule 1.10: Imputation of Conflicts of Interest: General Rule" (21 October 2014), online: <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_10_imputation_of_conflicts_of_interest_general_rule.html> [ABA Rule 1.10 Variations Table] (providing a state-by-state survey of the rules regarding the imputation of knowledge in cases of conflicts of interest).

89 See e.g. *Doe v Perry Community School Dist*, 650 NW (2d) 594 (Iowa Sup Ct 2002); *Kassis v Teacher's Ins & Annuity Ass'n*, 717 NE (2d) 674, 93 NY (2d) 611 (NY App Ct 1999); *Atasi Corp v Seagate Technology*, 847 F (2d) 826 at 831–32, 56 USLW 2734 (Fed Cir 1988). See generally Lerman & Schrag, *supra* note 1 at 474–80 (discussing the historical imputation rule); Hazard Jr et al, *supra* note 14 at 472–91; Freedman & Smith, *supra* note 1 at 278.

90 See e.g. Delaware State Bar Association Committee on Professional Ethics, "Opinion 1986-1", online: <media.dsba.org/ethics/pdfs/1986-1.pdf> [Delaware Opinion 1986-1]; *Nemours Foundation v Gilbane, Aetna, Federal Ins*, 632 F Supp 418, 54 USLW 2582 (D

situation, the Canadian and American rules are harmonious.[91] Both result in a rebuttable presumption of sharing confidential information unless the law firm can establish that sufficient mechanisms have been implemented to protect the confidential information prior to the creation of the conflict of interest.[92] Thus, if the offices of firms involve jurisdictions that apply the "presumption" found in *MacDonald Estate* and current ABA Model Rule 1.10 (for example, Canada, Delaware, and Michigan), no problem arises with respect to competing conflicts of interest rules.[93]

However, not all states have adopted the 2009 amendment to ABA Model Rule 1.10.[94] Historically, American courts (and the ABA Model Rules) have adopted a strict application of partnership and agency law to impute the knowledge of one lawyer to the other lawyers in the firm.[95]

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Del 1986) (permitting screens to be used to avoid disqualification) [*Nemours*]; William Freivogel, "Changing Firms: Screening: Part II", *Freivogel on Conflicts: A Guide to Conflicts of Interest for Lawyers*, online: <www.freivogelonconflicts.com/changingfirmsscreeningpartii.html>, citing Pennsylvania Bar Association Ethics Opinion 2005-140 (2005); *Dworkin v General Motors Corp*, 906 F Supp 273 (ED Pa 1995) (declining to disqualify law firm because the firm had implemented screening mechanisms to prevent the sharing of confidential information by the tainted lawyer) [*Dworkin*]. See also Freedman & Smith, *supra* note 1 at 278.

91 Compare *MacDonald Estate*, *supra* note 8 at 1260 with ABA Model Rules, *supra* note 57, ch 1.10.

92 See *MacDonald Estate*, *supra* note 8 at 1260–61. See also *Nemours*, *supra* note 90 at 429 (avoiding the presumption of imputed knowledge); *Dworkin*, *supra* note 90 at 281 (allowing screens to rebut the presumption of shared information).

93 See ABA Adoption Chart, *supra* note 88; ABA Rule 1.10 Variations Table, *supra* note 88; Del RPC, *supra* note 9, ch 1.10; Delaware Opinion 1986-1, *supra* note 90; *Nemours*, *supra* note 90; Mich RPC, *supra* note 57, ch 1.10; State Bar of Michigan, "Ethics Opinion R-4" (22 September 1989), online: <www.michbar.org/opinions/ethics/numbered_opinions?OpinionID=853&Type=6&Index=A>; *National Union Fire Ins Co v Alticor*, 466 F (3d) 456 (6th Cir 2006), modified by 472 F (3d) 436 (6th Cir 2007); *MacDonald Estate*, *supra* note 8 at 1260–61; FLSC CPC, *supra* note 8, ch 3.4-10–4-11, 3.4-20, 3.4-23–4-24, 3.4-26.

94 Currently only fourteen states have adopted a substantively similar provision to Model Rule 1.10. A further thirteen have adopted a rule that to some extent allows for lateral screening. See ABA Adoption Chart, *supra* note 88; ABA Rule 1.10 Variations Table, *supra* note 88. See e.g. *Applied Concepts, Inc v Superior Court*, 2002 Cal App Unpub LEXIS 603 (2002); *Henderson v Floyd*, 891 SW (2d) 252 (Sup Ct Tex 1995).

95 See e.g. *Restatement (Third) of Agency* § 5.02 (2006) [*Agency*] (providing that knowledge received by the agent is imputed to the principal); *Revised Uniform Partnership Act* §§ 102(f), 301 (1997) (providing that a partner is an agent of the partnership and that knowledge of the partner is imputed to the partnership); *TC Theatre*, *supra* note 58; *Westinghouse*, *supra* note 13; *Fund of Funds, Ltd v Arthur Andersen & Co*, 567 F (2d) 225 (2d Cir 1977). Interestingly, Justice Cory advocated for this position in his dissenting opinion in *MacDonald Estate*. The decision was ultimately decided on a 4–3 majority on this point. See *MacDonald Estate*, *supra* note 8 at 1268–71 (Cory J, dissenting,

This rule, sometimes referred to as the "substantial relationship" test,[96] disqualifies the entire firm from representing a client based on the joining of a single tainted lawyer, regardless of whether the lawyer works in the same office or in a satellite office halfway across the world.[97] This article will refer to this rule as the "historical rule."

Interestingly, the Supreme Court of Canada expressly rejected the historical American past conflicts rule as being too rigid in its *MacDonald Estate* decision.[98] The Court was worried that situations might arise where it could conclusively be established that no relevant confidential information would be disclosed.[99] This was especially worrisome given the modern tendency for lawyers to move from firm to firm and for law firms to grow both in regard to the number of lawyers and the number of domestic and international offices.[100] Accordingly, for firms with offices in jurisdictions that apply the historical rule (for example, California, New York, and Texas), and other offices in jurisdictions that apply the presumptive rule (for example, Canada, Delaware, and Michigan), the firm will face the decision of which conflicts of interest rule should be applied.[101]

## III. The Conflict of Laws Problem and Currently Proposed Solutions

As Part II illustrates, there are a number of situations where the American and Canadian rules on conflicts of interest may be in opposition. The question that inevitably arises is, which one should be applied? While this issue has been the subject of debate, much of the commentary has focused either solely on the conflict of laws issues or the issues in the law govern-

worrying that this rule was too focused on large law firms when the majority of lawyers practice solo or in small firms).

96 *TC Theatre*, *supra* note 58 at 268; *Analytica, Inc v NPD Research, Inc*, 708 F (2d) 1263 at 1267 (7th Cir 1983) [*Analytica*].

97 See generally *TC Theatre*, *supra* note 58; *EF Hutton & Company, Inc v Brown*, 305 F Supp 371 (SD Tex 1969); *Analytica*, *supra* note 96; Lerman & Schrag, *supra* note 1 at 474–80 (discussing the historical imputation rule); Hazard Jr et al, *supra* note 14 at 472–91; Freedman & Smith, *supra* note 1 at 278.

98 *Supra* note 8 at 1260–61. But see *ibid* at 1268 (Cory J, dissenting, expressly agreeing with *Analytica*).

99 See *MacDonald Estate*, *supra* note 8 at 1260–61.

100 See sources cited at notes 2, 4.

101 Compare State Bar of California, *California Rules of Professional Conduct*, San Francisco: State Bar of California, 2014, ch 3-310; NY RPC, *supra* note 10, ch 1.10; Tex RPC, *supra* note 10, ch 1.09 with Del RPC, *supra* note 9, ch 1.10; Mich RPC, *supra* note 57, ch 1.10; *MacDonald Estate*, *supra* note 8 at 1260–61.

ing lawyers.[102] This creates a problem as consideration of both substantive areas dramatically impacts the available solutions to resolving the competing rules. This part first identifies some of the currently proposed solutions that exist outside of the realm of conflict of laws: uniform lawyer regulation and double deontology. It then looks at the application of existing choice of law rules. Uniform lawyer regulation is problematic because it does not address the broader scope of the law governing lawyers and does not address the situation internationally. Double deontology and existing choice of law rules are problematic because they do not recognize the unique problems implicated by the law governing lawyers (i.e., that the relationship between a lawyer and client is neither one of pure agency nor pure contract). Given these unsatisfactory solutions, this article concludes that a new framework must be developed.

### *A. Uniform Regulation*

The resolution of the variances between ethical rules of various jurisdictions has been the subject of considerable academic commentary.[103] Many scholars, particularly in the United States, have advocated for either a blanket adoption of the ABA Model Rules,[104] or the creation of a federal regulator or federal ethics code for lawyers.[105] Canada has done this with a fair amount of success through the efforts of the Federation of

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[102] See e.g. Eli Wald, "Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age" (2011) 48:1 San Diego L Rev 489 (focusing on federal ethics solutions); Joanne Pitulla, "Mixed Messages: When Jurisdictional Rules Collide, Lawyers Get Caught in the Middle" (1992) 78:2 ABA J 93 (discussing a harsh choice of law rule); George A Riemer, "Tri-State Practice: Charting a Course for Ethical Practice Under the New Reciprocity Admission Rule", *Oregon State Bar Bulletin* (February/March 2002), online: <www.osbar.org/publications/bulletin/02mar/barcounsel.htm> (looking at limited choice of law rules).

[103] See e.g. J Mark Little, "The Choice of Rules Clause: A Solution to the Choice of Law Problem in Ethics Proceedings", Note, (2010) 88:4 Tex L Rev 855 at 871ff; Arvid E Roach II, "The Virtues of Clarity: The ABA's New Choice of Law Rule for Legal Ethics" (1995) 36:3 S Tex L Rev 907 at 921–27; Jeffrey L Rensberger, "Jurisdiction, Choice of Law, and the Multistate Attorney" (1995) 36:3 S Tex L Rev 799 at 840–48.

[104] See Jonathan M Weiss, "The Need for Federal Solutions to Interstate and International Ethics Conflicts: A Case Study in Confidentiality" (2012) 11:1 J Intl Business & L 1 at 31; Roach, *supra* note 103 at 922; Susanna Felleman, "Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct", Note, (1995) 95:6 Colum L Rev 1500 at 1529 (proposing uniform state adoption of a reformed version of the ABA's choice of law rule).

[105] See Weiss, *supra* note 104 at 37; Geoffrey J Ritts, "Professional Responsibility and the Conflict of Laws" (1993) 18 J Leg Prof 17 at 84. See generally Fred C Zacharias, "Federalizing Legal Ethics" (1994) 73 Tex L Rev 335.

Law Societies.[106] In theory, both of these solutions address the disparity between various states' ethical rules; in the United States, however, the practical limitations of implementing either solution across all fifty states are staggering.[107] Additionally, neither solution addresses the problem on an international level, nor is applicable to the wider body of obligations contained in the law governing lawyers. Even if all states adopted the ABA Model Rules, or a federal regulator were created, there would still exist the problem of differing rules and laws regarding lawyers' professional responsibilities internationally.[108] It is possible that an international organization to govern lawyers globally could be created,[109] or that countries could sign onto a multilateral treaty similar in scope and purpose to the *Agency Convention*[110] produced by the Hague Conference of Private International law,[111] but in reality the solution is much more likely to be found in examining where the lawyer-client relationship fits within the choice of law inquiry.

### *B. Double Deontology*

Another possible solution outside of the scope of conflict of laws is what some courts and some academic commentators have termed the double deontology rule—that, where applicable, the harsher rule should

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106 See e.g. FLSC CPC, *supra* note 8. Admittedly, with only ten provinces, three territories, and a single unitary court structure, this is a much easier to achieve in Canada than a similar result would be in the United States.

107 See Weiss, *supra* note 104 at 31 (stating that the remote chances of uniform adoption make its chances as a solution laughable); Roach, *supra* note 103 at 910 (noting the substantial lack of uniformity in the adoption of the ABA Model Rules); H Geoffrey Moulton, Jr, "Federalism and Choice of Law in the Regulation of Legal Ethics" (1997) 82:1 Minn L Rev 73 at 162 (arguing that the obstacles to reaching an agreement are "close to insurmountable").

108 See e.g. Weiss, *supra* note 104 at 41–47.

109 Some progress on this front has been made already. See generally Laurel S Terry, "An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the *CCBE Code of Conduct*" (1993) 7:1 Geo J Leg Ethics 1; Laurel S Terry, "An Introduction to the European Community's Legal Ethics Code Part II: Applying the *CCBE Code of Conduct*" (1993) 7:2 Geo J Leg Ethics 345.

110 Hague Conference on Private International Law, *Convention on the Law Applicable to Agency* (concluded 14 March 1978), online: <www.hcch.net/index_en.php?act=conventions.text&cid=89> [*Agency Convention*].

111 See the text accompanying note 135, *infra*. See also Laurel S Terry, "An Introduction to Cross-Border Practice ABA-Style: The Agreement between the ABA and the Brussels Bars Associations" (1998 Symposium Issue) Professional Lawyer 17 (while not an international treaty, this agreement between the ABA and the Brussels Bars Associations could serve as a model for bilateral or multilateral treaties).

be followed.[112] The double deontology rule has two strong benefits: (1) it ensures compliance with both legal rules; and (2) it provides a much greater degree of certainty in the application of the two legal rules.[113] The double deontology rule avoids the need for a choice of law analysis. However, in the context of conflicts of interest, the application of double deontology leads to the disqualification of a firm in many more situations than the application of the presumptive rule.[114] This is hardly desirable in an age of globalization, sophisticated international corporate clients, and large international law firms.[115] The list of lawyers with experience and expertise to advise these sophisticated clients in international deals is extremely small. Forcing lawyers to comply with the strictest conflicts of interest rules effectively eliminates the choice of counsel for these types of clients, as the pool of lawyers from which to draw is already small.[116] Applying the strictest of conflicts rules prevents clients from obtaining the legal advice they need. Additionally, because of the number of practitioners involved in large mega-transactions or large litigations is so small, a forced application of the strictest rule by virtue of double deontology could be used by counterparties to deprive "opponents of the services of the

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[112] See Janine Griffiths-Baker & Nancy J Moore, "Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?" (2012) 80:6 Fordham L Rev 2541 at 2556–57. See also Maya Goldstein Bolocan, ed, *Professional Legal Ethics: A Comparative Perspective* (Washington, DC: Central European and Eurasian Law Initiative, 2002) at 94, online: American Bar Association <apps.americanbar.org/rol/publications/professional_legal_ethics_con_paper.pdf>; International Bar Association, *IBA International Principles for the Legal Profession*, London: IBA, 2011, comment 1.3 (calling on lawyers to "observe applicable rules of professional conduct in both home and host jurisdictions (Double Deontology)" at 14). The United Kingdom requires lawyers practicing there to follow the double deontology approach: see Griffiths-Baker & Moore, *supra* note 112 at 2558.

[113] See generally Matthew T Nagel, "Double Deontology and the CCBE: Harmonizing the Double Trouble in Europe" (2007) 6:2 Wash U Global Stud L Rev 455.

[114] See Griffiths-Baker & Moore, *supra* note 112 at 2558; Andrew Boon & John Flood, "Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct" (1999) 2:1 Leg Ethics 29 at 42 (arguing that the imposition of the double deontology rule with respect to conflicts of interests has the effect of severely limiting clients' choice of counsel, especially in the context of "mega-transactions and disputes where only relatively few lawyers have the necessary expertise or resources to handle the matter").

[115] See Chambers & Partners, "Chambers Global Leading Law Firms Comparison Table" (2014), online: <www.chambersandpartners.com/global-comparisontable>. See generally Robert A Kagan & Robert Eli Rosen, "On the Social Significance of Large Law Firm Practice" (1985) 37 Stan L Rev 399 (detailing how large law firms operate, generally with large corporate clients).

[116] See sources cited at notes 2, 4. Some might argue that the application of double deontology is appropriate in a disciplinary context given the purpose of disciplinary action is to sanction bad behaviour. The problem with this argument is that it attempts to split hairs. Moreover, as discussed below, double deontology does not address the importance of an individual State's policy choices.

small field of experts capable of acting competently in the matter or, if not, significantly to delay the resolution of the main dispute."[117] Nor should only the most lenient rule or law apply. To do so would risk forgetting completely some of the policy considerations that weigh so heavily in the stricter laws. A compromise between the two is preferred—it allows for flexibility where needed, yet protects the interests that need protecting (especially when parties are less sophisticated).[118]

Moreover, double deontology does not address the issue of how a lawyer should proceed in a case where two rules or obligations are in direct conflict.[119] While less of an issue in conflicts of interest where the worst outcome is that the lawyer is precluded from acting for the client, double deontology poses a much larger problem in other areas of the law governing lawyers. One such example is in the case of confidentiality where the international obligations of lawyers differ greatly. In some countries a situation may exist where disclosure is required, yet in others secrecy is necessitated. This situation is aggravated where breach of each of these obligations is coupled with a criminal offence.[120]

Additionally, forcing individual lawyers and firms to comply with the historical rule ignores the other State's public policy considerations and does so in circumstances where that State's rules may be more appropriately applied given the connection of the lawyer-client relationship to that jurisdiction.[121] The double deontology approach effectively permits individual States to tell neighbouring States that their considerations and

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117 Boon & Flood, *supra* note 114 at 42.

118 See *ibid* at 41–42.

119 See Doak Bishop, "Ethics in International Arbitration" (Keynote Address delivered at the International Council for Commercial Arbitration Congress, Rio de Janeiro, 26 May 2010), online: <www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf>.

120 This is the situation presented by Hans-Jürgen Hellwig contrasting English and German law on confidentiality. See "At the Intersection of Legal Ethics and Globalization: International Conflicts of Law in Lawyer Regulation" (2008) 27:2 Penn St Intl L Rev 395 at 398–99.

121 *Cf United States v First Nat Bank of Chicago*, 699 F (2d) 341 at 345–47 (7th Cir 1983) [*First National Bank*] (giving weight to the policy valuations and interests of another country (Greece) in evaluating whether to order the defendants to produce certain documents, thereby imposing criminal sanctions on the Greek employees under Greek law); *In re Westinghouse Elec Corp Uranium Contracts Litigation*, 563 F (2d) 992 (10th Cir 1977) (looking to the balancing between forum interests and other interests); *Societe Internationale Pour Participations Industrielles et Commerciales, SA v Rogers*, 357 US 197, 78 S Ct 1087 (1958) [*Societe Internationale*] (evaluating the policy considerations of another state).

weighting of jurisprudential values is of less importance or validity.[122] This might be acceptable within a single State (although, given the comments of the Supreme Court of the United States in *Pennoyer v. Neff* regarding sovereignty and equality of U.S. states, highly unlikely[123]), but it is surely unacceptable on the international stage where the value of comity is increasingly important.[124] A better mechanism must be identified to deal with the conflict between the presumptive rule and the historical rule. Some might argue that one State's policy considerations will always be placed over those of another State any time two laws or rules differ. The difference is that an application of double deontology makes it so the stricter State always wins and never considers the fact that the more flexible State has valid considerations. While ultimately one law or rule will be chosen to apply, the approach advocated for in this paper—a choice of law rule—at a minimum takes into account the policy considerations of both States before selecting which law or rule to apply. It recognizes comity considerations instead of blindly applying a mechanistic rule.[125]

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[122] See Griffiths-Baker & Moore, *supra* note 112 at 2558. See also *First National Bank*, *supra* note 121 at 346 (worrying about not taking into account Greece's interests); but see *Societe Internationale*, *supra* note 121 (overturning the District Court decision to dismiss with prejudice partly because the District Court did not adequately consider Swiss policy considerations and the impossibility of dual compliance).

[123] See *supra* note 40 at 722 (in *Pennoyer* the Supreme Court of the United States focused on the idea that each state in the union was equal to every other state. It imported the idea of State sovereignty into the U.S. legal framework. Thus, it is unlikely that, given the inherent equality of each of the states in the union, the Court would view infringement on the sovereignty of a neighbouring state with any less scrutiny than it would the infringement on the sovereignty of another nation).

[124] See e.g. *Hilton v Guyot*, 159 US 113, 16 S Ct 139 at 165 (1895) [*Hilton* cited to S Ct] (discussing how comity promotes justice and produces friendly intercourse between nations); *Société Nationale Industrielle Aérospatiale v United States Dist Court for Southern Dist of Iowa*, 482 US 522, 107 S Ct 2542 at 2555–56 (1987) (stating that international comity requires an analysis of the respective interests of the foreign nation and the forum State); *Morguard*, *supra* note 27 at 1095, 1098, 1100–101 (stressing how the world has changed and become more international and that comity is an imperative part of Canadian law now); *Muscutt*, *supra* note 26 at paras 101–10.

[125] See generally Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*, 3rd ed (Boston: Charles C Little and James Brown, 1846) at 45 (on the principle of comity); Hay, Borchers & Symeonides, *supra* note 17, § 2.7 at 19 (on the historical importance of Story's treatment of comity).

### *C. Existing Choice of Law Rules*

Another possible solution is to look to existing choice of law rules.[126] Choice of law rules are used by courts to identify which substantive law should apply to a dispute involving multiple jurisdictions. There are existing choice of law rules for many substantive areas of the law including tort, contract, agency, unjust enrichment, marriage, divorce, trusts, and moveable and immovable property. Ultimately, the court must decide whether the applicable law is its own law (the law of the forum) or the law of the other jurisdiction. As the law governing conflicts of interest is grounded in the law of fiduciary duties (i.e., stemming from the duty of loyalty),[127] a possible choice of law rule is that of agency.[128] The lawyer is a special kind of agent for the client, so it makes sense that the choice of law rule for agency might be applicable. The lawyer-client relationship is also established in part by a retainer agreement.[129] Given that the retainer agreement is a contract, it is also possible that contract choice of law rules could be applied. Ultimately, we will see that both of these choice of law rules in their current form do not address some of the unique elements presented in the lawyer-client relationship. To apply to the law governing lawyers, each of these must be modified. These modifications are discussed in Part IV in the form of a proposed new framework for choice of law in the law governing lawyers.

#### 1. Choice of Law Rules for Agency

Unfortunately, the choice of law rules for agency are very unsettled. Courts have utilized a variety of different rules,[130] some focusing on the place where the agency relationship was created,[131] while other courts

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[126] The choice of law process uses a series of rules and a set of connecting factors to determine which law should be applied in a given situation. See generally Hay, Borchers & Symeonides, *supra* note 17 at 18ff; Pitel & Rafferty, *supra* note 23 at 206–23; David F Cavers, *The Choice-of-Law Process* (Ann Arbor, Mich: University of Michigan Press, 1965); Symeon C Symeonides, "The American Choice-of-Law Revolution in the Courts: Today and Tomorrow" (2002) 298 Rec des Cours 9.

[127] See sources cited at note 58.

[128] The fiduciary duty owed by the lawyer to client is grounded in the fact that the lawyer acts as agent for the client. See *Meinhard v Salmon*, 164 NE 545 at 546 (NY App Ct 1928) (providing Justice Cardozo's often-quoted articulation of fiduciary duties).

[129] In the context of the lawyer-client relationship, the retainer agreement acts similarly to a written agency agreement. Agency is also affected by contract, as contracts allow the principal and agent to accurately define the scope of the agreement.

[130] See Hay, Borchers & Symeonides, *supra* note 17 at 1199.

[131] See e.g. *Bank of America, Nat Trust & Sav Ass'n v Horowytz*, 248 A (2d) 446 at 449 (NJ Co Ct 1968); *Yoerg v Northern NJ Mortg Associates*, 130 A (2d) 392 (NJ Super Ct App Div 1957); *Louis Schlesinger Co v Kresge Foundation*, 260 F Supp 763 (D NJ 1996).

have focused on the place where the agency was performed,[132] or on the relationship's centre of gravity.[133] Peter Hay, Patrick Borchers, and Symeon Symeonidea indicate that the practical result of the "most significant relationship" test articulated in section 291 of the *Restatement (Second) of Conflict of Laws* is the application of the law of the forum (*lex fori*).[134] In short, there is no uniform approach to how choice of law rules are applied in the context of agency.

However, a possible solution may be found in articles 5 and 6 of the *Agency Convention* created at the Hague Conference on Private International Law.[135] Both articles deal with the internal law creating the agency relationship between the principal and agent.[136] If no internal law is explicitly chosen, the convention dictates that the applicable law for the agency relationship shall be the law of the state where, at the time of formation of the agency relationship, the agent has his business establishment (or habitual residence).[137] Interestingly enough, article 6 also provides for situations where either the agent or principal has more than one business establishment. In that case, the governing law will be the law of

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[132] See e.g. *Matarese v Calise*, 305 A (2d) 112 at 118 (RI Sup Ct 1973); *Davis v Jouganatos*, 402 P (2d) 985 at 988 (Nev Sup Ct 1965); *Wonderlic Agency, Inc v Acceleration Corp*, 624 F Supp 801 at 804 (ND Ill 1985). See also Hay, Borchers & Symeon des, *supra* note 17 at 1199–200.

[133] See e.g. *Southern International Sales Co, Inc v Potter & Brumfield Division of AMF Inc*, 410 F Supp 1339 at 1342 (SD NY 1976); *Japan Petroleum Co (Nigeria) Ltd v Ashland Oil, Inc*, 456 F Supp 831 (D Del 1978); *Leisure Group, Inc v Edwin F Armstrong & Co*, 404 F (2d) 610 (8th Cir 1968) (*per curiam*); *Ames v Ideal Cement Co*, 235 NYS (2d) 622 (Sup Ct 1962); *Feinberg v Automobile Banking Corp*, 353 F Supp 508 (ED Pa 1973); Hay, Borchers & Symeonides, *supra* note 17, § 18.33 at 1200.

[134] See *supra* note 17 at 1199–200.

[135] This convention is the product of an international conference attended by numerous countries, and seeks to develop rules for a uniform application of private international law. Note, however, that Canada and the United States have not yet ratified the treaty. See Hague Conference on Private International Law, "Status Table: Convention of 14 March 1978 on the Law Applicable to Agency", online: <www.hcch.net/index_en.php?act=conventions.status&cid=89>. Both nations are members of the Hague Conference. See Hague Conference on Private International Law, "Canada", online: <www.hcch.net/index_en.php?act=states.details&sid=28>; Hague Conference on Private International Law, "United States of America", online: <www.hcch.net/index_en.php?act=states.details&sid=76>. See also Hague Conference on Private International Law, *Statute of the Hague Conference on Private International Law*, as amended (entered into force 15 July 1955), online: <www.hcch.net/index_en.php?act=conventions.text&cid=29> [*Hague Statute*].

[136] See also Hay, Borchers & Symeonides, *supra* note 17 at 1199–203 (differentiating the internal relationship as that between the principal and the agent and the external relationship as that between the agent and third parties).

[137] See *Agency Convention*, *supra* note 110, arts 5–6.

the state where the business establishment most closely connected to the agency relationship is situated.[138] It appears that following the convention's approach, in a multiple office situation, the location of the office with which the client has its primary dealings will determine the law that applies to the agency relationship.

### 2. Choice of Law Rules for Contract

While the lawyer-client relationship is at its core an agency relationship,[139] it is also a relationship that is strongly defined by contract.[140] Both the Supreme Court of Canada and the *Restatement (Second) of Conflict of Laws* agree that when choosing the law applicable to a contract, the proper law should be applied.[141] If the contract does not include a choice of law provision, the contract is governed by the law of the State that has the most significant relationship to the transaction and the parties.[142] Both Canadian and United States courts apply a multi-factor balancing test to determine the applicable law, taking into account, *inter alia*: the place of contracting; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, and place of business of the parties.[143] The problem with this approach is that the polycentric nature of the inquiry leads to a great deal of uncertainty on the part of both the lawyer and the client.[144] It would be preferable for both parties to be able to proactively choose which law will govern their relationship.[145]

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138 See *ibid*, art 6.

139 See sources cited at note 58.

140 See *Strother*, *supra* note 8 at paras 133–34; *Scott v Chuhak & Tecson, PC*, 725 F (3d) 772 at 783 (7th Cir 2013) [*Scott*] citing *Practical Offset, Inc v Davis*, 404 NE (2d) 516 at 520 (Ill App Ct 1980) [*Practical Offset*] (stating that the duties of the lawyer are related to the scope of authority granted by the client).

141 See Hay, Borchers & Symeonides, *supra* note 17 at 1158–63, 1171–76 (discussing the proper law approach for contract choice of law and how it has been applied by United States courts). The "proper law" is a term used in private international law to identify the substantive law that the parties intended, either expressly or implicitly, to apply to their dealings, and in the absence of any intent, the law with which the transaction has its closest and most real connection. See Pitel & Rafferty, *supra* note 23 at 270.

142 See *Conflict of Laws*, *supra* note 55, §§ 6, 188; Pitel & Rafferty, *supra* note 23 at 275–77. See e.g. *Richardson International Ltd v Zao RPK "Starodubskoe"*, 2002 FCA 97 at paras 35–37, 288 NR 96; *Imperial Life Assurance Co of Canada v Colmenares*, [1967] SCR 443 at 448–49, 62 DLR (2d) 138.

143 See sources cited at note 142.

144 See Hay, Borchers & Symeonides, *supra* note 17, § 18.13 at 1159.

145 See *ibid*, § 18.1 at 1085–86 ("party autonomy" in choice of law provides predictability and protects party expectations). This may be entirely possible in the context of lawyer-client retainers, but has not yet been considered by a court.

However, the question that then arises is: to what extent can the fiduciary duties of the lawyer be modified or limited by contract? Will the law even permit the lawyer and client to choose an applicable law? In short, the answer is yes. Both Canadian and American courts have permitted lawyers and clients to define the scope of their relationship through the retainer agreement.[146] The fiduciary obligations imposed on the lawyer arise out of the fact that the lawyer is acting as an agent for the client.[147] It is trite law that the scope of the agency relationship is based upon the authority that the principal has granted to the agent, and also by the degree to which the agent has agreed to act for the principal.[148] Either party may terminate the agency relationship.[149] It is also black letter law that contracts may be used to define the scope of the agency relationship.[150] Thus, it makes sense that the lawyer and client would be able to choose which law would apply to their relationship so long as the fiduciary duties

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[146] See *Strother*, *supra* note 8 at para 134; *Scott, supra* note 140 at 783, citing *Practical Offset*, *supra* note 140 at 520 (stating that the duties of the lawyer are related to the scope of authority granted by the client). It should be noted that principals and agents cannot contract out of certain duties (such as fiduciary duties), but may only define what things would not constitute breaches of those duties. This is subject to considerable oversight by the courts. It remains to be seen whether lawyers and clients can restrict their core duties through contract (for example, agreeing to provide less than zealous advocacy on the part of the lawyer).

[147] See *Strother*, *supra* note 8 at para 133. See also *Merchant Law Group v R*, 2010 FCA 206 at para 25, 322 DLR (4th) 260 ("the solicitor-client relationship is generally one of agency"); *R v Wolkins*, 2005 NSCA 2 at para 70, 229 NSR (2d) 222 ("[a] lawyer is the client's agent"); *Clear View Estates, Inc v Veitch*, 67 Wis (2d) 372, 227 NW (2d) 84 at 88 (Sup Ct 1975) ("[t]he relationship between lawyer and client is one of agency"); *Dunphy v McKee*, 134 F (3d) 1297 at 1302 (7th Cir 1998) (recognizing that the lawyer-client relationship is one of agency).

[148] See e.g. *Agency*, *supra* note 95, § 1.01; *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727 at para 101, 140 DLR (4th) 463 ("[t]he general rule of agency is that a principal is bound by the acts of an agent when that agent is acting within the scope of his or her ordinary or apparent authority"); *Beck v Duncan* (1913), 4 WWR 1319, 12 DLR 762 at 763 (Sask SC (AD)) ("[h]e can bind or estop his wife only as to matters within the scope of his agency, and where he acts without due authority she is not bound").

[149] See *Agency*, *supra* note 95, § 3.06; *McDevitt v Grolier Society* (1916), 30 DLR 471 (Alta CA). Note that the law imposes restrictions on a lawyer's ability to drop a client. See *McKercher*, *supra* note 7 at para 44 ("[a]s a general rule, a lawyer or law firm should not summarily and unexpectedly drop a client simply in order to avoid conflicts of interest with existing or future clients").

[150] See *Agency*, *supra* note 95, §§ 1.01, 1.03, 3.02. See e.g. *Voyager Petroleums Ltd v Vanguard Petroleums Ltd* (1982), 17 Alta LR (2d) 212, [1982] 2 WWR 36 (Alta QB); aff'd on other grounds [1983] 5 WWR 622, 149 DLR (3d) 417 (Alta CA), leave to appeal to SCC refused (1983), 50 AR 82 (note) (agency contract excluded the ability to enter into contracts from the scope of the agency).

themselves are not eliminated.[151] It is likely that under both Canadian and American law, lawyers and clients would be able to choose which jurisdiction's conflicts of interest rules should apply to their relationship.

This idea is already starting to take effect. The ABA proposed an amendment to section 1.7 of its Model Rules. This proposed amendment allows lawyers and clients to determine which jurisdiction's rules will govern conflicts of interest provided that the client gives informed consent and has a reasonable opportunity to consult independent counsel. The selected jurisdiction must also be substantially related to the matter, and be one which applies the principle of informed consent.[152] This is a positive step forward. It recognizes the roots of the lawyer-client relationship and also finds backing in clients' ability to consent to future conflicts of interest. Moreover, an explicit choice of law provision in a retainer agreement makes it much easier to determine the "proper law" for choice of law purposes.[153] Similar provisions should be added to sections 1.9 or 1.10, or to both, as section 1.7 only deals with current conflicts.[154]

### 3. Why Not Use One of These Two Rules?

The problem with these two rules is that they do not provide a "one size fits all" way to resolve situations of conflicting ethical rules. The agency rules would appear to be an obvious choice, given that the lawyer-client relationship is at its heart an agency relationship.[155] However, courts do not consistently apply choice of law rules to agency situations.[156] Until a uniform solution is found, agency choice of law rules provide an unsatisfactory solution for lawyers licensed in multiple jurisdictions—there is little assurance when the lawyers do not know which rules will be applied. Additionally, the agency rules as applied in North America do not take into account the ability of the parties to define the lawyer-client relationship. The approach of the Hague Conference addresses this and is simple in its application, but it does not address the fact that each lawyer-

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151 See *Revised Uniform Partnership Act* § 103(b)(3) (1997) (permitting partners to define specific categories of conduct that do not constitute violations of the duty of loyalty). But see *Delaware Revised Uniform Partnership Act*, tit 6 § 15-103(f) (2014) (allowing for the complete elimination of fiduciary duties by contract).

152 See ABA Rule 8.5 Paper, *supra* note 12; ABA Rule 1.7 July Paper, *supra* note 12; ABA Rule 1.7 September Paper, *supra* note 12; ABA Rule 8.5 Resolution, *supra* note 12.

153 See e.g. *Conflict of Laws*, *supra* note 55, §§ 6, 187; Pitel & Rafferty, *supra* note 23 at 271–74.

154 See ABA Rule 1.7 July Paper, *supra* note 12; ABA Rule 1.7 September Paper, *supra* note 12.

155 See Hay, Borchers & Symeonides, *supra* note 17 at 1159.

156 See sources cited at notes 130–33.

client relationship is different and unique. Instead, it focuses solely on the location of the business of the lawyer. This lawyer-centric approach ignores the client's interests in exchange for predictability. Any choice of law rule for the law governing lawyers should not ignore this fundamental consideration.

The problem with contract choice of law rules is that contractual principles are only applicable to the lawyer-client relationship by virtue of the retainer agreement. It becomes much more difficult to apply a contracts rule to a situation where no physical retainer is signed and yet a lawyer-client relationship exists, or where the client has a reasonable belief that the lawyer is acting as their lawyer but no actual lawyer-client relationship is created.[157] The concern with using the contract choice of law rules is that the lawyer-client relationship entails many more duties than those present in ordinary contractual relationships (i.e., the duty of loyalty, the duty of candour, the duty of commitment).[158] A choice of law rule applicable to the law governing lawyers should be able to account for these other non-contractual duties and also be applicable in scenarios where a lawyer-client relationship exists but no formal retainer agreement is signed.

Rather than being forced to choose between these two tests, this article recommends that lawyers, judges, and disciplinarians not be consumed with labels or categories, and instead focus on substance over form. It suggests that the more appropriate response is not to try to shoehorn a legal ethics problem into the discrete rules of agency or contract, but instead look to the heart of both rules and the objectives they try to reach. A choice of law rule ultimately tries to resolve the issue of which State's interests should govern the dispute before the decision maker. When faced with a situation involving conflicting ethical rules, decision makers should look to the principles underlying the proper law of the lawyer-client rela-

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[157] See e.g. Alta CPC, *supra* note 9 (defining client to "include [any] person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law" at 9); FLSC CPC, *supra* note 8, ch 1.1-1 (defining client to include someone who has a reasonable belief the lawyer has agreed to render legal services on his or her behalf). See also ABA Model Rules, *supra* note 57, ch 1.18 (defining duties to prospective clients). See e.g. *Forsyth v Cross*, 2009 SKQB 184, 334 Sask R 203 (a phone call with prospective client created a conflict of interest for a later actual client); *Achakzad v Zemaryalai*, 2010 ONCJ 24, [2010] WDFL 1772 (two early consultations with a mother who could not pay the retainer caused the lawyer to be disqualified when retained by the father); Woolley, *supra* note 1 at 224.

[158] See *Karlin v Weinberg*, 77 NJ 408, 390 A (2d) 1161 at 1167 (Sup Ct 1978) (noting the unique relationship between lawyer and client); *Matter of Cooperman*, 83 NY (2d) 465, 633 NE (2d) 1069 at 1071 (App Ct 1994). See e.g. *McKercher*, *supra* note 7 at paras 55–59 (discussing the additional duties of candour and commitment that are imposed upon the lawyer). See also *Flores v Willard J Price Associates, LLC*, 20 AD (3d) 343, 799 NYS (2d) 43 at 45 (Sup Ct App Div 2005) (noting the unique agency obligations of a lawyer).

tionship and utilize the spirit of the agency and contracts choice of law rules to guide their determination as to which law applies. This approach is outlined and discussed in Part IV.

## IV. Using the Proper Law Approach to Determine the Applicable Law for Multijurisdictional Disputes Involving the Law Governing Lawyers: A New Framework

How, then, should one approach a choice of law inquiry involving the law governing lawyers? In determining which law should be applied, one must remember that the ultimate goal of a choice of law rule is to achieve justice between the parties, and as Pitel and Rafferty indicate, proximity is central to this inquiry.[159] Any rule or analytical framework for choice of law must therefore be assessed with regard to how well it ensures that there is a close connection between the applicable law and the dispute.[160] This means that choice of law rules should operate as the parties expect them to, and that they will produce uniform results when applied across different jurisdictions.[161] Moreover, any rule applied in a legal ethics situation must reflect the constraints of the law governing lawyers (i.e., the different fora and situations where it may operate). It must be applicable in disciplinary proceedings as well as in civil suits and interlocutory motions.

Some options for a choice of law rule for the law governing lawyers include single factor bright line rules such as: the law of the jurisdiction where the lawyer has his or her principal practice; the law where the client resides or where the client's principal place of business is located; the law of the forum; or the law of the jurisdiction where the work is to be performed or executed.[162] The benefit of a bright line rule is its certainty. Everyone knows what the rule is and how it will be applied. However, bright line rules are inherently rigid, severely limiting the discretion of a

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[159] See *supra* note 23 at 297. See also Hay, Borchers & Symeonides, *supra* note 17 at 6.

[160] See Pitel & Rafferty, *supra* note 23 at 297; Hay, Borchers & Symeonides, *supra* note 17 at 6.

[161] See Pitel & Rafferty, *supra* note 23 at 297; Hay, Borchers & Symeonides, *supra* note 17 at 77.

[162] See Mary C Daly, "Resolving Ethical Conflicts in Multijurisdictional Practice: Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?" (1995) 36:3 S Tex L Rev 715 at 760–61; Rensberger, *supra* note 103 at 833, 840. See also *Law Governing Lawyers*, *supra* note 61, § 5, comment h (providing a list of considerations in performing a choice of law rule).

decision maker. They make it difficult to account for unique factual situations that may require other interests to take precedence.[163]

Rather than apply a bright line choice of law rule, this article advocates for a bifurcated balancing approach that finds its roots in the proper law choice of law analysis used in contract cases.[164] This proposed framework consists of two steps, designed to account for the three different scenarios where a law governing lawyer problem may arise (i.e., conflicts of interest). In the first step, the decision maker determines whether the dispute arises out of already instituted proceedings (i.e., an interlocutory motion for disqualification of counsel in an existing lawsuit). If answered in the affirmative, the inquiry ends. This is because the tribunal is already seized of the matter and jurisdictional questions will have been addressed. The tribunal will apply its own law (the law of the forum) in these situations because the tribunal will be concerned with the administration of justice before it. This means that any interlocutory application for disqualification of counsel can be resolved without a choice of law analysis. Here the concern over the administration of justice in the forum trumps any concerns of extraterritoriality or comity. There are no concerns about forum shopping with respect to the disqualification motion because the motion arises out of the substantive suit already before the court.

The second step occurs only if the first step is answered in the negative (i.e., the matter arises on its own merits). This will most commonly occur for disqualification motions in a transactional setting or in the case of disciplinary proceedings. In the second stage of the approach, the tribunal applies the proper law to the substantive issues before it. In applying the proper law, the tribunal will first look to see if the lawyer and client have contemplated a specific jurisdiction's substantive law to govern their relationship.[165] If no law can be identified, then the tribunal will apply the law of the jurisdiction with the closest connection to the lawyer-

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[163] See e.g. Pitel & Rafferty, *supra* note 23 at 297.

[164] See Parts III.C.2 and III.C.3, *above* and sources cited at notes 139–61. While this article has used the term "bifurcated" to describe the structure of the proposed test, the test could also be viewed similarly in structure to the "innocence at stake" exception articulated by the Supreme Court of Canada in *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445. In that case the court articulated that first there is a threshold inquiry (a pre-test) before the test for "innocence at stake" can be undertaken: see *ibid* at paras 48, 50–57; Woolley, *supra* note 1 at 133–34. The proposed test here attempts to use a similar approach.

[165] See also *Conflict of Laws*, *supra* note 55, §§ 6, 187; Pitel & Rafferty, *supra* note 23 at 271–74.

client relationship in question.[166] The evaluation of the closest connection is a polycentric inquiry, evaluating multiple factors such as: the location of the lawyer's principal place of business; the location of the client's principal place of business or his residence; the location where the work is to be performed or executed; the location where the work product is to have effect; the substantive law that will govern the work; the interests of the individual States in regulating their own lawyers (i.e., considerations of the duties of loyalty, confidentiality, and candour); considerations of State sovereignty and international comity; and concern over the administration of justice in the forum.[167]

In many ways, this proper law stage of the test is similar to that of the contract choice of law rule. It follows the same basic form and even uses a few of the same factors. However, it differs from the contract choice of law rule in its explicit considerations of elements unique to the lawyer-client relationship, the work the lawyer does for the client, and to the repute of justice in the forum.

The benefit of the proper law approach is that it takes into account the overarching considerations of fundamental justice and helps to ensure that the law to be applied has the closest connection to the dispute.[168] It also allows the parties to have a much greater role in choosing the law to be applied, furthering the policy goal of ensuring party expectations.[169] Additionally, by incorporating and balancing the various factors that might otherwise serve as their own choice of law rule, the proper law approach maintains an inherent fairness in the analysis, ensuring that no one factor substantially outweighs another.[170] In theory, a proper law ap-

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166 See e.g. *Conflict of Laws*, *supra* note 55, §§ 6, 188; Pitel & Rafferty, *supra* note 23 at 275–77.

167 See e.g. *Law Governing Lawyers*, *supra* note 61, § 5, comment h.

168 See generally Hay, Borchers & Symeonides, *supra* note 17 at 1090–98 (providing discussion and criticism of the "substantial" connection requirement where parties have made an agreement regarding the choice of law); Pitel & Rafferty, *supra* note 23 at 270. See also "Conflict of Laws and the Discharge of Contracts: An Approach", Note, (1957) 57:5 Colum L Rev 700 at 700–701, n 4 ["Conflict of Laws"] (discussing the proper law's roots in closest connection to the forum).

169 See Hay, Borchers & Symeonides, *supra* note 17 at 1085–88 (on the principle of party autonomy); Pitel & Rafferty, *supra* note 23 at 271 (linking the proper law to the law the parties intended). See also "Conflict of Laws", *supra* note 168 at 716 (articulating that the proper law gives effect to the expectations of parties).

170 See generally Hay, Borchers & Symeonides, *supra* note 17 at 6, 62–78 (on the importance of fairness in this context and the rationale behind the Second Restatement's attempts at balancing the factors of the analysis); Larry Kramer, "Return of the Renvoi" (1991) 66:4 NYUL Rev 979 at 1018, n 126 (noting the proper law's connection to fairness); Pitel & Rafferty, *supra* note 23 at 302–303 (discussing the pros and cons of the proper law rule).

proach would also produce uniform results across jurisdictions; however, in practice, the polycentric nature of the rule may lead to a greater variance in the results that ultimately would make the rule less predictable.[171] Despite this fact, the ability of the parties to actively select the law to be applied to the relationship helps to overcome this deficiency and produce much more predictable results.[172]

I make one comment regarding the ability of the parties to select the law governing their relationship. Built into the choice of law rule itself is a consideration of the jurisdiction's connection to the dispute.[173] Thus, any jurisdiction selected by the parties must have some connection to the parties and their relationship. The ABA has already addressed this in their proposed version of Model Rule 8.5; however, the commentary does not explain why this is a necessary inclusion.[174] The necessity of connection to the jurisdiction in question is at the heart of a choice of law rule.[175] Thus, if an Ontario client hires a lawyer licensed in both British Columbia and Washington state to perform work in Seattle, it should not be open for the lawyer and the client to choose English law as the governing law of their relationship.[176] There is no connection to the United Kingdom in their re-

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171 This is one of the largest criticisms of the approach taken by the Second Restatement. See Hay, Borchers & Symeonides, *supra* note 17 at 67–68, 71–72; Richard A Posner, *The Problems of Jurisprudence* (Cambridge, Mass: Harvard University Press, 1990) at 429–30; *Neumeier v Kuehner*, 31 NY (2d) 121, 286 NE (2d) 454 at 457 (App Ct 1972) (focusing on inconsistencies based on balancing-type rules); Little, *supra* note 103 at 869 (condemning the uncertainty in substantial connection rules).

172 See Little, *supra* note 103 at 870. See also Russell J Weintraub, *Commentary on the Conflict of Laws*, 6th ed (New York: Foundation Press, 2010) at 483; William J Woodward, Jr, "Finding the Contract in Contracts for Law, Forum and Arbitration" (2006) 2:1 Hastings Bus LJ 1 at 9–12; Larry E Ribstein, "From Efficiency to Politics in Contractual Choice of Law" (2003) 37:2 Ga L Rev 363 at 403 (discussing how choice of law clauses increase certainty).

173 See *Conflict of Laws*, *supra* note 55, § 187(2)(a). See generally Hay, Borchers & Symeonides, *supra* note 17 at 1090–98.

174 See ABA Rule 8.5 Paper, *supra* note 12.

175 See Hay, Borchers & Symeonides, *supra* note 17, § 18.3 at 1090–91 (discussing the requirement of a "substantial relationship"); *Conflict of Laws*, *supra* note 55, § 187(2) (requiring a substantial relationship to the parties of the transaction). See also *Armstrong v Accrediting Council for Educ & Training, Inc*, 980 F Supp 53 (D DC 1997), aff'd 168 F (3d) 1362 (DC Cir 1999) (requiring a substantial nexus to the transaction). But see *Conflict of Laws*, *supra* note 55, § 187(1) (providing that there are no geographic limitations on choice of law).

176 See Hay, Borchers & Symeonides, *supra* note 17, § 18.33 at 1200. See also *National Sur Corp v Inland Properties, Inc*, 286 F Supp 173 at 190 (ED Ark 1968), aff'd 416 F (2d) 457 (8th Cir 1969) (requiring a reasonable relationship or substantial connection). But see *Conflict of Laws*, *supra* note 55, § 187(2)(a) (permitting parties to choose a jurisdiction with no connection so long as there is a "reasonable basis" for their choice); *Radioactive, JV v Manson*, 153 F Supp (2d) 462 at 471 (D NY 2001) (permitting New York

lationship or the work being done, and as such the proper law rule should not permit this. Instead, the proper law rule should override the choice of English law[177] and instead facilitate the polycentric balancing to select among Ontario, British Columbia, and Washington as the applicable law.

The reason for this override is to prevent exploitation of an unsophisticated party. By requiring a connection to the chosen jurisdiction, the choice of law rule implicitly ensures that the client is not waiving rights unawares. Requiring a connection to the jurisdiction ensures that the client has at least some familiarity with the law that will apply to his or her lawyer-client relationship. It prevents them from having some unknown law govern the relationship—a necessary protection, especially in the case of unsophisticated parties. However, this power to overrule party autonomy is a power that courts must not use lightly, as in exercising this power the court is usurping the expectations of the parties and adding a considerable degree of uncertainty to the analysis.[178] The overruling of the parties' choice should only be done in the most exceptional circumstances, where there is truly no connection (or a *de minimis* connection) to the selected jurisdiction and there is a fear of the client losing fundamental protections or unknowingly waiving fundamental rights.

## V. Applying the Choice of Law Framework: Conflicts of Interest Test Case

We return now to the scenario presented in the introduction, where Mary's firm is looking to hire Chad for its Calgary office. It is reproduced for convenience here:

> Mary is a finance partner who works primarily out of Firm A's Toronto office. She spends some of her time working out of Firm A's

law to be chosen because New York courts "have significant experience with music industry contracts"). The law permits parties to choose the law of another jurisdiction (for example, New York, Delaware, United Kingdom) to govern their transaction often because of commercial reasons or the fact that the law is well established in an area. Some may argue that this itself amounts to a connection because of the subject matter, while others may argue that there is in fact no connection with the chosen jurisdiction but that parties should be able to exercise their freedom to contract. However, in the context of the lawyer-client relationship, it makes sense that there should be a substantial connection requirement on the law governing the relationship. Unlike in the business context where the law is *facilitating* the transaction, the law in a lawyer-client context is prophylactic and is meant to *protect* the client; it is a means of controlling the agency costs associated with the relationship.

177 See sources cited at note 175.

178 See generally Hay, Borchers & Symeonides, *supra* note 17 at 1090–98 (on limiting party autonomy through a "substantial relationship" or "reasonable basis" requirement for parties' choice of law).

> New York office and is licensed to practice in both Ontario and New York. She has been hired by BorderCo, which is looking to build a pipeline across the Canada—United States border. As part of its development strategy, BorderCo wishes to acquire TexCo, a company specializing in pipeline design and construction. BorderCo is incorporated in and maintains its head office in New York. TexCo's head office is in Texas but the company is incorporated in Delaware. Midway through the deal, a large national firm dissolves and Mary's firm has an opportunity to hire Chad, an industry expert in oil and gas acquisitions and divestitures. Chad has a big book of business and would be a great addition to the firm. He has worked for most of his career in Texas, but is also licensed to practice in Alberta. Mary's firm would like to hire Chad in its Alberta office to do some work for some clients in the oil sands industry. However, on a previous transaction, Chad worked for TexCo on a pipeline development project in the Marcellus Shale in Pennsylvania although the retainer has since been terminated. BorderCo plans to tie in TexCo's existing Pennsylvania pipeline into BorderCo's Ontario pipeline networks. TexCo is unwilling to waive conflicts.

The problem as presented brings five jurisdictions into the analysis (Alberta, Delaware, New York, Ontario, and Texas). If Alberta, Ontario, or Delaware law are found to apply, then Chad will be able to move to the Calgary office so long as the firm has taken the necessary protective measures—such as ethical screens, segregation of files, and cones of silence—to ensure that TexCo's confidential information is protected.[179] However, if New York or Texas law is found to apply, then Chad will not be able to join Mary's firm because both New York and Texas law imputes Chad's confidential knowledge regarding TexCo to the rest of the members of the firm. Neither New York nor Texas law permit the use of institutional mechanisms to protect confidential information.[180]

Using the choice of law framework developed in Part IV, we see that this scenario does not arise out of an existing litigation. Thus, the first stage of the inquiry is answered in the negative and the second stage is engaged—a proper law, choice of law analysis must be performed.[181] Given that it is TexCo's confidential information as held by Chad that we are concerned about protecting, the relationship that must form the basis for application of the choice of law rule is the lawyer-client relationship between Chad and TexCo. The situation as presented creates a past client conflict. BorderCo is a current client of Mary's firm. TexCo is a past client of Chad's. If Chad were to join Mary's firm, a client-client conflict would occur because of the two representations and the fact that TexCo and the

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[179] See *MacDonald Estate*, *supra* note 8 at 1262; Del RPC, *supra* note 9, ch 1.10.

[180] See Tex RPC, *supra* note 10, ch 1.06, 1.09; NY RPC, *supra* note 10, ch 1.6, 1.9.

[181] See Part IV, *above*.

bank are on opposite sides of the transaction. This raises the possibility of misuse of confidential information, which is at the heart of the past client conflicts rule.[182]

In applying the proper law analysis that comprises the second stage of the inquiry, we first determine whether Chad and the client have agreed on a set of ethical rules to govern their relationship.[183] In the proposed scenario (and likely in most real world situations) there is no provision in the retainer agreement that identifies which jurisdiction's ethical rules will govern. As such, the analysis must proceed by a polycentric balancing where consideration must be given to each of the connecting factors between the relationship and the jurisdictions in question. In this situation, the critical moment in time is the formation of the lawyer-client relationship between Chad and TexCo. At that moment the two are as close to *consensus ad idem* as possible; thus, it is from that moment that the connecting factors should be evaluated.

Chad is licensed in both Texas and Alberta, so at the time of formation of the relationship it would be possible for both jurisdictions to govern the relationship.[184] Both Texas and Alberta have an interest in ensuring that Chad is practicing according to their articulated professional standards and upholding their respective codes of conduct.[185] Chad's practice is primarily based out of Texas. This weighs in favour of Texas law applying. On the other hand, TexCo is incorporated in Delaware, so it is possible that Delaware law might best govern the relationship. For example, if Chad had been retained to complete a corporate restructuring, or to provide counsel on a merger or acquisition to be performed under Delaware law, there would be a strong pull toward Delaware law governing the relationship because the advice Chad would give would be about Delaware law. However, here the previous work that Chad did was a pipeline development project—something most likely substantively governed by Texas law (given the depth of Texas law relating to oil and gas issues). This again weighs in favour of Texas law governing the relationship.[186] Addi-

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[182] See e.g. *MacDonald Estate*, *supra* note 8 at 1246; ABA Model Rules, *supra* note 57, ch 1.9, comment 1.

[183] See Part IV, *above*.

[184] See Part I, *above*.

[185] On government interest, see e.g. Hay, Borchers & Symeonides, *supra* note 17 at 27–41; Brainerd Currie, *Selected Essays on the Conflict of Laws* (Durham, NC: Duke University Press, 1963) at 189ff.

[186] If instead the pipeline deal were governed by Pennsylvania law, that would lessen the weight in favour of Texas. However, given that this would be the only factor pointing to Pennsylvania, it is unlikely that Pennsylvania law would govern the lawyer-client relationship, especially with so many other factors pointing toward Texas.

tionally, TexCo's head office is in Texas, the retainer agreement was likely signed in Texas given the location of TexCo's head office, and Chad's practice is primarily located in Texas. Chad likely performed most of the work in Texas, and the impact of Chad's legal work would be realized by TexCo in Texas by virtue of the sale being completed in Texas (despite the fact that the assets were physically elsewhere). Here, the connecting factors weigh so strongly in favour of applying Texas law to govern the relationship that there are minimal concerns about infringing on Alberta's sovereignty, and the risk of offending international comity is nominal. Thus, a weighting of the connecting factors indicates that Texas law should govern the relationship between Chad and TexCo, thereby precluding Chad from joining the Alberta office of Mary's firm.

But does this make sense in light of the conditions of the modern world, where lawyers are increasingly mobile and increasingly members of multiple bars? If Chad is moving to a jurisdiction that would permit him to use ethical screens and cones of silence to protect TexCo's confidential information, should our law not permit him to do so? While this rationale has some merit, stemming from the policy rationale of permitting clients to have their own choice of counsel, this argument forgets two fundamental considerations. First, it flies in the face of notions of comity and State sovereignty, by stating in essence that one State's policy choices are inferior to another State's.[187] Second, it encourages forum shopping, as it allows parties to escape prior obligations by moving to jurisdictions with more permissive rules.[188] This is different than choosing a rule to govern the relationship at the outset, which instead encourages the fulfillment of the mutual expectations of both parties. To argue that Chad should be able to join Mary's firm because of the value of lawyer mobility and of allowing clients to have their counsel of choice allows Chad to escape the commitment and duties he owes to TexCo. Moreover, if lawyer mobility is truly a necessary element, the lawyer may include a provision to that effect in the retainer agreement. Thus, the proposed rule not only takes into account the expectations of the parties while trying to provide a predicta-

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[187] See Weiss, *supra* note 104 at 40; Edward A Carr & Allan Van Fleet, "Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street" (1995) 36 S Tex L Rev 859 at 901–903; Zacharias, *supra* note 105 at 375.

[188] See Hay, Borchers & Symeonides, *supra* note 17 at 6; *Erie R Co v Tompkins*, 304 US 64, 58 S Ct 817 at 820–22 (1938) [*Erie*] (expressing concerns about forum shopping). See also *Gasperini v Center for Humanities, Inc*, 518 US 415, 116 S Ct 2211 at 2238–39 (1996) (applying the *Erie* concerns about forum shopping to a choice of law analysis); *Shady Grove Orthopedic Associates, PA v Allstate Ins Co*, 559 US 393, 130 S Ct 1431 at 1447–48 (2010) (again applying concerns about forum shopping in the choice of law analysis).

ble outcome, it also builds in considerations of fairness, comity, and State sovereignty—values that are at the heart of private international law.[189]

## Conclusion

Neither Canadian nor American law resolves the question of how to address conflicting rules in the law governing lawyers for attorneys licensed and practicing in multiple jurisdictions. These lawyers are subject to multiple regulatory regimes and ethical obligations, some of which can be in direct conflict. Additionally, by virtue of their licences, these lawyers are subject to the proscriptive rules and adjudicative jurisdiction of each State in which they are licensed. In order to provide some clarity and predictability as to how the lawyer should act in these situations, a choice of law rule for the law governing lawyers should be developed. This article has advocated for the proper law approach, to allow lawyers and clients to predetermine which law will govern their relationship. If the lawyer and client do not proactively choose a jurisdiction to govern their relationship, then a polycentric inquiry should be performed, looking to the connecting factors between the lawyer-client relationship and the jurisdictions in question. This helps to fulfill the mutual expectations of the parties and also account for fundamental justice and international law considerations such as fairness, comity, and respect for State sovereignty.

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[189] See Hay, Borchers & Symeonides, *supra* note 17 at 6.