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Cover Page Footnote

J.D. Candidate, 2003, Fordham University School of Law. I would like to thank Professor Michael Berch for directing me to this topic. I would also like to thank my parents and my sister for their unwavering support. Lastly, a special thanks to Paula Reynolds for never letting me give up on this Note.

CHOICE OF LAW IN ONLINE LEGAL ETHICS: CHANGING A VAGUE STANDARD FOR ATTORNEY ADVERTISING ON THE INTERNET

*Daniel Backer**

INTRODUCTION

The Internet has exploded as a commercial medium across almost all industries and professions, and the practice of law is no exception. Although lawyers are catching on to the information revolution at a slower pace than other professions, they are nevertheless becoming increasingly technology-oriented.¹ While most lawyers and law firms use the Internet primarily as a marketing tool,² there are now online services that give state-specific explanations of law, prepare various legal documents, and even offer computer-mediated dispute resolution.³ In addition, lawyers and law firms are using web pages to solicit class-action plaintiffs, to participate in real-time chat forums, and to bid for legal engagements.⁴

While this new technology is proving to be an extremely important medium for the practice of law, it raises a number of ethical issues.⁵ The uncertainty that exists when applying ethics rules to emerging technologies has led many jurisdictions to conclude that existing ethics rules apply to websites in the same way they apply to conventional

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1. See Kate Marquess, *Caught in the Web: Survey Reveals Increasing Use of Internet in Law Practices, but Lawyers are Making Transition Slowly*, 86 A.B.A. J. 76 (2000).

2. See J. Clayton Athey, Note, *The Ethics of Attorney Web Sites: Updating the Model Rules to Better Deal with Emerging Technologies*, 13 Geo. J. Legal Ethics 499, 507-08 (2000).

3. eLawyering: In Practice, at <http://www.elawyering.org/what/practice.asp> (last visited Mar. 19, 2002) (listing "innovative approaches to the use of technology in the practice of law").

4. D.C. Bar Legal Ethics Comm., Op. 302 (2000), http://www.dcbar.org/attorney_resources/opinions.cfm#ethics (discussing the solicitation of plaintiffs for class action lawsuits and obtaining legal work through Internet-based web pages).

5. J.T. Westermeier, *Ethical Issues for Lawyers on the Internet and World Wide Web*, 6 Rich. J.L. & Tech. 5, ¶ 1 (1999), at <http://www.richmond.edu/jolt/v6il/westermeier.html>.

attorney communications.⁶ Although it is feasible to draw analogies between traditional media and the Internet for some types of online conduct,⁷ existing ethics rules are not always a good fit for the issues presented by the growing online presence of attorneys.

One such issue plaguing attorneys is the question of which state's ethics laws apply to their conduct on the Internet.⁸ The Internet is global in nature, and websites are accessible to anyone in the world with a computer and a telephone line.⁹ As such, websites cut across all jurisdictional and geographic borders.¹⁰ A potential client may access information about a lawyer located in a different state in the same manner and with the same ease as a lawyer in her home state.¹¹

The extra-territorial nature of the Internet is at odds with the way the legal profession is regulated in the United States. The American Bar Association promulgates model rules governing attorneys,¹² to be adopted by each state's highest court. Although the states have generally implemented model ethics rules proposed by the American Bar Association,¹³ there are substantial variations among states on a number of ethics issues.¹⁴ Most of these differences appear in rules relating to lawyer advertising and solicitation.¹⁵ In fact, only nine states have adopted rules on lawyer communications that exactly match those promulgated by the ABA.¹⁶

6. *Id.* ¶ 5.

7. For example, jurisdictions have successfully applied Model Rule 7.3 concerning solicitation to newsgroups. In 1993, Cantor and Siegel, a Phoenix law firm, posted off-topic messages to every Usenet group advertising their services. After thousands of complaints, the principal of the firm was disbarred. *See* Amy Haywood & Melissa Jones, Note, *Navigating a Sea of Uncertainty: How Existing Ethical Guidelines Pertain to the Marketing of Legal Services Over the Internet*, 14 *Geo. J. Legal Ethics* 1099, 1109 (2001).

8. *See* Anthony E. Davis, *Ethics and Etiquette of Lawyering on the Internet—Part 2*, N.Y. L.J., July 3, 2000, at 3.

9. *See* Westermeier, *supra* note 5, ¶ 2 (“[W]ebsites are in essence storefronts with worldwide exposure. There are no countries or state borders on the Internet.”).

10. *Id.*

11. Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 *Wash. L. Rev.* 785, 847 (2000).

12. *Id.* at 810.

13. *Id.* Forty-three states have adopted the model rules in some form. *Id.* at 810-11.

14. *See* Westermeier, *supra* note 5, ¶ 3 (“To keep pace with the law of legal ethics in the United States, for example, one must have the ABA/BNA Lawyers Manual on Profession Conduct . . . Hazard and Hodus’ [sic] *The Law of Lawyering*, local statutes and opinions from applicable local ethics rules committees and local bar counsel.”).

15. *See* Hill, *supra* note 11, at 810.

16. *See* Alaska Rules of Prof'l Conduct R. 7.1-7.3 (1999); Del. Rules of Prof'l Conduct R. 7.1-7.3 (1999); Haw. Rules of Prof'l Conduct R. 7.1-7.3 (1999); Idaho Rules of Prof'l Conduct R. 7.1-7.3 (2000); N.H. Rules of Prof'l Conduct R. 7.1-7.3 (1999); Utah Rules of Prof'l Conduct R. 7.1-7.3 (1999); Wash. Rules of Prof'l Conduct R. 7.1-7.3 (1999); W. Va. Rules of Prof'l Conduct R. 7.1-7.3 (1999); Wyo. Rules of Prof'l Conduct R. 7.1-7.3 (2000).

These jurisdictional variations, combined with the a-jurisdictional nature of the Internet, create a dilemma for the lawyer who disseminates information electronically on a website. The lawyer must ascertain whose standards will apply to his online conduct, and whether he will be subject to discipline by virtue of such conduct.¹⁷ American Bar Association Model Rule of Professional Conduct 8.5(b)(2)(ii) confronts this problem by proposing a choice of law rule in which a lawyer is subject to the rule of the jurisdiction where the “predominant effect” of his conduct is felt, if he is licensed to practice in that jurisdiction.¹⁸

This “predominant effect” test was meant to be a narrow exception to the general choice of law rule for ethics violations.¹⁹ According to the official comment to the rule, the test applies to situations where lawyers principally practicing in one state handle a transaction that occurs wholly in another state in which they are licensed.²⁰ However, in the context of an attorney’s use of the Internet, the “predominant effect” test is problematic, because it is difficult to discern where the predominant effect of Internet activity is felt.²¹ Rule 8.5(b), therefore, potentially subjects lawyers and law firms to the ethics rules of any state in which they are licensed to practice.

Part I.A of this Note will provide background information regarding attorneys’ use of the Internet. Part I.B will discuss efforts by states to regulate online advertising by attorneys. Part I.C will discuss the American Bar Association’s choice of law rule, 8.5(b). Part II will explain the problems created by the vague language in Rule 8.5(b), and how those problems are implicated when attorneys market themselves online. Part II will further discuss the various competing solutions that have been suggested to resolve these problems. Part III proposes amending Rule 8.5(b) so that the “predominant effect” test will no longer be applied to online legal advertising.

I. BACKGROUND

A. Attorney Use of the Internet

The main reason behind the growth of attorney presence on the Internet is marketing,²² and the majority of online marketing exists in

17. See Hill, *supra* note 11, at 847.

18. Model Rules of Prof’l Conduct R. 8.5 (2001).

19. Model Rules of Prof’l Conduct R. 8.5 cmt. (2001).

20. *Id.*

21. See Davis, *supra* note 8.

22. Jesse H. Sweet, Note, *Attorney Advertising on the Information Superhighway: A Crash Course in Ethics*, 24 J. Legal Prof. 201, 205 (1999/2000) (discussing the reasons law firms use websites as marketing tools).

the form of attorney websites.²³ Most firms realize that “their websites assist them in selling themselves to prospective clients by providing inquiries and leads,”²⁴ and that “[l]aw firms that rely solely on *Martindale-Hubbell* or paper brochures risk not being seen by these potential clients.”²⁵ Since 1994, when the first major law firm website was launched,²⁶ almost all large law firms and many small firms and solo practitioners have made a place for themselves on the World Wide Web.²⁷

One commentator has drawn a distinction between “interactive” and “noninteractive” legal websites.²⁸ “Noninteractive” websites are the norm for most lawyers and law firms. The most common functions of these websites are to provide biographical and contact information for an attorney.²⁹ Although this type of information can also be accessed from a legal directory, “the convenience of checking for such information on Web sites is increasingly surpassing the usefulness of traditional directories.”³⁰ “Noninteractive” websites often include a firm’s history, a lawyer directory, recruitment information, attorney publications, and news releases.³¹

Many of these “noninteractive” websites are becoming increasingly sophisticated, in order to market the lawyer or firm to potential clients more effectively. Firms are adding new features and technologies to their websites in an attempt to “demonstrat[e their] technological savvy to computer-conscious clientele—in other words, marketing.”³² Websites now include scholarly work by attorneys, intelligent search engines on various legal topics,³³ and interactive graphics and animations. Lawyers are also adding links to other sites, which allow

23. See David J. Romano, *L.E.I. 98-03: Attorney Advertising on the Internet*, W. Va. Law., Feb. 1999, at 28, 28 (“the most common form of attorney advertising [on the Internet] is a website.”).

24. Paul F. Lewis, *Building a Law Firm Website*, Colo. Law., Oct. 1998, at 33, 33.

25. *Id.*

26. The Baltimore law firm of Venable, Baetjer and Howard claims to hold the title of the first major law firm website. See Venable, Baetjer and Howard, LLP, *So You Want to Be on the Internet?* at <http://www.venable.com/Internet/index.htm> (last visited Mar. 19, 2002).

27. All of the firms listed on the AmLaw 100, which lists the 100 highest grossing U.S. law firms, have websites. See http://www.law.com/special/professionals/amlaw/amlaw100/amlaw100_highgross.html. (last visited Mar. 19, 2002). In a 1997 survey of small law firms by the American Bar Association, almost two-thirds of the responding firms had websites. Hill, *supra* note 11, at 788. It is almost certain that this number has risen considerably since 1997.

28. Darren Franklin, Note, *Hanging a Shingle on the Information Superhighway: Legal Advice on the Internet and the Problems of Prohibited Client Solicitation and Unintended Attorney-Client Relationships*, 2001 Stan. Tech. L. Rev. 2, ¶¶ 3-4, at http://stlr.stanford.edu/STLR/Articles/01_STLR_2.

29. Athey, *supra* note 2, at 508.

30. *Id.*

31. Franklin, *supra* note 28, ¶ 3.

32. Sweet, *supra* note 22, at 208.

33. *Id.* at 208 & n.34.

users to “move seamlessly between documents, regardless of their location.”³⁴ Most lawyers and firms believe that a website with “good substantive content” will be more effective at attracting new legal work than “those that serve merely as electronic billboards.”³⁵

In the past several years, lawyers as well as Internet startups have extended the boundaries of typical attorney websites by offering “interactive” features and services to users.³⁶ These websites often go beyond simple marketing to the actual practice of law over the Internet. The eLawyering Committee of the American Bar Association Law Practice Management Section has divided these innovative websites into three categories: law firm websites, lawyer/client marketplaces, and law-related organizations.³⁷

Law firms are finding new ways to deliver legal services to clients, and to attract new clients. For example, some firms have used private, web-based “chat” or “deal” rooms to “keep clients informed and well advised, at significantly lower costs than traditional service models.”³⁸ Law firms are also including online bulletin boards on their websites in order to develop virtual “communities” for marketing purposes. The Washington, D.C. firm of Arent Fox sponsors a discussion forum on the advertising law section of its website.³⁹ This web-based discussion group invites lawyers and potential clients to discuss issues in advertising law.⁴⁰ Through these types of online forums, firms are able to disseminate information to current clients and draw new clients to their website.

Firms are also finding ways to deliver traditional legal functions and services online. The large personal injury firm Jacoby & Meyers offers what it calls the “J&M Instant Interview,”⁴¹ an online client intake form, in which the potential client is asked a series of pre-programmed questions regarding her claim. A computer program then evaluates whether the firm is interested in speaking to the user in person.⁴² Another law firm, Connecticut’s Webber, Jacobs, Murphy & Horan, provides free legal advice and preliminary assessments of cases by e-mail.⁴³ These novel approaches to conduct that is usually

34. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 298 n.2 (S.D.N.Y. 1996) (quoting *Shea v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2d Cir. 1997)).

35. Lewis, *supra* note 24, at 33-34.

36. Franklin, *supra* note 28, ¶ 4.

37. eLawyering: In Practice, at <http://www.elawyering.org/what/practice.asp> (last visited Mar. 19, 2002).

38. eLawyering Basics, at <http://www.elawyering.org/what/basics.asp> (last visited Mar. 19, 2002).

39. See <http://www.arentfox.com> (last visited Mar. 19, 2002).

40. *Id.*

41. See Instant Interview Agreement, at <http://www.jacoby-meyers.com/cgi-bin/InstantInterview.pl> (last visited Mar. 19, 2002).

42. *Id.*

43. See <http://www.freelegal.com> (last visited Mar. 19, 2002).

carried out in law firm offices demonstrate a growing desire among law firms to tap “a wholly new market of un-met legal needs.”⁴⁴

Many web-based companies owned and operated by lawyers also provide legal services online.⁴⁵ Some of these companies are in the business of providing “lawyer/client marketplaces,” in which the website acts as an intermediary between clients and lawyers. Companies such as eLawForum, AttorneysBid.com, and FirstLAW allow lawyers to submit bids to prospective clients.⁴⁶ The clients can then decide which bid to accept, and negotiate the terms of the representation directly with the lawyer. By using the Internet to bring market forces to bear on legal practice, these websites make it simpler for firms to locate new clients, and allow individuals to shop more easily for affordable legal services.

Other online companies, categorized as “law-related organizations,” offer an array of legal services to Internet users,⁴⁷ including legal information, dispute resolution, document preparation, and research aids. For instance, American Law Online contains a host of detailed, state-specific legal information, and also provides a document assembly service for which it charges a fee.⁴⁸ Cybersettle.com is a computer-mediated method of settling insurance claims online, which charges a fee if the settlement is successful.⁴⁹ MyCounsel.com is a wholly online law firm, in which users prepay for legal services ranging from consultations to document preparation to court filings.⁵⁰

All of these examples, which are by no means exhaustive, demonstrate that the Internet is becoming increasingly integrated into the practice of law. If attorneys are to remain competitive, they will find it extremely difficult to ignore this trend and continue to deliver legal services in exactly the same way they have in the past.⁵¹

44. eLawyering Basics at <http://www.elawyering.org/what/basics.asp> (last visited Mar. 19, 2002).

45. *Id.*

46. AttorneysBid.com, for example, operates by allowing [a]ttorneys interested in securing clients via the internet [to] register with Legal-Bid.com giving their areas of expertise and the states in which they are licensed to practice. Individuals or companies with a need for legal services log on to Legal-Bid.com, list the county and state in which they reside, and describe in very general terms the type of legal service which they are requesting. After obtaining more specific details directly from the prospective clients, the lawyers then submit bids, leaving the client in the enviable position of deciding which bid to accept. <http://www.Attorneysbid.com> (last visited Mar. 13, 2002).

47. eLawyering: In Practice, at <http://www.elawyering.org/what/practice.asp> (last visited Mar. 19, 2002).

48. See <http://www.americanlawonline.com> (last visited Mar. 19, 2002).

49. See <http://www.cybersettle.com> (last visited Mar. 19, 2002).

50. See <http://www.mycounsel.com/app/consumers/whymycounsel/how.html> (last visited Mar. 19, 2002).

51. For an interesting account of the way attorneys historically have been

However, this new technology also raises a host of ethical issues for lawyers.⁵² This Note will address one of the most confusing issues for lawyers who use the Internet in their practice of law—the determination of which ethics rules to follow. Specifically, this Note will focus on rules relating to advertising and solicitation.

B. Rules Regarding Online Attorney Advertising and Solicitation

For the first three quarters of the twentieth century, advertising by attorneys was condemned by professional bar organizations, and, by 1937, all forms of media advertising, except in ABA-approved law lists, were prohibited.⁵³ By 1970, a leading treatise on professional responsibility asserted that “the solicitation of professional employment by direct or indirect advertising is unprofessional.”⁵⁴ In 1977, however, the Supreme Court held in *Bates v. State Bar of Arizona*⁵⁵ that attorney advertising was commercial speech, and that the “blanket suppression” of such advertising was impermissible.⁵⁶ A state, however, could place reasonable restriction on the time, place and manner of lawyer advertising.⁵⁷ A series of Supreme Court decisions after *Bates* arrived at the basic principles that attorney advertising can be regulated but not prohibited, and that certain forms of attorney solicitation are protected, but that face-to-face and telephone solicitation can be prohibited.⁵⁸

ambivalent to new technology, and the problems that have arisen from such ambivalence, see Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 Duke L.J. 147, 164-68 (1999).

52. See Ethical Issues: Summary, at <http://www.elawyering.org/ethics/ethics.asp> (last visited Mar. 19, 2002) (listing advertising, competence and duty to inform, confidentiality, conflicts, legal fees and duties to prospective clients, and unauthorized practice of law as ethics issues that are implicated by technology).

53. See J. Gordon Hylton, *Professional Values and Individual Autonomy: The United States Supreme Court and Lawyer Advertising* 11-33 (1998).

54. *Id.* at 36 (citing Raymond L. Wise, *Legal Ethics* 134 (2d ed. 1970)). The Model Code of Professional Responsibility, as originally adopted in 1969, provided that “lawyer[s] shall not publicize [themselves] . . . through newspaper or magazine advertisements, radio or television announcements . . . or other means of commercial publicity.” Hill, *supra* note 11, at 792 (quoting Model Code of Professional Responsibility DR 2-101(B) (1969)).

55. 433 U.S. 350 (1977).

56. *Id.* at 383.

57. *Id.* at 384.

58. See *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (upholding thirty-day ban on mailed solicitations to accident victims); *Ibanez v. Fla. Dep’t of Bus. and Prof’l Regulation*, 512 U.S. 136 (1994) (upholding the right of a lawyer to truthfully communicate that she was a CPA, even though doing so violated the professional rules governing accountants in Florida); *Peel v. Attorney Registration and Disciplinary Comm’n of Ill.*, 496 U.S. 91 (1990) (holding that a state cannot prohibit a lawyer from including on a letterhead a truthful statement that the lawyer is certified as a specialist in a particular legal field, even if the state does not provide for certification of specialties); *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466 (1988) (holding that truthful and nondeceptive mail targeted to individuals with a specific need could not be prohibited); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)

With these principles in mind, the American Bar Association has proposed rules governing attorney advertising and solicitation⁵⁹ aimed principally at prohibiting lawyers from communicating “false or misleading” information regarding their services.⁶⁰ The Model Rules also “require attorneys to limit their direct contact with potential clients.”⁶¹ In line with the Supreme Court decisions discussed above,⁶² the Model Rules are intended to “allow truthful and nondeceptive advertising subject to defined limitations and restrictions.”⁶³

Unfortunately, the Model Rules do not directly address how to apply the rules to lawyer advertising and solicitation over the Internet, and the case law on the subject is sparse. This situation has forced state bar associations to address the issue through their own formal and informal opinions. A consensus has developed that attorney websites are commercial speech and subject to state ethics rules regarding advertising and solicitation.⁶⁴ Most states have determined that, under their existing rules, attorney websites can be considered advertising, but are generally not considered solicitation.⁶⁵

In Iowa, an ethics ruling determined that websites “are generally designed to promote the firm and to sell legal services of the firm and constitute advertising.”⁶⁶ The ethics committee consequently concluded that attorney websites must conform to the Iowa Code of Professional Responsibility.⁶⁷ Similarly, the Standing Committee of Professional Responsibility and Conduct of the State Bar of California recently concluded that an attorney’s website is a “communication,”

(holding that states may not prevent lawyers from making accurate statements of fact concerning their experience); *In Re R.M.J.*, 455 U.S. 191 (1982) (holding that states may not put an absolute prohibition on certain types of potentially misleading information if the information may also be presented in a way that is not deceptive); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (holding in-person solicitation for pecuniary gain subject to regulation); *In Re Primus*, 436 U.S. 412 (1978) (holding solicitation for social cause and no pecuniary gain permissible).

59. See Model Rules of Prof’l Conduct R. 7.1-7.5 (2001); see also William E. Hornsby, Jr., *Marketing and Legal Ethics: The Boundaries of Promoting Legal Services 15-16* (3d ed. 2000) (providing a brief outline of Model Rules 7.1 through 7.5).

60. See Model Rules of Prof’l Conduct R. 7.1 cmt. (2001) (“Whatever means are used to make known a lawyer’s services, statements about them should be truthful.”).

61. Athey, *supra* note 2, at 503.

62. See *supra* note 58 and accompanying text.

63. Hornsby, *supra* note 59, at 16.

64. Francis G.X. Pileggi, *Ethics Rules and the Internet*, The Metropolitan Corporate Counsel, Oct. 1999, at 17 (discussing the application of *Zauderer* to attorney websites).

65. Westermeier, *supra* note 5, ¶ 18. At least two states, Texas and Florida, have put specific restrictions on electronic media, including websites. See Haywood & Jones, *supra* note 7, at 1113.

66. Westermeier, *supra* note 5, ¶ 6 (quoting Joan Rogers, *How Do Advertising & Rules Apply to Lawyers on the Net?*, 12 ABA/BNA Law. Manual on Professional Conduct 37).

67. Westermeier, *supra* note 5, ¶ 7.

and is therefore subject to all of the California ethics rules governing attorney communications.⁶⁸ Connecticut, Illinois, Kentucky, Maryland, Michigan, Utah, Vermont, and Virginia also have determined that their own particular advertising rules govern websites.⁶⁹

While applying existing ethics rules to attorney websites might seem an easy solution to the regulation of lawyers' online conduct, it creates an untenable situation for lawyers who are licensed to practice in multiple states. This is because the Internet is "not limited to geographical or jurisdictional boundaries,"⁷⁰ while rules pertaining to advertising and solicitation vary significantly from jurisdiction to jurisdiction.⁷¹ These circumstances make it extremely difficult for an attorney to determine which states' ethics rules may be violated by any particular online conduct.

Attorney websites are subject to different requirements, depending on the jurisdiction.⁷² Of the states that have adopted the Model Rules of Professional Conduct, approximately eighty percent have provisions that differ from Model Rules 7.1-7.5 regarding lawyer communications.⁷³ These variations concern a number of issues, including the disclosure of contingent fees,⁷⁴ the emotional vulnerability of prospective clients,⁷⁵ filing and screening of advertising content,⁷⁶ disclaimer requirements,⁷⁷ and record-keeping requirements.⁷⁸

For example, Florida, Indiana, Nevada, New Mexico, and Ohio have expressly prohibited the use of testimonials in advertising.⁷⁹ By contrast, California, Louisiana, Missouri, Oregon, Pennsylvania, Virginia, and Wisconsin all permit the use of testimonials or

68. See State Bar of Cal. Standing Committee on Prof'l Responsibility and Conduct, Formal Op. 2001-155 (2001), www.calbar.org/2pub/3eth/ca2001-155.htm (also determining that attorneys' websites do not implicate solicitation rules, even where users are directed to the website from another site).

69. Westermeier, *supra* note 5, ¶ 18.

70. Pa. Bar Ass'n, Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 98-85 (1998).

71. Westermeier, *supra* note 5, ¶ 5.

72. *Id.*

73. Hill, *supra* note 11, at 811. Furthermore, even where states have adopted the same language pertaining to advertising, judicial interpretations may lead to conflicting applications of the same rule. Cf. H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 Minn. L. Rev. 73, 96 (1997) (discussing the no-contact rule as an example of such "interpretive disparity").

74. Hill, *supra* note 11, at 811.

75. *Id.*

76. *Id.* at 811-12.

77. Westermeier, *supra* note 5, ¶ 20.

78. *Id.*

79. Hill, *supra* note 11, at 812 n.143; Fla. Rules of Prof'l Conduct R. 4-7.2(b) (2001); Ind. Rules of Prof'l Conduct 7.1(d)(3) (2001); Nev. Rules of Prof'l Conduct R. 195(4) (1999); N.M. Rules of Prof'l Conduct R. 16-701(a)(2) (2001); Ohio Code of Prof'l Responsibility DR 2-101(a)(3) (1999).

endorsements, as long as they include certain disclaimers.⁸⁰ Therefore, if a lawyer licensed to practice in both Nevada and California were to include a testimonial on his website, even if that testimonial was only directed to Nevada clients, he would be in violation of the ethical rules of California and subject to discipline.

Another example of these variations among ethics rules can be seen in ABA Model Rule 7.5(b), which provides that “[a] law firm with offices in more than one jurisdiction may use the same name in each jurisdiction.”⁸¹ While most states have adopted this rule,⁸² Nevada ethics rules provide that all of the named partners in a law firm must be licensed to practice in Nevada, or, if deceased or retired, must have been licensed in Nevada at the time of their death or retirement.⁸³

These variations in legal advertising rules make it difficult, if not impossible, to formulate a uniform approach to Internet regulation.⁸⁴ The absence of such uniformity, coupled with the growth in the number of lawyers online,⁸⁵ has led to increasing problems “for lawyers attempting to comply with the applicable ethics rules.”⁸⁶

C. Model Rule 8.5(b): Choice of Law

1. Background of Choice of Law Doctrine

The necessity for a body of law to decide which laws a court will apply to particular conduct arises out of the simple fact that we live in a world with many different governments, all with separate legal systems.⁸⁷ Choice of law doctrine developed in American jurisprudence as a response to legal problems in which the elements of the problem had contacts with more than one of these governments.⁸⁸

80. Hill, *supra* note 11 at 812 n.145; Cal. Rules of Prof'l Conduct R. 1-400 (1999); La. Rules of Prof'l Conduct R. 7.1(a)(vi) (1999); Mo. Rules of Prof'l Conduct R. 7.1(g) (1997); Or. Code of Prof'l Responsibility DR 2-101(A)(6) (2000); Pa. Rules of Prof'l Conduct R. 7.2(e) (1998); Va. Rules of Prof'l Conduct R. 7.1(a)(4) (2000); Wis. Rules of Prof'l Conduct R. 20:7.1 (2001).

81. Model Rules of Prof'l Conduct R. 7.5(b) (2000).

82. See Haywood & Jones, *supra* note 7, at 1110.

83. Nev. Rules of Prof'l Conduct R. 199 (1999).

84. Westermeier, *supra* note 5, ¶ 22.

85. Hill, *supra* note 11, at 812 n.145.

86. *Id.*

87. Luther L. McDougal, III, et al., *American Conflicts Law* § 8 (5th ed. 2001) (stating that conflict law is “little but a nuisance,” but that it is necessary because “state lines divid[e] human activity into territorial compartments that are often disregarded in commerce and industry and in ordinary social intercourse”).

88. *Conflict of Laws: Cases and Materials* 1 (Peter Hay et al. eds., 11th ed. 2000). American choice of law doctrine was largely developed in America, and not handed down from English jurisprudence. This was a result of the early establishment in England of a common law for the entire realm, combined with the use of a legal fiction by which English courts assumed that all facts in international cases occurred in England. Consequently, England did not develop a consistent body of choice of law

The growth of this body of law, however, has often been controversial.⁸⁹ The difficulty inherent in formulating choice of law rules lies in the tension between providing “uniform solutions” that protect “the legitimate expectation[s] of the parties,”⁹⁰ and respecting a state’s interest in having its law applied in a multistate case.⁹¹

Early courts avoided this tension by applying rules that generally utilized a single specified type of contact with a conflict, such as domicile or place of injury, to identify which state’s law should govern the controversy.⁹² These approaches adequately protected the expectations of the parties as to which law would apply to their conduct, and lent stability and certainty to choice of law problems.⁹³ However, they ignored the fact that states have an interest in the application of their laws, and the policies that underlie them, to certain multi-jurisdictional disputes.⁹⁴

In recognition of this lack of balance between certainty and states’ interests, many courts began in the 1950s to use “escape devices” to avoid application of the rigid and mechanical traditional rules. These “escape devices” consisted of recharacterizing the cases before the court in order to achieve the desired result. An example of such a case is *Grant v. McAuliffe*,⁹⁵ which involved an automobile collision between California residents in Arizona. The plaintiff sued the defendant’s estate for injuries sustained as a result of the defendant’s alleged negligence. Under Arizona law, tort actions do not survive the tortfeasor’s death, while under California law they do.⁹⁶ Justice Traynor avoided applying the traditional rule that the place of the wrong—here Arizona—governs the choice of law in tort cases by characterizing the issue of survival of causes of action as one of procedure, not of substantive state law. He therefore concluded that “survival of causes of action should be governed by the law of the

rules until late in the nineteenth century, by which time America had many decades of experience with conflicts law. *Id.* at 3-4.

89. Perspectives on Conflict of Laws: Choice of Law 1 (James A. Martin ed., 1980) (“Conflicts is an area of the law noted for disputations over theory.”).

90. Ernst Rabel, *The Conflict of Laws: A Comparative Study* 94 (2d ed. 1958).

91. See Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 *Colum. L. Rev.* 772, 811 (1983) (discussing a series of essays by Brainerd Currie which first advocated consideration of state policies in choice of law analysis).

92. See, e.g., *Louis-Dreyfus v. Paterson Steamships, Ltd.*, 43 F.2d 824 (2d. Cir. 1930) (using the place of contract formation to decide choice of contract law); *Ala. G.S.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892) (using the place of injury to decide choice of substantive tort law); *In Re Jones’ Estate*, 182 N.W. 227 (Iowa 1921) (using place of domicile to decide choice of law on intestate succession).

93. See Korn, *supra* note 91, at 778-79.

94. For example, in a case involving intestate succession, rigidly applying the law of the decedent’s domiciliary state, where the law of that state and the state in which a relative of the decedent lives would produce differing results, ignores the interests of the relative’s state in applying its policy of intestate succession to the case.

95. 264 P.2d 944 (Cal. 1953).

96. *Id.* at 946.

forum."⁹⁷ By this reasoning, Justice Traynor was able to apply California law and allow the California plaintiff to seek redress for his injuries.⁹⁸

The use of these "escape devices" to evade traditional choice of law rules prompted many commentators and courts to search for new approaches. This search led to the modern approach to choice of law, in which courts analyze the relative contacts between the state laws and parties to the dispute, taking into account the interests and policies underlying these laws.⁹⁹ This approach, often called the "center of gravity" approach, aims to "giv[e] controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."¹⁰⁰

The center-of-gravity approach analyzes relative contacts and competing governmental interests in the hope of arriving at "the better rule of law."¹⁰¹ Some commentators, however, have criticized this approach, at least as it is currently applied, on the grounds that it does not strike the correct balance between achieving this better rule and providing certainty to individuals as to which law will govern their conduct.¹⁰² Although many commentators have differed on how best to strike this balance, most agree that "[c]ertainty and predictability in decisions appear to still be a long way away."¹⁰³

97. *Id.* at 949.

98. Justice Schauer delivered a vigorous dissent to this approach, saying that it allows the court to "apply one 'rule' or another as the untrammelled whim of the majority may from time to time dictate." *Id.* at 950 (Schauer, J., dissenting). Other courts found various ways of recharacterizing the issues before them in order to reach what they felt was the proper choice of law. *See, e.g.,* *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163 (Conn. 1928) (characterizing the issue in an automobile collision case as one of contract, and applying "place of making" rule instead of "place of wrong" rule); *Haumschild v. Continental Casualty Co.*, 95 N.W.2d 814 (Wis. 1959) (recharacterizing a tort issue as a standing issue to avoid applying the "place of wrong" rule, and instead applying the "place of domicile" rule).

99. For a detailed discussion and critical analysis of this modern approach to choice of law, see Korn, *supra* note 91.

100. *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963). This principal is reflected in the Restatement (Second) of Conflict of Laws § 6:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

101. *See* American Conflicts Law, *supra* note 87, § 4, at 8.

102. *See* Korn, *supra* note 91, at 960 (describing current choice of law concepts as "unpredictable and unprincipled").

103. American Conflicts Law, *supra* note 87, § 4, at 9.

2. Choice of Law in Legal Ethics

Before 1993, the problem of how best to formulate a choice of law rule in the realm of legal ethics was exacerbated by “the limited body of law and commentary [which] . . . left all the crucial questions in regard to choice of law for legal ethics unanswered.”¹⁰⁴ Courts and disciplinary panels had no clear-cut rule for dealing with choice of law in the sphere of legal ethics.¹⁰⁵ As a result, disciplinary committees and courts that dealt with this issue applied inconsistent approaches in choosing which ethics rules applied to particular conduct.¹⁰⁶ For example, some states required their attorneys to follow their ethics rules, even when practicing in another admitting state.¹⁰⁷ Other states simply looked to the rules of the jurisdiction where the conduct occurred.¹⁰⁸ Still other states applied a more typical modern choice of law analysis, applying the rules of the jurisdiction that had the greatest interest in the matter.¹⁰⁹

In 1993, The American Bar Association attempted to resolve this confusion by amending Model Rule 8.5 to delineate which state’s ethics rules would apply to attorney conduct.¹¹⁰ The choice of law framework adopted in the amendment recognized that a lawyer “may be potentially subject to more than one set of rules of professional conduct which impose different obligations.”¹¹¹ Amended Model Rule 8.5, subsection (b) provides that

[i]n any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for the purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and (2) for any other conduct, (i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular

104. Arvid E. Roach, II, *The Virtues of Clarity: The ABA’s New Choice of Law Rule for Legal Ethics*, 36 S. Tex. L. Rev. 907, 920 (1995).

105. *Id.* at 918-19.

106. *Id.* at 918.

107. See Cal. Rules of Prof’l Conduct R. 1-100(d)(1) (2000) (requiring California bar members licensed in other states to follow California rules outside of the state, except when another licensing jurisdiction specifically required them to follow different rules).

108. Roach, *supra* note 104, at 919.

109. *Id.*; see also Fla. Bar Ass’n, Ethics Op. 88-10 (1988) (applying the ethics rules of the jurisdiction with the most significant relationship to the client and the cause of action).

110. See Model Rules of Prof’l Conduct R. 8.5 (2001).

111. R. 8.5 cmt. 2.

conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.¹¹²

Model Rule 8.5(b) was drafted in response to a concern by the American Bar Association that lawyers lacked “clear guidance” when they faced conflicting obligations, a belief that was “exacerbated by the fact that existing authority as to choice of law in the area of ethics rules is unclear and inconsistent.”¹¹³

In 1995, Illinois became the first state to adopt Rule 8.5(b) verbatim.¹¹⁴ Since then, Model Rule 8.5(b) has been adopted by only seven jurisdictions.¹¹⁵ The reluctance on the part of the states to implement the ABA’s choice of law rule can be at least partly attributed to a fear of the inconsistency that would result from the predominant effect test.¹¹⁶ If the ABA hopes for a uniform choice of law rule, it must promulgate a standard that allows lawyers to predict, with reasonable certainty, what rules will govern their conduct.

3. The Predominant Effect Test

Given that Model Rule 8.5(b) exposes lawyers to discipline from multiple disciplinary authorities,¹¹⁷ one would think that it should provide lawyers with a simple method of determining whose rules they must follow. In fact, that was the goal of Rule 8.5(b)’s drafters, who wanted to provide “relatively simple, bright-line rules” for

112. R. 8.5(b).

113. Stephen Gillers & Roy D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards* 451 (2001) (excerpting ABA Committee Report explaining 1993 amendment to Rule 8.5).

114. *Id.* at 453.

115. See D.C. Rules of Prof’l Conduct R. 8.5(b) (2001); Ill. Rules of Prof’l Conduct R. 8.5(b) (1999); Pa. Rules of Prof’l Conduct R. 8.5(b) (1999); Ga. Rules of Prof’l Conduct R. 8.5 (2000); N.C. Rules of Prof’l Conduct R. 8.5(b) (2001); Wis. Rules of Prof’l Conduct R. 8.5 (2001). One state, Vermont, has extended its choice of law rule even farther than the Model Rules. The Vermont code tracks ABA Rule 8.5(b), but adds a third subsection to Rule 8.5, providing that in an exercise of Vermont’s disciplinary authority, a court may apply Vermont rules to the conduct of a lawyer not licensed to practice in Vermont who engages in the practice of law in Vermont. See Vt. Rules of Prof’l Conduct R. 8.5(b)(2)(iii) (1999).

116. See Mark H. Aultman, *A Post Conference Reflection: Does Amended Model Rule 8.5 Help Anyone?*, 36 S. Tex. L. Rev. 1055, 1063 (1995) (arguing that, based on “past experience” and “the merits of the rule itself,” states will not adopt Rule 8.5(b)).

117. See *id.* at 1060 (“[I]t is clear that the rule has not diminished the number of jurisdictions in which a lawyer is subject to discipline.”).

choice of law.¹¹⁸ However, many commentators believe that they did no such thing.¹¹⁹

Less than two years after it was drafted, Model Rule 8.5(b) was criticized on the basis that it does not actually serve to resolve the conflicts created by varying state rules.¹²⁰ Rather, it simply codifies “utterly irreconcilable conflicts.”¹²¹ By subjecting lawyers to the ethics laws of any jurisdiction in which they are licensed to practice, subsection (b) gives disciplinary panels even “more power in choosing which inconsistent rules from different jurisdictions and courts to apply.”¹²² Therefore, it is argued, the rule leads to “greater uncertainty and unpredictability for lawyers, their clients, and the agencies that must interpret and apply the rules.”¹²³ This uncertainty is at odds with the stated purpose of Model Rule 8.5(b), which was to bring clarity to choice-of-ethics rules.¹²⁴

Subsection (b)(2)(ii) of Model Rule 8.5 attempts to create a “bright-line rule” by using the concept of “predominant effect.” However, the rule fails to define this term, making application of the rule “more complicated than its simple language suggests.”¹²⁵ This test is intended to apply when it is clear that the predominant effect of a lawyer’s conduct is in a specifically identified jurisdiction.¹²⁶ Such clarity can rarely be achieved in practice.¹²⁷

Therefore, it has been suggested that the clarity the predominant effect test was supposed to create is felt only “after the fact”—that is, after the lawyer has made the determination of whose ethics rules to follow, and a court has reviewed this choice.¹²⁸ A lawyer is forced to predict where a court or disciplinary authority would decide the predominant effect of his conduct would be felt. Furthermore, there is nothing precluding another agency or court from deciding that the predominant effect of a lawyer’s conduct was felt in an altogether different place.¹²⁹ These problems put the lawyer in the same position

118. Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. Tex. L. Rev. 715, 758 (1995) (citing ABA Comm. on Ethics and Prof’l Responsibility, Recommendation and Report to the House of Delegates 4 (1993)).

119. See Gregory B. Adams, *Reflections on the Reaction to Proposed Rule 8.5: Consensus of Failure*, 36 S. Tex. L. Rev. 1101 (1995) (summarizing a 1995 symposium on the amended Model Rule 8.5, in which all but one of the participants expressed the belief that the rule would not increase clarity in choice-of-ethics law).

120. Aultman, *supra* note 116, at 1059.

121. *Id.*

122. *Id.* at 1065.

123. *Id.*

124. See Daly, *supra* note 118, at 758.

125. *Id.* at 761.

126. Aultman, *supra* note 116, at 1062.

127. *Id.*

128. *Id.* at 1066.

129. *Id.*

he was in before the adoption of subsection (b)—subject to different and often conflicting standards of conduct.

Model Rule 8.5, therefore, does not lend any simplicity to a lawyer's decision on whose ethics rules to follow. As one commentator has observed, "[t]he lawyer has no guidance in deciding what rule to follow at the time of the conduct."¹³⁰ Because predominant effect is an "inherently vague standard,"¹³¹ and conduct based on this standard "may later result in discipline or in litigation in any number of jurisdictions,"¹³² a lawyer must find some other method of deciding whose rules to follow. This problem is particularly implicated in attorneys' use of websites for marketing purposes.

II. THE PROBLEM OF UNCERTAINTY REGARDING APPLICATION OF ETHICS RULES TO INTERNET USE

A. *The Predominant Effect Test and Lawyers' Use of the Internet*

The difficulties inherent in the predominant effect test of Model Rule 8.5 are exemplified when one attempts to apply this test to lawyers' websites. The a-jurisdictional nature of the Internet, which gives users easy access to information without regard to state boundaries, makes identifying a particular jurisdiction where the predominant effect of a website is felt an impossible task. This is because "the Internet is a community without walls or boundaries that encourages people to indiscriminately communicate and conduct business over state and national borders."¹³³ Therefore, a lawyer who makes information available on a website necessarily crosses all fifty state lines.¹³⁴

It is possible that in the future, technology will allow lawyers to "filter" their websites to specific geographic areas. This type of technology may allow lawyers to act in accordance with the rules that govern the intended jurisdiction. Until such technology becomes available, however, attorneys who wish to market on the Internet must identify whose ethics rules will apply to their website.¹³⁵

In a move that may make the situation even more complicated, the ABA has proposed removing the restrictions in Rule 8.5(b)(2)(ii), which currently require a lawyer to be licensed in a jurisdiction before the rules of that jurisdiction can be applied to her.¹³⁶ Under the proposed rule, a lawyer would be subject to the rules of *any*

130. *Id.* at 1062.

131. *Id.* at 1065.

132. *Id.* at 1062.

133. Sweet, *supra* note 22, at 202 (citation omitted).

134. Hill, *supra* note 11, at 814.

135. William E. Hornsby, Jr., *Marketing and Legal Ethics: The Boundaries of Promoting Legal Services* 107 (2000)

136. Model Rules of Prof'l Conduct R. 8.5 (2000).

jurisdiction in which the predominant effect of her conduct is felt, regardless of whether or not she is a member of the bar of that jurisdiction.¹³⁷ This proposed change is a result of the ABA Commission on Multijurisdictional Practice's acknowledgment of the trend towards cross-jurisdictional legal practice.¹³⁸ As the Commission notes, "a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct."¹³⁹

The comment to this proposed rule indicates recognition that the predominant effect test is not always clear, and may subject a lawyer to numerous ethics standards.¹⁴⁰ The drafters have therefore inserted a clause that allows a tribunal to apply the ethics rule of a "jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."¹⁴¹ However, this addition does not provide any extra certainty in the context of Internet websites, because a lawyer can reasonably believe that the effects of a website may be felt in all jurisdictions. What the proposed change leaves us with, if adopted, is a rule that intensifies the already confusing situation of choice of law for attorney websites.¹⁴²

In light of the global nature of the Internet, how is a lawyer to determine which jurisdiction's ethics rules to follow when creating and

137. The proposed rule 8.5(b)(2) reads as follows:

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

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

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

A.B.A. Comm'n on Evaluation of Prof'l Standards, Proposed Revisions of the ABA Model Rules R. 8.5 (2000).

138. ABA, Interim Report of the Comm'n on Multijurisdictional Practice 34 (2001) (citing the ABA Ethics 2000 Commission).

139. *Id.*

140. See ABA Comm'n on Evaluation of Prof'l Standards, Proposed Revisions of the ABA Model Rules R. 8.5 cmt. 5 (2001) ("When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred.").

141. ABA Comm'n on Evaluation of Professional Standards, Proposed Revisions of the ABA Model Rules, Proposed Model Rules of Prof'l Conduct. R. 8.5(b)(2) (2000).

142. The American Bar Association has delayed debate on proposed Rule 8.5 pending the completion of the work of the ABA Commission on Multijurisdictional Practice. See Patricia Manson, *Bar Completes Overhaul of Ethics Rules*, Chi. Daily Law Bull., Feb. 5, 2002, at 1.

maintaining a website that markets himself? Because of the substantial differences between each state's rules regarding advertising and solicitation,¹⁴³ a lawyer may be faced with as many rules as jurisdictions in which he (or anyone in his firm) is licensed to practice.¹⁴⁴ Under the proposed amendment to the rule, a lawyer would have to contend with the rules of as many jurisdictions as exist.¹⁴⁵ Looking to the Model Rules' choice of law framework for help in this determination does not provide much guidance.

Subsection (b)(2)(ii) of Model Rule 8.5 would make a website subject to the rules of the jurisdiction where the predominant effect of the website would be felt. Websites can be viewed throughout all jurisdictions, so how can one determine on which state a website will exercise its predominant effect? Because this question cannot be answered with any degree of certainty,¹⁴⁶ a number of commentators and bar opinions have suggested several methods for lawyers to avoid discipline.

B. *The Competing Solutions*

1. Solutions Within the Current Regulatory Framework

The most extensive state bar opinion discussing the issue of choice of law and the Internet is the Pennsylvania Bar Association's Informal Opinion No. 98-85. This opinion recognized that "[t]he rules currently in force provide little guidance for resolving these questions because they are premised on a jurisdictional model that the Internet does not follow."¹⁴⁷ The opinion suggested that because the Rules of Professional Conduct are silent on how to determine where a website has its predominant effect, lawyers admitted in more than one state should take a "least common denominator" approach.¹⁴⁸ This approach entails following the advertising rules of the most restrictive state in which the attorney, or any of the attorneys in a firm, are licensed.¹⁴⁹

Many commentators have argued that the "least common denominator" approach imposes an inherently unworkable task upon a lawyer.¹⁵⁰ Where the rules of admitting jurisdictions are conflicting,

143. See *supra* notes 71-81 and accompanying text.

144. See Sweet, *supra* note 22, at 218.

145. See *supra* notes 137-42 and accompanying text.

146. See Westermeier, *supra* note 5, ¶58.

147. Penn. Bar Ass'n, Comm. on Lethal Ethics and Prof'l Responsibility, Informal Op. N. 98-85 (1998), available at 1998 WL 988187, at *2.

148. *Id.* at *3.

149. Davis, *supra* note 8, at 6.

150. See, e.g., Hill, *supra* note 11, at 848 ("[S]ome lawyers attempt to follow the course of least resistance and comply with the most stringent regulations among the applicable states."); Pileggi, *supra* note 64, at 17 ("[A] lawyer can probably best

it is not simply an issue of choosing the most restrictive rule.¹⁵¹ For example, “the labeling requirements of the various jurisdictions may be so different that it is impossible to be in compliance with multiple language, print size, and color requirements of several states.”¹⁵² Furthermore, this approach will necessarily ignore some jurisdictions’ minor, yet compulsory rules.¹⁵³

Another approach, called the “absolute compliance” approach,¹⁵⁴ is simply to follow the ethics rules of all states in which the lawyer is licensed to practice, or in which lawyers in a law firm are licensed.¹⁵⁵ William Hornsby, staff counsel to the American Bar Association Commission on Advertising, proposes that this approach requires consideration of where a lawyer has an office, where any lawyer in a firm is admitted, and where the firm or lawyer is seeking clients.¹⁵⁶

It has been argued that this approach is also infeasible, mainly because it places an extremely onerous burden upon lawyers and law firms.¹⁵⁷ For a large law firm, with partners and associates licensed to practice in many jurisdictions, absolute compliance with the rules of all these jurisdictions would be exceedingly difficult.¹⁵⁸ For example, the firm would have to keep in mind the filing requirements and record-keeping requirements of each licensing jurisdiction.¹⁵⁹ Even one minor deviation from this plethora of rules may leave the firm subject to discipline. Of course, where ethics rules conflict, compliance under this approach would be impossible.

A further argument against the absolute-compliance approach is that it would lead to unsightly websites, which would be poor marketing tools.¹⁶⁰ Many states have specific requirements as to advertising copy.¹⁶¹ For example, Alabama ethics rules require any communication to include the disclaimer: “No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”¹⁶² Florida ethics rules state that any advertising must declare the following: “The hiring of a lawyer is an important decision that should not be

minimize his exposure by following the ‘lowest common denominator’ approach of complying with the most restrictive rules of a state wherein he is licensed.”)

151. Hill, *supra* note 11, at 847-48.

152. *Id.* at 848.

153. Sweet, *supra* note 22, at 229.

154. *Id.* at 228.

155. See Westermeier, *supra* note 5, ¶ 23.

156. Hornsby, *supra* note 135, at 125-28.

157. Sweet, *supra* note 22, at 228.

158. *Id.*

159. *Id.*

160. *Id.*

161. See *id.* (citing William E. Hornsby, Jr., *The Ethical Boundaries of Selling Legal Services in Cyberspace*, available at <http://www.computerbar.org/netethics/abawill.htm> (last visited Oct. 31, 1999)).

162. *Id.* (citing Al. Rules of Prof'l Conduct R. 7.2(e) (1996)).

based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.”¹⁶³ A website with multiple disclaimers would look cluttered and unruly, and might cause potential clients to worry about a firm that has so extensively disclaimed its own assertions.

Another approach that has been suggested is for lawyers with multiple bar admissions to establish separate websites for each admitting jurisdiction.¹⁶⁴ This is the approach offered by an ethics committee in Iowa.¹⁶⁵ The Iowa ethics committee determined that an out-of-state firm with a branch office in Iowa or members licensed to practice in Iowa should create a distinct website, which would not refer to the websites for any other offices, and would provide no links to those websites.¹⁶⁶ However, this approach seems impractical, because it does not take into account the a-jurisdictional nature of the Internet. Because the alternative websites can be seen in all jurisdictions, they would give potential clients the impression that they represented separate firms.¹⁶⁷ This would be confusing to the public, and would not serve the firm well as a marketing tool.

All of these approaches seemingly address the fundamental problem with the ABA's approach for designating a choice of law: the lack of clarity for lawyers when deciding whose ethics rules apply to their websites. While they are all easily stated, however, commentators have made strong arguments that difficulties inherent in actually applying these approaches to real-life situations make them largely unworkable.

2. Changing the Regulatory Regime

The previously discussed approaches are attempts to work within the current regime of lawyer regulation. A number of commentators have proposed alternate solutions, involving fundamental changes to the advertising ethics rules themselves.

One of these proposals is the creation of entirely new advertising and solicitation rules dealing exclusively with the Internet. This approach is premised on the notion that the Internet is a fundamentally different medium than traditional forms of advertising such as television, radio, and newspapers.¹⁶⁸ The Internet Law & Policy Forum, a public policy organization, has proposed that “the Internet should be recognized as a separate jurisdiction and subject to

163. *Id.* at 228-29 (citing Fla. Rules of Prof'l Conduct R. 7.3(b) (2001)).

164. *Id.* at 229.

165. See Iowa Sup. Ct., Board of Prof'l Responsibility, Formal Op. 96-14 (1996).

166. *Id.*

167. Peter Krakaur, *Internet Advertising: States of Disarray? Are Uniform Rules a More Practical Solution?*, N.Y. L.J., Sept. 15, 1997, at S4, S14.

168. See Athey, *supra* note 2, at 504-05.

its own laws and regulations (similar to the medieval law merchant).¹⁶⁹ Under this system,

[d]istinct ethical rules would help to emphasize the benefit that the Web medium offers (providing an easily accessible source of substantial information to the public), while at the same time recognizing the ethical disconnect in the minds of most attorneys between traditional forms of advertising and a presence on the World Wide Web.¹⁷⁰

The hope is that by separating the Internet from conventional advertising methods, uniformity will be encouraged in the adoption of new online advertising rules. However, current advertising rules are geared toward the prevention of untruthful and deceptive communications from lawyers to the general public.¹⁷¹ Any ethical rules drafted specifically to regulate Internet communications would necessarily have the same goal.¹⁷² Because jurisdictions differ greatly on how to achieve this goal, there is no reason to believe that such differences would not also appear in entirely new ethical rules for the Internet. Individual states would most likely continue to differ on the proper way to regulate Internet activity.

Another proposed solution to the lack of uniformity between ethics rules is the creation of national standards for lawyer communications.¹⁷³ The principle behind this proposal is that standardized rules will “provide clear guidance [to lawyers] on how to disseminate information to the public.”¹⁷⁴ Proponents of this idea recognize that while interpretations by courts and disciplinary agencies will necessarily result in some differences between jurisdictions, “uniform standards with interpretive guidelines will go a long way towards leveling the playing field.”¹⁷⁵

National standards would also allow lawyers to more effectively represent clients, because the public would receive “consistent, complete and clear” information about the law and the availability of legal services.¹⁷⁶ National standards would effectively end the difficulties created by the a-jurisdictional nature of the Internet,

169. Lorelie S. Masters, *Professionals Online: Advice for Travels on the Information Superhighway*, *The Computer Law.*, Mar. 1999, at 1. See also <http://www.ilpf.org>.

170. Athey, *supra* note 2, at 505-06.

171. Louise Hill, *Lawyer Advertising* 91 (1993).

172. Athey, *supra* note 2, at 506.

173. A main proponent of this solution, Professor Louise Hill, takes pains to establish that this approach does not entail national licensing and regulation of lawyers. “Rather, what this [proposal] suggests are uniform standards on lawyer communications, with interpretive guidelines, to be regulated by the individual states.” Hill, *supra* note 11, at 855.

174. Krakaur, *supra* note 167, at S14.

175. Hill, *supra* note 11, at 855.

176. Krakaur, *supra* note 167, at S4.

because lawyers would no longer have to choose from among different and conflicting sets of ethics rules.¹⁷⁷

The main problem with such an approach is that it is inconsistent with the territorial-based system that governs lawyers in the United States. Who would be able to promulgate a national standard for regulating attorney advertising? Currently, the source of the law regulating lawyers is the highest court of each state.¹⁷⁸ It is unrealistic to believe that courts will give up some of their authority over lawyers within their jurisdiction simply to increase attorneys' certainty of which rules govern their website.¹⁷⁹

A similar, but more modest, proposal that has been suggested is for the federal government to promulgate a choice of law rule to address conflicts among the differing state ethical standards.¹⁸⁰ It is argued that a national choice of law rule for lawyer conduct would allow states to continue to maintain diversity in ethics rules, while providing some measure of uniformity in resolving ethics conflicts.¹⁸¹ It would seem, however, that a federal choice of law rule would run into the same application problems as Rule 8.5, and would be no improvement over the current system.¹⁸² Nevertheless, one commentator has argued that such a rule does have an advantage over "even an ideal version of Model Rule 8.5."¹⁸³ Because it would be enacted by a single, central jurisdiction, "it would not be subject to varying state amendments [and] interpretations."¹⁸⁴

One author has suggested, however, that it is highly unlikely that Congress would enact any law regarding choice of law.¹⁸⁵ The argument is made that the only interest groups that might effectively push for federal regulation of choice of law are consumer groups, who would be trying to attain substantive reform, and not a way to help states regulate more effectively.¹⁸⁶ Furthermore, Congress will be very unlikely to attempt to usurp the long-standing state right to regulate lawyers.¹⁸⁷

177. Hill, *supra* note 11, at 856.

178. Professional Responsibility: Problems and Materials 41 (Thomas D. Morgan & Ronald D. Rotunda eds., 2000). However, a few state courts have "ceded limited authority over lawyers to the state legislatures." *Id.*

179. See Larry E. Ribstein, *Ethical Rules, Law Firm Structure and Choice of Law*, 69 U. Cin. L. Rev. 1161, 1195 (2001).

180. See Moulton, *supra* note 73, at 165.

181. *Id.* at 166-69.

182. See Ribstein, *supra* note 179, at 1195. ("[T]here is no guarantee that [a federal jurisdictional choice regime] would improve on the current system, while federal law would forestall further state experimentation on choice of law.")

183. See Moulton, *supra* note 73, at 166.

184. *Id.*

185. See Ribstein, *supra* note 179, at 1195. For a general discussion of the problems of federal choice of law rules, see Erin A. O' Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. Chi. L. Rev. 1151 (2000).

186. See Ribstein, *supra* note 179, at 1195.

187. *Id.* (citing Jonathan R. Macey, *Federal Deference to Local Regulators and the*

Some commentators have raised the issue of doing away with Rule 8.5(b) altogether, and simply relying on existing choice of law principles.¹⁸⁸ The argument has been made that lawyers and clients would both benefit if a disciplinary authority employs its state's common law rules on choice of law.¹⁸⁹ The thrust of this argument is simply that it is easier for a lawyer to learn one set of confusing rules than two.¹⁹⁰

However, two reasons have been suggested supporting why lawyers should have their own separate rules. First, that the existing authority as to choice of law for ethics rules is so sparse and inconsistent that it would be unfair to subject lawyers to this negligible body of law.¹⁹¹ Second, that because of the severe nature of the disciplinary sanction, it is unjust to impose such a remedy without clear prior guidance.¹⁹²

3. Amending the ABA's Choice of Law Rule

Creating new regimes for regulating attorney advertising and solicitation will be difficult. A simpler solution to the problem created by diverging ethics rules may be to address the ambiguities contained in the Model Rules choice of law provision directly. For example, one commentator has proposed eliminating the "predominant effect" language in Model Rule 8.5, and replacing it with a "client-based" rule.¹⁹³ This rule would apply the law of the state in which the client is domiciled at the time the conduct occurs.¹⁹⁴ Although this provision

Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 Va. L. Rev. 265 (1990).

188. Moulton, *supra* note 73, at 163 ("What would be wrong with consigning lawyers to consult on their own behalf the same body of conflicts law they consult on behalf of their clients?"). Currently, most states who have not adopted Rule 8.5(b) provide for the application of choice of law principles to conflicts between different jurisdictions' ethics rules. See, e.g., Miss. Rules of Prof'l Conduct R. 8.5 cmt. 2 (2001) ("If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction."); Utah Rules of Prof'l Conduct R. 8.5(b) cmt. 3 (2001) ("Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation.").

189. See Kathleen Clark, *Is Discipline Different? An Essay on Choice of Law and Lawyer Conduct*, 36 S. Tex. L. Rev. 1069, 1072 (1995) (discussing whether lawyers are advantaged by a choice of law rule tailored to lawyer discipline).

190. *Id.* at 1072.

191. See Moulton, *supra* note 73, at 163-64; see also *supra* notes 101-07 and accompanying text.

192. See Moulton, *supra* note 73, at 163, 164 (analogizing the disciplinary sanction to criminal penalties). However, Moulton goes on to argue that even with a special statutory choice of law rule for legal ethics, the problem of inconsistency is not solved, which is why he supports a federal choice of law rule. *Id.* at 164-70.

193. See Colin Owyang, Note, *Professional Responsibility and Choice of Law: A Client-Based Alternative to the Model Rules of Professional Conduct*, 28 U. Mich. J.L. Reform 459 (1995).

194. *Id.* at 465.

would eliminate the uncertainty surrounding the current rule in some situations,¹⁹⁵ it does not address the opposing ethics rules regulating attorney advertising. In the case of advertising, there is no identified client whose domicile may be the basis for a choice of law.

Another proposal to amend Rule 8.5 has been made by Professor Larry Ribstein, specifically in reference to law firms.¹⁹⁶ He has suggested applying ethical rules that relate to the structure of law firms,¹⁹⁷ including advertising rules, on a firm-wide, rather than a lawyer-by-lawyer basis.¹⁹⁸ Under this system, Rule 8.5 would be amended to allow an entire law firm (but not individual lawyers) to pre-select the advertising rules¹⁹⁹ of any state in which that firm maintains a branch office.²⁰⁰ This regime of "jurisdictional choice" is designed to eliminate the problem of individual jurisdictions forcing their ethical rules on multi-state firms.²⁰¹ While this proposal may also solve the uncertainty problem for a large firm, it necessarily does little to aid individual lawyers who market through websites.

III. APPLYING THE "PRINCIPALLY PRACTICES" TEST TO ONLINE ADVERTISING

A more appropriate change to Rule 8.5(b) may be an amendment providing that the predominant effect test will not apply to lawyers' conduct in marketing over the Internet. Under this provision, a lawyer who is licensed to practice in multiple jurisdictions would look to the first sentence of Model Rule 8.5(b)(2)(ii), and conform to the rules of the jurisdiction in which he "principally practices."²⁰² The "principally practices" standard is also somewhat ambiguous,²⁰³ but it is clearer than the predominant effect test "because the primary locale of the attorney's practice is easier to determine than the primary locale of the effects of that practice."²⁰⁴ Although the "principally

195. This "client-based" rule was proposed in the context of conflicts involving the future crime exception to the attorney-client privilege and the ethical duty of confidentiality. *Id.* at 465-68.

196. *See* Ribstein, *supra* note 179, at 1195.

197. Professor Ribstein defines "structural" rules as those that "directly affect the overall organization of the firm." *Id.* at 1166. Some examples of structural ethical rules include vicarious liability rules, restrictions on who can own shares in the firm, rules requiring screening structures, and rules concerning promotion and advertising of the firm. *Id.* at 1166-77.

198. *Id.* at 1164.

199. As well as other "structural" rules, identified as ABA Model Rules 1.10, 5.1-5.7, and 7.1-7.6. *Id.* at 1190-91.

200. *Id.* at 1190-94.

201. *Id.* at 1203 (arguing that such a scheme would "facilitate competition, experimentation and variation in ethical rules").

202. Model Rules of Prof'l Responsibility R. 8.5 (2000).

203. Owyang, *supra* note 193, at 465.

204. *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 Harv. L. Rev. 1547, 1589 (1994).

practices” test may be difficult to apply to a large firm with offices in many jurisdictions, disciplinary tribunals and courts could simplify this problem by utilizing a test similar to the one used by diversity courts to determine a corporation’s “principal place of business.”²⁰⁵

A hypothetical may help to explain how this amendment would add certainty to choice of law in the ethics realm. An attorney, with offices and most of his clients in State A, wishes to market his practice on the Internet to residents of State A. He is licensed to practice in both State A and State B, which have conflicting rules on the type size for attorney websites. State A mandates that all disclaimers be in 15-point type, while State B requires 20-point. Assume, for the purpose of this hypothetical, that anything larger than 15-point type would be an ethical violation in State A.

Under the predominant effect test, the attorney would have to guess where a disciplinary tribunal might determine the website had the most impact, a seemingly impossible task since it will be seen equally in both jurisdictions. Following the “least common denominator”²⁰⁶ or the “absolute compliance”²⁰⁷ approaches would not aid the attorney, because of the direct conflict between the rules of State A and State B. If the attorney is licensed to practice in more states than just A and B, the problem becomes even more complicated.

Applying the “principally practices” test to these facts eliminates the dilemma that our attorney faces. Because his office is located in State A, and most of his clients are in State A, the lawyer will be justified in believing that a court will find he principally practices in State A. Therefore, he can confidently use 15-point type on his website. Even if the attorney had an equal amount of clients from State A and State B, or also kept an office in State B, a court can perform a relatively uncomplicated factual analysis to determine in which state he principally practices. Analogizing to the “principal place of business” test for corporate citizenship in diversity cases, a court can look at the locale of the attorney’s legal activities and the location of offices to decide where the attorney principally practices.²⁰⁸

As can be seen from the hypothetical, the main advantage of eliminating the predominant effect test is that it greatly reduces the ambiguity of the Model Rule, and provides certainty and predictability to the attorney who markets his practice online. By shrinking the conflicting obligations that the predominant effect test places on an attorney, this proposal comes closest to satisfying the

205. *Id.* (advocating applying only the “principally practices” test to conflicts of confidentiality rules). See 28 U.S.C. § 1332(c)(1) (2001).

206. See *supra* note 150 and accompanying text.

207. See *supra* note 154 and accompanying text.

208. See Mary Kay Kane, *Civil Procedure in a Nutshell* 13 (4th ed. 1996).

intent of the drafters of Model Rule 8.5(b), which was to "provide clear answers to [choice of law] problems in nearly all cases."²⁰⁹

A drawback to this rule is that it only takes into account the interests of the state in which the attorney conducts the majority of his practice, while sacrificing the substantive policy interests inured in the ethics rules of the forty-nine other jurisdictions where websites can be accessed.²¹⁰ However, as the Restatement (Second) on Conflict of Laws recognizes, "any rule of choice of law... represents an accommodation of conflicting values."²¹¹ The tension between competing state interests is outweighed by the need for greater certainty for lawyers employing websites. Furthermore, it is difficult to argue that any one foreign jurisdiction has a greater policy interest in regulating an attorney's online conduct because the website can be seen in all jurisdictions equally.

Because this new rule would apply only to lawyers marketing themselves through their websites, it does not restrict the interest analysis reflected in the predominant effect test in other situations, outside the context of the Internet, where the predominant effect of conduct is easier to ascertain. In those cases, the choice of law would continue to recognize the appropriate regulatory interests of foreign jurisdictions.²¹²

CONCLUSION

The legal profession's growing presence on the Internet raises numerous ethical dilemmas for attorneys. The disparity among states' rules of professional responsibility make any analysis of these ethical considerations extremely complex, especially with regard to attorneys marketing themselves through websites. The agencies that regulate the practice of law in this country must attempt to reduce the uncertainty and risk created by their own choice of law rules, which force lawyers to contend with varying standards. Because uniformity of advertising rules on a national basis is unlikely to be achieved, bar associations should promulgate a choice of law rule that gives lawyers confidence in their choice of whose rules to follow. They must also ensure that the public receives consistent, clear, and correct information about the law and the availability of legal services.

Lawyers need to be able to predict how their actions will be interpreted in order to conduct themselves properly in the practice of law.²¹³ A choice of law rule that removes the focus on the predominant effect test for legal websites will serve this goal. Such a

209. Gillers & Simon, *supra* note 113, at 451 (excerpting ABA Committee Report explaining 1993 Amendment to Rule 8.5).

210. *See supra* notes 99-102 and accompanying text.

211. Restatement (Second) on Conflict of Laws § 6 cmt. c (1971).

212. *See* Model Rules of Prof'l Conduct R. 8.5 cmt. 6 (2001).

213. Hill, *supra* note 11, at 856.

rule would provide much clearer guidance for lawyers on how to disseminate information online, while still allowing state regulatory agencies to control the conduct of lawyers within their jurisdiction.

Notes & Observations