

*Peace is Not the Absence of Conflict:*  
**A Response to Professor Rogers' Article "Fit and Function in Legal Ethics"**

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### Abstract

This paper takes the theoretical model Professor Catherine Rogers developed in her article “Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration,” 23 MICH. J. INT’L L. 341 (2002) as the starting point for an original argument that conflicts of laws analysis should be used to determine which legal ethics rules should apply to lawyers practicing international arbitration. The argument is supported by the new ABA Model Rules of Professional Conduct rule on choice of law explicitly applies conflicts of laws analysis to lawyers practicing in the multijurisdictional settings. This paper analyses the new ABA Model Rule and its impact on lawyers practicing in international arbitration.



***Peace is Not the Absence of Conflict:***\*

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Introduction

International arbitration has become the preeminent way in which transnational business disputes are adjudicated.<sup>1</sup> As the field of arbitration expands and diversifies,<sup>2</sup> the question as to how the lawyers who represent parties to these disputes can and should best be regulated has come to the forefront.

Suppose a German and an American lawyer represent opposing sides in an arbitration: The German professional ethics rule prohibits the lawyer from speaking with witnesses before the hearing, because such communications would constitute "witness tampering."<sup>3</sup> The American rule not only permits pre-testimonial communications, but arguably *requires* that the lawyer engage in such "witness preparation."<sup>4</sup> Which ethical rules should apply to these lawyers?

Professor Catherine A. Rogers sets out to answer this question in her article "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration."<sup>5</sup> Rogers proposes a novel methodology, which she calls the "functional approach," that is designed to develop the substantive content of the rules of professional conduct to govern in the context of international arbitration. In a companion article, Rogers' proposes that these rules should be

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\*"Peace is not the absence of conflict but the presence of creative alternatives for responding to conflict." Dorothy Thompson.

<sup>1</sup>Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 12 (1987); Carrie Menkel-Meadows, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 949 (2002). See also, Susan L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5, 33 (2003); Detlev Vagts, *The International Legal Profession: A Need For More Governance?*, 90 A.J.I.L. 250, 261 (1996).

<sup>2</sup>Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 26 S. TEX. L. REV. 715 (1995) (noting the expansion of multijurisdictional practice); Richard Abel, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994) (describing trends in globalization of legal practice).

<sup>3</sup>Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 359, n.84 (2002) (using the terms "witness tampering" and "witness preparation"). This example is also discussed in Detlev Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 688 (2000).

<sup>4</sup>Rogers, *supra* note 3, at 359.

<sup>5</sup>Rogers, *supra* note 3.

This paper evaluates the “functional approach” and concludes that it is not necessary to derive a wholly new set of rules of professional conduct for lawyers practicing international arbitration. This paper argues, instead, that currently extant professional rules and disciplinary institutions are sufficient to regulate attorneys practicing in international arbitration and that a conflicts of laws approach is the best approach to lawyer regulation in that context.

In Part I, I outline Rogers’ functional approach and describe the way in which it derives the content of the ethical rules governing lawyers from the “functional role” in a particular context. In laying the foundation for her novel theory, Rogers rejects several alternative methods for ascertaining ethical rules for lawyers in international arbitration, including the conflicts of laws approach. I review Rogers’ critique of the choice of law approach at the end of Part I. In Part II, I argue that the conflicts of law approach is not only a feasible solution, but, in fact, provides the best answer to the question of which rules should govern lawyers practicing in international arbitration. First, I provide an alternative description of the differences between national legal ethics regimes, which does not require the conclusion that lawyers play fundamentally different roles in these regimes. Then I argue that national ethical regulation already provides for application of conflicts of laws principles in the context of international arbitration. Finally, I analyze the conceptual reasons, including independence of the legal profession and co-equal sovereignty of nations under international law, that support the application of conflict of laws doctrine. In Part III, I apply a conflicts of laws approach to a few of Rogers’ examples as well as those of other scholars who have addressed these issues in order

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<sup>6</sup>Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for*

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to demonstrate the practicability of the approach.

I. Rogers Claims the *Functional Approach* Provides the Only Viable Methodology for Developing the Content of Ethical Rules in International Arbitration.

Rogers provides two different formulations of the problem of lawyer regulation in international regulation: Either international arbitration is an “ethical no man’s land” where lawyers are not subject to any regulation at all, or lawyers practicing in international arbitration are subject to multiple regulatory regimes so that it is unclear which ethical rules they should follow.<sup>7</sup> Furthermore, even if there is not an obvious conflict, such as the witness preparation/tampering example, there is always an implicit conflict among lawyers from different jurisdictions simply because they have different “professional habits” that structure the ways in which they practice.<sup>8</sup> Compliance with ethical rules can have significant effects on the substantive outcome of the arbitration—if the American lawyer prepares her witnesses, but the German lawyer does not, the American client may well fare better. In order for a proceeding to be fair, all attorneys involved must be “playing by the same rules.”<sup>9</sup> Under Rogers’ theory, either formulation of the problem requires the same solution, namely, a self-sufficient code of ethics for lawyers engaged in international arbitration.

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*International Arbitration*, 39 STAN. J. INT’L L. 1 (2003).

<sup>7</sup>Rogers, *supra* note 3, at 343; Rogers, *supra* note 7, at 2-3 (“[A]ttorneys in an international arbitration are either each abiding by different and often conflicting national ethical rules, or are engaging in a completely unregulated ethical free-for-all.”)

<sup>8</sup>*Id.* at 357. See also Sheila Block, *Ethics in International Proceedings*, INT’L LITIG. NEWS, (Int’l Bar Ass’n), Oct. 2004, at 15, 18 (noting that “it may be hard for lawyers in some jurisdictions to get used to” regulations that differ from the rules to which they are accustomed, clear regulations are preferable.)

<sup>9</sup>Rogers, *supra* note 3, at 346. Cf. Daly, *supra* note 3, at 757.

A. The “Functional Approach” Derives Legal Ethics from the Lawyer’s Role.

Rogers’ theory describes ethics as inextricably dependent on the lawyer’s role.<sup>10</sup> Rogers insists that this is a “conceptual analysis” of ethical rules and not an account of their historical origins.<sup>11</sup> The first part of the functional approach describes the “universal” structure of the lawyer’s role. The second situates that role in the context of the procedural and the ethical rules of a justice system.

1. The Ethical Obligations of a Lawyer Are Derived from Her Role, Which Is Determined by the Procedural Framework of Her Legal System.

Rogers argues that the ethical obligations of any particular person under a particular circumstance are inherently bound up with her “role” and can only be determined in the context of that role.<sup>12</sup> She illustrates with the example of the obligation to take care of a child—the child’s mother has an ethical obligation to feed the child, whereas an unrelated person in a far away place may not.<sup>13</sup> However, while a role guides conduct, it does not fully determine the corresponding ethical obligations. To extend the example, while the mother’s role creates an affirmative duty to feed the child, that role does not specify when, what or how she should feed it. Since the lawyer’s role is more complex and nuanced than can be fully captured within any set of ethical rules, no matter how comprehensive, professional codes of conduct are best viewed as “mak[ing] certain choices impermissible and fram[ing] the inquiry for other choices.”<sup>14</sup>

Legal ethics is complex because the lawyer’s role “rests on an inherent contradiction,” in

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<sup>10</sup>Rogers, *supra* note 3, at 387 (“The thesis of the *functional approach* is that ethical regimes are tied to the inter-relational roles performed by actors ... in different systems”).

<sup>11</sup>*Id.* at 380 n.188.

<sup>12</sup>*Id.* at 382.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*



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that it encompasses obligations both to the public as well as to the client.<sup>15</sup> Legal ethics is situated on the continuum between law and ethics, professional and moral responsibility. Given the premise that ethics are inextricably connected to role, Rogers identifies several “universal features” and “core principles” that, in varying proportions, define the contours of the lawyer’s role in any judicial system.<sup>16</sup> These values include: truthfulness, fairness, independence, loyalty and confidentiality.<sup>17</sup> The essence of any advocate’s role is the particular balance it strikes between the advocate’s obligations to the client (as manifested in loyalty and confidentiality) and her obligations to the public, the profession, and the courts (truthfulness and fairness). The lawyer’s role in any given society rests somewhere along the continuum between “officer of the court” and “zealous advocate.”<sup>18</sup>

The second part of the functional approach situates this “generic” role structure the context of the cultural values of the society, and the procedural, evidentiary and ethical rules of that society’s justice system.<sup>19</sup> Rogers argues that a code of legal ethics represents the final culmination of a developmental progression that begins with the cultural values of a society. The cultural values of a society give rise to the procedural and evidentiary rules of the justice system.<sup>20</sup> The procedural and evidence rules in turn determine the lawyer’s role by “dictat[ing] the specific activities through which the lawyer will perform [their advocacy obligations].”<sup>21</sup> Finally, that role is expressed in the ethical code. Rogers strongly emphasizes that the lawyer’s role in the justice system *precedes* the ethical code even as it may be “defin[ed]’ by that code.”<sup>22</sup>

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<sup>15</sup>*Id.* at 383. *See also* Vagts, *supra* note 3, at 686 (“The tension between keeping clients’ confidences and assuring honesty and legality is resolved in different ways if one sees lawyers as court officers or as client caretakers.”)

<sup>16</sup>Rogers, *supra* note 3, at 384.

<sup>17</sup>*Id.* at 358–71.

<sup>18</sup>*Cf.* Vagts *supra* note 3, at 686 (discussing the differences between cultures that emphasize the lawyer’s function as an “officer of the court” function as opposed to those which emphasize the lawyer’s obligation to the client).

<sup>19</sup>Rogers, *supra* note 3, at 385.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* at 383.

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In comparing legal ethics across national boundaries, then, Rogers suggests that we should think about “national ethical regimes ... as reflecting procedurally-determined and culturally-bound differences” in the lawyer’s roles in those various countries.

2. The Relationship Between “Role” and “Rules” Described by the Functional Approach Explains the Differences Between Civil and Common Law Systems.

Rogers moves on to “prove” her theory by using it to describe differences between the US and German legal systems.<sup>23</sup> She characterizes the US judicial system as founded on values of “individualism” and “due process.”<sup>24</sup> These values lead to a framework of procedural and evidentiary rules that allow each party to present his case to a neutral judge whose decisions ultimately make law.<sup>25</sup> In this context, the lawyer is a “strategist,” who presents the facts of the case and the supporting precedent in the light most favorable to her client, and a “lobbyist,” who persuades the judge of the way the law should be. The lawyer’s role is weighted to the zealous advocacy side of the continuum. This role determines that the ethical rules will encourage conduct that will further client-based strategy and advocacy, including, for example, witness preparation.

The German culture, on the other hand, is characterized by a “greater acceptance of authority and less tolerance for certainty.”<sup>26</sup> Those values lead to a set of procedural and evidentiary rules that places the judge at the helm where he actively runs the fact-finding process, including interrogating the parties’ witnesses, and then applies the civil code to these facts. In this system, the lawyer is not a strategist, and certainly not a lobbyist, but rather a

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<sup>23</sup>*Id.* at 387. *See also*, Vagts, *supra* note 3, at 687 (noting that “[w]hile comparisons between Anglo-American and Continental legal systems as being adversarial as opposed to inquisitorial are regarded as oversimplified by the experts, they still provide a useful contrast for comparative purposes.”).

<sup>24</sup>*Id.* at 394.

<sup>25</sup>Rogers, *supra* note 3, at 390 (describing the US system as “a model of party contest before a ‘judicial *tabula rasa*’”).

<sup>26</sup>*Id.*

“guide” to the court, a collaborator with the judge in a mutual quest for resolution of the issue.<sup>27</sup>

This role requires an ethical rule that prohibits lawyers from tampering with witnesses, because such conduct would undermine the judge’s access to unadulterated evidence.

3. The Functional Approach Can Prescribe the Content of the Rules for International Arbitration.

The purpose of the functional approach is, of course, to formulate a set of professional ethics rules to govern lawyers practicing in international arbitration, thus filling the void of regulation Rogers identifies in this area.

In order to derive the content of the ethical rules from the role of the lawyer in the international arbitration system, Rogers looks first to the underlying “cultural values” of international arbitration. While she concedes that international arbitration is “a system of dispute resolution without geographic borders or a discernible citizenry” such that it doesn’t have “cultural values” per se, she nevertheless maintains that international arbitration has “distinctive normative goals” that provide the basis for the procedural and, ultimately, ethical rules of that system.<sup>28</sup> These normative goals include: neutrality, effective resolution of disputes, and party autonomy.<sup>29</sup> Because international arbitration has these qualities, businesses often select it as the mandatory form of dispute resolution in their initial contracts. Arbitration provides a more neutral venue than the national court of any of the parties.<sup>30</sup> Arbitral awards are not appealable enforceable in nearly any jurisdiction, under international treaties, such as the New York Convention.<sup>31</sup> Arbitrators typically have particularized knowledge of the industry or terms of the dispute so that they have a unique ability to adjudicate the fine subtleties of the dispute in the

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<sup>27</sup>*Id.* at 389.

<sup>28</sup>*Id.* at 408.

<sup>29</sup>*Id.* at 408–411.

<sup>30</sup>Smit, *supra* note 1, at 11.

<sup>31</sup>*Id.* at 10.

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most equitable manner (and not necessarily one dictated by precedent).<sup>32</sup> As a private regime, the parties control which issues are addressed as well as the procedures followed by the tribunal.<sup>33</sup>

Although parties are entitled to determine the procedures used in their arbitral proceedings,<sup>34</sup> default procedures have been adopted by the International Bar Association (“IBA”).<sup>35</sup> Rogers makes much of these “hybridized” procedures and claims that they flow from the normative goals of the international arbitration system. In my opinion, the more ready explanation is that the hybrid procedures represent a compromise between the civil and common law procedural frameworks to which the lawyers practicing in international arbitration are accustomed.<sup>36</sup> That contention is addressed in detail in Part II, below. According to Rogers, however, the fact that the hybrid procedures allow for a fair amount of US-style lawyer advocacy, including direct and cross-examination of witnesses, represents the expression of arbitration’s normative goal of party autonomy.

The final step in the functional approach is, of course, to derive ethical rules from the lawyer’s role as it is shaped by procedure. The hybrid arbitral procedures create a role for the lawyer in which “the attorney’s sphere or obligation to the client must be expanded over that of the classic civil law system, but not nearly to the dimensions of the US system.”<sup>37</sup> Specifically, Rogers notes that the procedural rules allow for introduction of prepared witness statements and a certain amount of cross-examination.<sup>38</sup> She infers that the ethical rules “must therefore

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<sup>32</sup>Rogers, *supra* note 3, at 408 n.319.

<sup>33</sup>*Id.* at 11, 12

<sup>34</sup>Smit, *supra* note 1, at 12 n. 11.

<sup>35</sup>Rogers, *supra* note 3, at 414.

<sup>36</sup>*Id.* at 416 n.362; *see also*, notes 83–92 and accompanying text, *infra*.

<sup>37</sup>*Id.* at 418.

<sup>38</sup>*Id.* *See also*, Rogers, *supra* note 6, at 27.

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accommodate some pre-testimonial communication with witnesses.”<sup>39</sup> The functional approach requires that ethical rules agree with the procedural framework and that they account for and flow from the lawyer’s role in the particular justice system.

B. Conflicts of Law Doctrine Cannot Provide Ethics Rules for International Arbitration Because it Does Not Account for the Lawyer’s Unique Role in That Setting.

Rogers addresses several alternative ways of coming up with rules of professional responsibility for international arbitration and declares them all “implausible.”<sup>40</sup> I will only address her brief critique of conflicts of laws here.

The conflicts of law discussion is only relevant to international arbitration in the event that national ethics regimes apply in that context. If it is truly the case that international arbitration is void of professional regulation, conflicts of laws doctrine will not get us anywhere. Rogers’ insists that national regulation *does not* apply, based on a prior formulation of ABA Model Rule 8.5 that “expressly disavow[ed] application in the international context.”<sup>41</sup> As I will discuss below, the rule has been changed and now expressly *does* apply to international practice. This change nullifies Rogers’ initial argument that there is no conflict between national laws to resolve because they don’t apply in the first instance.

In the case national ethics rules do apply to lawyers engaged in an international arbitration, Rogers gives several reasons why conflicts of law does not provide a satisfactory solution. Her primary critique is that international arbitration and the role of its lawyers have “unique features” and differ “at an organic level” from national courts and their lawyers.<sup>42</sup> These differences render ethics rules devised to fit the function of lawyers in national courts

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<sup>39</sup>Rogers, *supra* note 3, at 418.

<sup>40</sup>*Id.* at 395.

<sup>41</sup>*Id.* at 356–357 nn. 71–73 & 403 n.296. MODEL RULES OF PROF’L CONDUCT R. 8.5 (1993).

<sup>42</sup>*Id.* at 402, n.304.

inapplicable to international arbitration. Essentially, she argues that the unique role of the international arbitration lawyer requires unique ethics rules. To expose the “untenab[ility]” of conflicts of law in this arena, Rogers describes a situation in which the procedures chosen for the arbitration allowed for American-style discovery, but the ethics rule selected by choice of law did not privilege attorney-client communications.<sup>43</sup> The untenable result is that attorney-client communications would be discoverable. As I will illustrate in Part III of this paper, proper application of conflicts doctrine should not produce such results.

Rogers further points out that national ethics rules do not provide guidance for all of the circumstances found in international arbitration, including selection of the arbitrator. She claims the “time-cost” of filling these gaps on an ad hoc basis is “prohibitive.”<sup>44</sup> Finally, she notes that conflicts of laws are “unsettled ... in many legal systems,” so that there is a danger that they would be hard to agree upon and their application would be “unpredictable” and “potentially detrimental.”<sup>45</sup> This is not a criticism of the fundamentals of conflicts of law, but rather a suspicion that it will not be applied properly. Rogers fundamental criticisms of conflicts of law rest firmly on the assumption that international arbitration is unique and so requires a “specially tailored” ethics code. In the next Part of this paper, I will provide an alternate explanation of national ethical codes and the procedural framework of international arbitration that renders the application of conflicts of law to ethics rules in that context not only plausible but necessary.

### III. Conflicts of Laws Doctrine Accounts for the Relevant Regulatory Interests Better Than Does Rogers’ Functional Approach.

Rogers’ theory, as described above, depends on the factual assessment that international

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<sup>43</sup>*Id.* at 402.

<sup>44</sup>*Id.* at 404.

<sup>45</sup>*Id.* at 405 n.305.

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arbitration takes place in “an a-national space.”<sup>46</sup> She argues that nationally based professional regulation does not reach lawyers’ conduct in international arbitration. I argue in this Part that both of this premises is false, as evidenced by the new version of the ABA Model Rule 8.5 and the European Community Professional Ethics Code (the CCBE), and as supported by the principles of the co-equal sovereignty of nations and the independence of the legal profession. Conflicts of laws provides a way to apply extant ethical regimes and disciplinary systems to international arbitration. I will argue that this is a theoretically more sound solution than Rogers’ recommendation that institution-specific ethical rules be derived by way of the functional method.

I will begin by reformulating the problem as one of notice rather than conflicting rules. For example, take the pre-testimonial communications rules discussed above. Instead of focusing on the difference between the rules the two sides are accustomed to following, I would like to note that the unfair result only occurs in the situation in which the American lawyer prepares her witnesses and the German lawyer does not. If both sides knew about the discrepancy, this would never come to pass. In that case, the German lawyer would protest against the inequity, and the American lawyer would insist on her right and duty to go forward with her preparation. The parties and the tribunal would be forced to resolve the disagreement in some manner. The problem is one of notice: The American and German lawyer must know about and adhere to the same standard in order to ensure that the proceeding is equitable and fair. Furthermore, lawyers in international arbitration need to know which ethics rules will be applied to their conduct in the event of an eventual disciplinary action.<sup>47</sup>

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<sup>46</sup>*Id.* at 356.

<sup>47</sup>Block, *supra* note 8 (emphasizing the practical problem lawyers face in deciding what ethical rules to follow in international proceedings). As Professor Detlev Vagts notes, “questions of lawyer behavior in international situations may have to be determined in the context of professional disciplinary proceedings.” Vagts, *supra* note 3, at 688.

Whereas Rogers states that “[a]ttorneys remain subject to often conflicting professional obligations,”<sup>48</sup> I insist that attorneys are actually only subject to one set of professional obligations. The problem is that it may not be clear to them which obligations they are subject to. Rogers concludes that “[a] code is needed to get all the participants playing by the same rules.”<sup>49</sup> To which I respond that a level playing field can also be achieved by notifying all counsel of the applicable ethical rules. The playing field will just as level if the American lawyer is told that the German rule on pre-testimonial communications governs in a particular case. Rogers concedes this point with respect to cross-border practice when she states “[f]or regulation of cross-border practice, conflict-of-law rules may in fact be appropriate, as long as they are clear in their application.”<sup>50</sup> But she does not explain why arbitration should be treated differently than other cross-border practice. As long as we can provide practitioners with notice as to which ethics rules apply to them, the playing field will be leveled and the dilemmas faced by lawyers in international arbitration will be resolved. Conflicts of laws doctrine provides the necessary notice.

A. The Differences Among National Ethics Rules Are Best Explained Historically.

I would replace Rogers’ “conceptual” analysis of legal ethics with a comparative, historical analysis. Ethical rules best understood, not in terms of the concept of the lawyer’s role, but rather as a historical contingency that operates in tandem with the procedural and other features of a legal system to express the lawyer’s role within it. The development of detailed ethics rules in the US took place over the course of nearly one hundred years, instigated and

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<sup>48</sup>Rogers, *supra* note 3, at 346.

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 398 n.276.



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propelled by various forces that changed the way in which legal services were provided.<sup>51</sup>

Similarly, legal ethics in European countries and the EU have developed over the past few decades, including the notable promulgation of a code of conduct for European lawyers engaged in cross-border practice, the CCBE Code.<sup>52</sup> Whereas Rogers suggests we should analyze international arbitration as if it were a society with a culture that promoted the values of its justice system by implementing certain procedures within its tribunals, I suggest that we view international arbitration as a commingling of the historically rooted legal systems of co-equal sovereigns.

In this subsection, I argue first that differences in national ethical rules do not necessarily reflect profound differences in the lawyer's role. Then I argue that the variation in national ethical codes can be largely credited to the different stages of historical development of the legal profession across jurisdictions. Finally, I argue that the procedural rules of international arbitration reflect a compromise between these systems.

1. The Cultural Divide Between Civil and Common Law Judicial Systems Does Not Necessarily Reflect a Profound Difference in the Understanding of the Lawyer's Role.

The success of Rogers' argument depends on the uniqueness of the lawyer's role in a given legal system. It is possible to maintain Rogers' view that ethics rules are closely related to procedural rules without concluding that different procedural rules reflect fundamentally different conceptions of the lawyer's role. This is because the procedural framework underdetermines the lawyer's role. The hybrid procedures of international arbitration are

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<sup>51</sup>Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463 (2005) (surveying the development of legal ethics from 1904 through the present).

<sup>52</sup>Council of the Bars and Law Societies of the European Community (CCBE) published the CCBE Code in 1988. CCBE CODE OF CONDUCT (1988) [hereinafter "the CCBE Code"]. See, Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993) [hereinafter "Terry Part I"]; Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345 (1993) [hereinafter "Terry Part II"]. See also John Toulmin Q.C., *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L. J. 673 (1992) (discussing the CCBE code in connection with the possibility for an international code of professional ethics).

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insufficient to hypothesize a wholly unique role for the lawyer in that context.

Even though the dichotomy between adversarial and inquisitorial systems has been widely used to characterize the procedural differences between legal systems,<sup>53</sup> lawyers' roles are not necessarily distinguishable along adversarial and inquisitorial lines. For example, one scholar notes that the rift between the lawyer's role in the "adversarial" and "inquisitorial" systems is not as wide as one might think.<sup>54</sup> In fact, a report prepared by Austrian lawyers "suggests a completely reversed perspective with respect to these gross generalizations concerning the role of the American lawyer and Austrian lawyer," namely, that "the Austrian lawyer ... is [the] vigorous advocate of the client's interests ... whereas the lawyer from the Anglo-American tradition puts the duty to find the truth at least as high, if not higher, than the duty of loyalty to a client."<sup>55</sup>

Furthermore, lawyer's roles are fluid and changeable even within one system. US lawyers serve a variety of roles, including "civil advocate, adviser, prosecutor and lawyer for governmental organizations."<sup>56</sup> Rogers does not explain why her functional approach describes and prescribes the differences in ethical rules in the international arena, yet does not explain the sometimes vast differences between states' ethical rules within the domestic context of the US, where, one would assume, the same cultural values would result in the same role for lawyers.<sup>57</sup> In many European countries the roles played by the members of the legal profession differ widely enough from one another that there are actually a variety of names for legal

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<sup>53</sup>Carrie Menkel-Meadows, *The Limits of Adversarial Ethics*, in ETHICS IN PRACTICE 125 (Deborah L. Rhode ed., 2000).

<sup>54</sup>Terry Part I, *supra* note 51, at 49 n.194 (citing Professor Luban for the conclusion that "German lawyers [a]re really operating on an adversary basis, notwithstanding the tradition comments about 'inquisitorial systems'").

<sup>55</sup>Terry Part II, *supra* note 51, at 389-390.

<sup>56</sup>Menkel-Meadows, *supra* note 53, at 126.

<sup>57</sup>Vagts, *supra* note 3, at 678 (noting the tenacity of divergence among state ethical rules, despite long-standing model rules)

There are, in any case, a diversity of viewpoints about the nature of the lawyers' role—among systems as well as under a given unitary procedural framework. The best characterization of the lawyer's role in international arbitration is as manifesting a combination of traits from different national systems. Indeed, international arbitration has become increasingly more American or adversarial<sup>59</sup> as it has expanded and developed from its origins as a private dispute mechanism among the “grand of men” of Europe.<sup>60</sup> Rogers' imposition of the binary divide in her characterization of adversarial and inquisitorial systems belies an adversarial way of thinking, and her goal of promulgating an original ethical code for arbitration could itself be viewed as a reflection of this process of Americanization.<sup>61</sup>

2. The Differences in Forms of National Codes of Professional Conduct Are Relevant to Evaluating Professional Ethics in the International Sphere.

One of the assumptions Rogers makes in her proposal for a code of ethics in the context of international arbitration is that lawyers hailing from different jurisdictions will share an understanding of the *form* of professional ethics and that disagreement will only arise as to the appropriate *content* of those rules. Codes of professional responsibility take different forms across jurisdictions. For example, there are vast gaps in the specificity of professional rules governing conflicts of interest. The US rules “are among the strictest in the world,”<sup>62</sup> whereas other nations' rules mention conflicts only in the most general of terms, on the theory that “conflicts are a matter of [personal] ethics, not law.”<sup>63</sup> In France, for example, “the Code of

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<sup>58</sup>Terry Part I, *supra* note 51, at 10 (describing the variety of names for legal professionals used in European countries).

<sup>59</sup>Karamanian, *supra* note 1; *see also*, Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1142 (1999) (noting that the “‘judicialization’ of professional responsibility is a distinctive feature of the U.S. legal system” (emphasis added)).

<sup>60</sup>Menkel-Meadows, *supra* note 1, at 958.

<sup>61</sup>Menkel-Meadows, *supra* note 53, at 125 (“[T]he juxtaposition of adversarial to inquisitorial frameworks itself illustrates a primary deficiency of adversarial thinking—an assumption of two presumed opposites.”)

<sup>62</sup>Toulmin, *supra* note 52 at 681.

<sup>63</sup>Daly *supra* note 59, at 1149 (quoting Justin Castillo, *International Law Practice in the 1990s: Issues of Law, Policy, and Professional*

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Conduct governing the notarial attorneys has no specific provisions on conflicts of interest. The notarial attorney simply has to put the interest of his client before his own interest.”<sup>64</sup>

The cultural divide goes deeper than this however. The legal professions in jurisdictions around the globe are at different stages of development with respect to the rules and standards of ethical conduct. Some European countries have only general ethics guidelines, if they have any codified ethics rules at all.<sup>65</sup> Ever increasing transnational practice and the growth of international arbitration may well encourage the development of more specific and codified ethical rules in jurisdictions where those rules are as yet uncoded.

The ABA Model Rules and the CCBE Code each represent the current status of the historical development of professional ethics in the US and the EU, respectively. One scholar describes the progression of ethical rules over time as one from *standards* to *rules* of conduct.<sup>66</sup> The US rules have developed further toward the rules end of the spectrum, as evidenced by a level of specificity that European regulations have not yet achieved. The generality of the European regulations is however not perceived as a deficiency.<sup>67</sup> Indeed, Europeans do not want or need more specific professional rules and regulations. Professor Hazard has reported that “[t]he English barristers [think] it quaint that American lawyers [feel] in need of legal rules for

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Ethics, 86 Am. Soc’y Int’l L. Proc. 272, 283 (1992)).

<sup>64</sup>Daly, *supra* note 59 at 1149 n.165 (quoting Olivier d’Ormesson, French Perspectives on the Duty of Loyalty: Comparisons with the American View, in Rights, Liability, and Ethics).

<sup>65</sup>Daly, *supra* note 59 at 1149–1150 & 1150 n.169 (noting that some countries rely on oral tradition for rules of professional conduct, that the codes in France and Italy are much less specific than the US code of conduct, and that Mexico has no code of ethics at all); Terry, Part II, *supra* note 52 at 384.

<sup>66</sup>Daly, *supra* note 59, at 1124 (“Understanding the standards / rules dichotomy is an important first step in the creation of a cross-border code of lawyer conduct”).

<sup>67</sup>Commentators have identified the benefits of general standards over specific rules with respect to the current EU regulations as well as historical US regulations. Compare Terry Part I, *supra* note 52 at 16 (regarding current EU regulation, quoting the CCBE Compendium: “Codes ... have limitations. They have more often more often a dissuasive effect than a positive impetus. ... They are attempts to capture on paper an approved pattern of behavior, a desired moral climate, an answer to all questions of conduct – which cannot be adequately captured on paper”), with Daly, *supra* note 59, at 1126 (describing the reasoning behind the “vague” standards of the 1908 Canons of Ethics, quoting the Preamble: “no code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life”).

their governance, but they recalled that Americans seemed to need rules for everything.”<sup>68</sup>

Professor Daly describes the historical development of the self-regulation of the American legal profession as a steady movement away from an early reliance on the interconnectedness within the “mini-communities” of lawyers within the profession for regulation.<sup>69</sup> Each of these subsections of the profession “had its own shared understandings of the ethical standards governing its members” and functioned with a self-contained, largely informal regulatory system.<sup>70</sup> As the American legal progression expanded, diversified, and the disciplinary mechanisms became more “regularized,” “professionalized,” and institutionalized,<sup>71</sup> the demand for “clearer, more sharply framed directives”<sup>72</sup> of professional conduct for lawyers grew. The 1908 *Canons* of Ethics was surpassed by the 1969 Model *Code* of Professional Responsibility, which gave way to the 1983 Model *Rules* of Professional Conduct.<sup>73</sup>

The development of the CCBE Code provides an interesting historical parallel to the development of US domestic legal ethics. Professor Terry notes the ready comparison between the 1977 Declaration of Perugia and the 1908 Canons of Legal Ethics,<sup>74</sup> and the correlation between the 1988 CCBE Code and the 1969 Model Code of Professional Responsibility.<sup>75</sup> The developments on both sides were motivated by similar changes in circumstances, including greater diversification of the legal community and movement within it. A comment Justice Stone’s made on the state of the American legal profession in 1934 could just as easily be applied to the European legal profession in period before the promulgation of the CCBE code:

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<sup>68</sup>Daly, *supra* note 59, at 1121; Terry Part I, *supra* note 52, at 16.

<sup>69</sup>Daly, *supra* note 59, at 1126.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.* at 1137.

<sup>72</sup>*Id.* at 1128.

<sup>73</sup>*Id.* at 1125–31 (describing the progression from canons to codes to rules).

<sup>74</sup>Terry Part I, *supra* note 52, at 9.

<sup>75</sup>Terry Part I, *supra* note 52 at 15–16 (“The concerns ... about the nature and shape of the CCBE Code mirror many of the same concerns that appeared in the United States revolving around whether the approach of the *Model Rules* should be used in place of the established *Model Code* approach,” but that while the CCBE provides “black letter rules” it is “‘leaner’ than the Model Rules”).

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“the petty details of form and manners which have been so largely the subject of our codes of ethics ... Our canons of ethics for the most part are generalizations designed for an earlier era.”<sup>76</sup>

The drafters of the CCBE remarked that “rudimentary rules met simpler circumstances, more refined and detailed rules now meet more complex circumstances.”<sup>77</sup> Despite the strides made by the EU toward a rules-based as opposed to standards-based framework for professional conduct, the legal profession in Europe remains less institutionalized than in the US,<sup>78</sup> and regulation remains less regularized and professionalized.<sup>79</sup>

The state of affairs of ethical regulation in the practice of international arbitration stands essentially at the same crossroads where the American legal profession found itself in the early part of the century and which motivated the adoption by the European nations of the CCBE Code in the early 1990s.<sup>80</sup> International arbitration is no longer the “gentlemen’s club” run by a “cadre of ‘grand old men’” that it used to be.<sup>81</sup> Whereas “differences [among the ethical obligations binding attorneys] were mute when international arbitration was run by a small group of insiders,” the growth and diversification of the practice had rendered these differences disruptive.<sup>82</sup>

Rogers’ theory simply does not account for the current divergence of the form of professional rules across jurisdictions. In order to truly level the playing field of ethical regulation in international arbitration, we must account for differences in both the form and content of national ethical regulation. It might be just as difficult for the British barrister to

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<sup>76</sup>Daly, *supra* note 59, at 1127 (citing Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934)).

<sup>77</sup>Terry Part I, *supra* note 52, at 16 n.54 (quoting the CCBE Compendium).

<sup>78</sup>*Id.* at 11 (referring to the “incomplete institutionalization of the legal profession in Europe”).

<sup>79</sup>Daly, *supra* note 59 at 1160–1161 (noting that CCBE Code could be seen as a shift toward rules, but that the shift is in no way wholehearted).

<sup>80</sup>*Cf.* Abel, *supra* note 2, at 750 (“Transnational lawyers are significantly deprofessionalized. In this they increasingly resemble their competitors in offices of house counsel and accounting firms, as well as their predecessors – lawyers before the emergence of strong professional associations”).

<sup>81</sup>Menkel-Meadows, *supra* note 1, at 959.

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adjust to myriad detailed ethical rules as it is for the German lawyer to adjust to a rule that permitted him to prepare his witnesses for their testimony. The project of ascertaining which ethics rules should apply to lawyers in the context of international arbitration must be informed by the background of historical development of ethical rules in other contexts and the continued divergence in the form of national professional ethics rules.

3. Hybrid Procedures in International Arbitration Reflect Compromises Between International Legal Systems.

Whereas Rogers argues that we should understand the hybrid procedures found in international arbitration as a manifestation of the normative goals of that system, including neutrality, effective resolution of disputes, and party autonomy, I agree with Professor Andreas Lowenfeld that hybrid procedures are better understood as compromises between international systems. Professor Lowenfeld argues that procedures developed for use in international arbitration represent the best of both the civil and common law worlds.<sup>83</sup> He remarks that “many of the techniques and approaches developed in one context are indeed portable, that is they are capable of being adapted to use in different contexts and different fora from those for which they were originally planned.”<sup>84</sup> He further observes that the exchange of procedural ideas between arbitration and litigation is a two-way street: Arbitration borrows procedure from litigation, but litigation can also be influenced by procedures that have proved effective in arbitration.<sup>85</sup> According to Lowenfeld, therefore, procedures don’t necessarily represent the underlying normative goals of the international arbitration system, but rather, flow from an interactive dialogue between the lawyers who each bring knowledge of their own procedural frameworks.

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<sup>82</sup>Rogers, *supra* note 3, at 357.

<sup>83</sup>Andreas F. Lowenfeld, *The Elements of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 654 (“Altogether, I think international arbitrators have gotten it about right - better than civil litigation in New York or Paris or Rome - *without any treaty or universal rules or other act of creation*”).

<sup>84</sup>*Id.* at 655.

<sup>85</sup>*Id.* at 654 (noting that the arbitration practice of distributing witness statements in advance of testimony has been “adopted in

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Ultimately, international arbitration and international domestic legal systems reflect a certain amount of convergence, generally in the direction of Americanization.<sup>86</sup> The fact that the International Bar Association's Rules of Evidence for Arbitration provide for cross-examination, some discovery by the parties,<sup>87</sup> and testimony by party witnesses, reflects a "mild" form of Americanization.<sup>88</sup>

By Rogers' own estimation, international arbitration has become "more formalized and legalized," "judicialized," and "sophisticated."<sup>89</sup> Given this fact in conjunction with the evidence that arbitral procedures reflect measured compromises between national regimes, it is no stretch to claim that arbitration has become tantamount to "offshore litigation."<sup>90</sup> Why, then, shouldn't the conflicts of laws approach we take to professional ethics other cross-border practice seamlessly carry over to the international arbitration context? The more similar international arbitration and litigation become, the less need there is for a wholesale new professional ethics code. In light of Lowenfeld's description of the procedural rules in international arbitration as a compromise in progress, Rogers' theory that the procedures of international arbitration embody a fundamentally different role for the lawyer seems incorrect.

Under Rogers' functional approach, the role of the lawyer is hard and fast and the differences between the civil and common law legal systems are discernible and definitive. In the context of the individual countries' national legal professions, such narrowly defined roles are hard to pin down, however. The ethics rules that Rogers claims express the lawyer's role

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American civil trials").

<sup>86</sup>Vagts, *supra* note 3, at 680 ("Internationally, one sees signs of a certain amount of convergence between systems as other countries adjust their rules in the direction of the American norm"); Karamanian, *supra* note 2 (discussing the "Americanization" of international arbitration).

<sup>87</sup>Although, Lowenfeld insists that discovery in arbitration is much more limited, reflecting yet another compromise between the civil and common law procedural systems. Lowenfeld, *supra* note 91, at 654.

<sup>88</sup>Karamanian, *supra* note 1, at 10.

<sup>89</sup>Rogers, *supra* note 3, at 353-54.

<sup>90</sup>*Id.*



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seem to be more readily described in terms of the institutionalization and historical development of the profession. The procedures that she argues provide the foundation for the lawyer's role in international arbitration represent a set of strategic compromises made between lawyers familiar with different legal systems in an effort to facilitate adjudication. By describing international arbitration in terms of its procedural development and by exposing the historical contingency of the form of ethics codes, I have attempted to deprive Rogers' theory of its central premise that the lawyer's role in international arbitration is unique and fundamentally different from her role in national legal systems. If this is not the case, and if the lawyer's role in international arbitration is an amalgam of adversarial- and inquisitorial-style procedures that govern the proceeding,<sup>91</sup> there is no need to fabricate an ethics code for international arbitration out of whole cloth. If the lawyer practicing international arbitration is simply a lawyer in a novel venue,<sup>92</sup> there is no reason that conflicts of laws principles, which have historically been used to ascertain the ethics rules applicable to lawyers in novel venues, should not apply. The following section argues that US and EU ethics codes currently affirmatively apply conflicts of laws to international arbitration. The subsequent section argues that conflicts of laws should be used to determine the applicable ethics rules in international arbitration.

B. National Disciplinary Authorities Have Explicitly Invoked Conflicts of Law to Address Issues Arising in Connection with International Arbitration.

National regulatory authorities have several bases of prescriptive jurisdiction which permit them to regulate attorney conduct in international fora.<sup>93</sup> The problem arises "when

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<sup>91</sup>Vagts, *supra* note 1, at 260 ("The way in which a case is tried before an international tribunal ... depends greatly on the composition of the panel. It may come close to an Anglo-American adversarial model or may tend toward a civil law pattern").

<sup>92</sup>Block, *supra* note 8, at 21 ("The international arbitration bar is a glaring misnomer as the practitioners in the field are a random collection of lawyers from around the world"); Smit, *supra* note 1, at 11 ("In international arbitration, parties frequently use the lawyers they customarily use in their principle place of business, even if the arbitration takes place in another country").

<sup>93</sup>Vagts, *supra* note 3, at 689 (citing territoriality (states can regulate conduct of lawyers who act within their territory), nationality (states can regulate conduct of lawyers who are their citizens), and effects (states can regulate conduct of lawyers who cause effects in their territory)).

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multiple states have legitimate power to, and an interest in, regulating the same conduct.”<sup>94</sup>

Rogers identifies the problem as “a risk that an attorney will be subject to conflicting obligations.”<sup>95</sup> As noted above, I would re-characterize the problem as a lack of notice to the lawyers as to which obligations they are subject to. Conflicts of law doctrine provides a method to “identify and evaluate the competing policies behind different rules in order to determine which should prevail.”<sup>96</sup> This approach shares Rogers’ goal of leveling the playing field and ensuring that all lawyers in a proceeding are subject to the same rules.<sup>97</sup> The 2002 version of the ABA Model Rule 8.5 and the CCBE Code both provide conflicts of laws rules that apply in case of cross-border or international practice including international arbitration.

1. ABA Model Rule 8.5 Applies a Conflicts of Law Approach to Professional Ethics in the Context of International Arbitration.

As discussed above, the question practitioners in international arbitration must ask themselves is: Which ethical rules must I abide by? The implied question is: If my conduct were to become subject to a disciplinary proceeding, under what rules would it be evaluated?<sup>98</sup> The new version of ABA Model Rule 8.5 “Disciplinary Authority; Choice of Law” answers this question for lawyers engaged in international arbitration by providing “relatively simple, bright-line rules”<sup>99</sup> designed to “facilitate international law practice.”<sup>100</sup> And, as long as it is clear to practitioners what rules they will be held to account for at the end of the day, they will know

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<sup>94</sup>Rogers, *supra* note 6, at 23–24.

<sup>95</sup>*Id.*

<sup>96</sup>Vagts, *supra* note 3, at 678, 698 (discussing the application of common law conflicts of laws doctrine, including the 2d Restatement test and governmental interest analysis as these approaches have been applied by courts in the context of malpractice suits).

<sup>97</sup>*Id.* at 692, 690.

<sup>98</sup>*See supra* note 47.

<sup>99</sup>Daly, *supra* note 2, at 757.

<sup>100</sup>*Id.*; *See also*, MODEL RULES OF PROF’L CONDUCT R. 8.5 cmt. 7 (2002) (noting that the choice of law provision applies to “transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.”); VAGTS, ET AL., TRANSNATIONAL BUSINESS PROBLEMS, 18–20 (2003)(commenting on the application of the 2002 version of Model Rule 8.5 to international practice).

The 2002 version of the Model Rule 8.5 embodies an interest analysis approach to conflicts of law. Interest analysis holds that a particular law is applicable to a given factual situation only if that factual situation implicates the purpose of the law.<sup>102</sup> This purposive approach would dictate, therefore, that a German rule prohibiting pre-testimonial communications does not govern an arbitration proceeding in which procedural rules provide for counsel to conduct direct and cross-examination of their witnesses. This is because the purpose of the prohibition (maintenance of unadulterated evidence for the judge) is not promoted in a proceeding where the lawyers are each required to present their versions of the facts by way of witness examination.<sup>103</sup> This example is discussed more fully below.

Each provision of Rule 8.5 reflects this purposive approach. The self-identified purpose of the Model Rules is to define the relationship between lawyers and the legal system as part of the self-government of the autonomous legal profession.<sup>104</sup> The provision of Rule 8.5 governing lawyer conduct other than in the context of a proceeding before a tribunal manifests an intent to apply the rules of a jurisdiction only to conduct which implicates the relationship between lawyers and the legal system in that jurisdiction. It premises application of a jurisdiction's ethics rules on contacts that are relevant to this relationship, namely the place of the lawyer's conduct, or the "predominant effect" of the conduct.<sup>105</sup>

Professor Daly has criticized the "predominant effect" standard in previous versions of

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<sup>101</sup>Cf. Daly, *supra* note 2, at 790 (regarding the prior version of the Model Rule: "it is not very useful for lawyers seeking guidance about future conduct").

<sup>102</sup>Larry Kramer, *The Myth of the Unprovided-for Case*, 75 VA. L. REV. 1045 (1989); see also, *Industrial Indemnity Company v. Chapman and Culter*, 22 F. 3d 1346, 1350 (1994) (describing California's governmental interest approach).

<sup>103</sup>Thus, Rogers' concern that conflicts of law might result in the application of an ethical rule that would not agree with the procedural rules of an arbitration is unwarranted.

<sup>104</sup>MODEL RULES OF PROF'L CONDUCT Preamble, paras. 10, 12 & 13.

<sup>105</sup>MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(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.")

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this Rule as vague and difficult to apply.<sup>106</sup> The force of that critique is lessened by the addition of a safety catch for lawyer's conduct that "conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur" designed to protect "lawyers who act reasonably in the face of uncertainty."<sup>107</sup> Despite the fact that the rule writers do not provide a "method" whereby lawyers could ascertain the jurisdiction of predominant effect, as Daly would have liked,<sup>108</sup> the writers seem to indicate that a lawyer's "reasonable" determination will be accepted. Indeed, Daly herself suggested the inclusion of a "reasonableness requirement," noting that "requiring reasonableness prevents lawyers from taking advantage of their ability to 'choose'."<sup>109</sup> Because the current version of Rule 8.5 relies on the place of conduct along with the reasonableness requirement, it is likely to lead to the application of the rules of a state that has an interest in regulating that conduct. The place where conduct that affects this relationship occurs has a greater interest in having its rules of ethics apply than does the jurisdiction in which the lawyer happened to be licensed, for example, as under the previous version of the Rule.

Lawyer conduct in international arbitrations will fall under the provision governing conduct in connection with matters before tribunals. The historical choice of law rule of the situs would apply the ethical rules of the jurisdiction in which the tribunal is located. This is articulated in Rule 8.5, which provides that "the rules of the jurisdiction in which a tribunal sits" shall apply. As Rogers points out, it does not make sense for the ethics rules of a state that is hosting an arbitration to apply merely because it is the situs of the arbitration.<sup>110</sup> The Model

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<sup>106</sup>Daly, *supra* note 2, at 760.

<sup>107</sup>MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2) cmt. 3.

<sup>108</sup>Daly, *supra* 2, at 760–61.

<sup>109</sup>Daly, *supra* note 2, at 797.

<sup>110</sup>Rogers, *supra* note 6, at 3.

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Rules account for this concern by further providing that the rules of the tribunal have preeminent authority to designate which ethics rules shall apply.<sup>111</sup> Rogers' suggestion that arbitral tribunals should promulgate full-fledged codes of ethics to regulate the lawyers who appear before them is however unnecessary. In order to regulate the attorneys, arbitral tribunals need only provide a choice of law rule which invokes extant regulatory systems where the purposes of those regulations are implicated.

Rogers' critique of the choice of law approach centers on her allegation that this approach falsely views "ethical norms as freestanding precepts, which are independently modifiable and interchangeable."<sup>112</sup> On my reading, the approach taken by the Model Rules does not view "ethical norms as ... independently modifiable," but rather recognizes the fact that rules of ethics have specific purposes and should only be applied to lawyers' conduct when those purposes are implicated. The Model Rule 8.5 explicitly applies a conflicts of laws approach informed by interest analysis to international arbitrations.

2. The CCBE Code Applies a Conflicts of Laws Approach to Cross-border Practice Including International Arbitration.

The CCBE Code operates slightly differently than the ABA Model Rules. Like Model Rule 8.5, the CCBE Code applies to international arbitrations.<sup>113</sup> Whereas the ABA Rules apply primarily to domestic practice and have a few provisions that address multijurisdictional practice (including international arbitration), the CCBE Code was designed solely to address issues surrounding cross-border practice in Europe.<sup>114</sup> Further, when the ABA Rules are adopted in whole or in part by the individual states the Rules become the substantive content of that state's

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<sup>111</sup>MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2) ("the rules of the jurisdiction in which a tribunal sits, unless the rules of the tribunal provide otherwise").

<sup>112</sup>Rogers, *supra* note 3, at 379.

<sup>113</sup>See CCBE Code R. 4.5 "Extension to Arbitrators" that provides that "the rules governing a lawyer's relations with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis."

<sup>114</sup>See *supra* notes 74–79 and accompanying text.

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disciplinary system. On the other hand, a European state's adoption of the CCBE Code merely supplements the ethics rules and disciplinary system already in place in the adoptive state by providing rules for cross-border practice. In this way, the whole of the CCBE code can be loosely analogized to Model Rule 8.5.

Professor Terry characterizes the Code as one which provides a series of conflicts of laws rules indicating which national ethics rules should apply, rather than setting forth a “universally acceptable ‘legal ethics’ code.”<sup>115</sup> The Code was intended to prevent the simultaneous application of conflicting ethical rules (“double deontology”), without necessarily “adopting a particular substantive position” (“single deontology”).<sup>116</sup> The CCBE Code provisions on “incompatible occupations,” “advertising,” and “confidentiality of communications between lawyers” provide such conflicts of laws guidance that directs lawyers to follow a given state's rule under specified circumstances instead of dictating a new rule.<sup>117</sup> Other provisions, for example, that on ex parte communications, combine a substantive component with a choice of law rule. This rule forbids ex parte communications “unless [they] ... are permitted under the relevant rules of procedure.”<sup>118</sup> In a manner similar to that of the Rule 8.5 provision that defers to the rules of the tribunal, the CCBE Code incorporates the principles underlying interest analysis by recognizing that a tribunal before which a lawyer appears has a greater interest in regulating the conduct of that lawyer than does the state.<sup>119</sup>

The CCBE Code likewise applies its conflicts of law approach to determining which

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<sup>115</sup>Terry Part I, *supra* note 52, at 18. *See also*, Vagts, *supra* note 3, at 678 n.5 (noting that the CCBE Code “turns out to contain many instances in which it in effect resorts to conflict of laws solutions rather than providing uniform rules”).

<sup>116</sup>Terry Part I, *supra* note 52, at 18.

<sup>117</sup>*Id.* at 25.

<sup>118</sup>*Id.* at 37.

<sup>119</sup>The CCBE Code, R. 4.1. (“A lawyer who appears, or takes part in a case before a court or tribunal in a Member State, must comply with the rules of conduct applied before that court or tribunal.”)de4

rules of professional conduct should apply to international arbitration.<sup>120</sup> A hint of interest analysis is apparent in certain rules of the Code that seek to level the playing field between lawyers from jurisdictions which may have more specific and restrictive rules and those from jurisdictions with less restrictive rules. For example, the CCBE Code rule governing conflicts of interest is surprisingly strict, given the vagueness or non-existence of conflicts of interest rules in many of the CCBE member states.<sup>121</sup> In an cross-border arbitration in which the parties were represented by a lawyer from a jurisdiction with a specific conflicts of interest rule and a lawyer from a jurisdiction with a vague conflicts of interest rule, the CCBE Rule would govern so that these lawyers could be prevented from representing their clients in the event of a conflict even if their national rule would not have prevented the representation. In terms of interest analysis, the CCBE prioritizes the states' interest in preventing conflicts over the interest in promoting freedom of representation. The restrictive rule guarantees that in all cases, the state interest in preventing conflicts is upheld. In sum, the CCBE Code applies a conflicts of law approach that incorporates the competing regulatory interests of the European nations to cross-border practice, including international arbitration.

3. Conflicts of Laws Rules for Professional Ethics in International Arbitration Should Be Decided by the Tribunals.

Given that national regulation, including the ABA Model Rules<sup>122</sup> and the CCBE Code, apply choice of law rules to lawyer conduct in the context of international arbitration, the next question is: Which choice of law rules should be followed? For example, in an international arbitration proceeding between German and American parties, held in Geneva, which choice of

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<sup>120</sup>The CCBE Code, Rule 4.5 extends the application of all provisions referring to "courts" to arbitrations and other "judicial or quasi-judicial" institutions.

<sup>121</sup>Terry, Part I, *supra* note 52, at 31, and 31 n. 118.

<sup>122</sup>The practical matter of application of the Model Rules depends, of course, on whether the individual states have adopted those Rules. The adoption of the current Model Rule 8.5 in New York is still pending, and the rule currently in force in that state corresponds to the prior version of the rule. See ABA "State Implementation of Model Rule 8.5," [http://www.abanet.org/cpr/fclr/8\\_5\\_quick\\_guide.pdf](http://www.abanet.org/cpr/fclr/8_5_quick_guide.pdf); ABA Ad

law rules determine the ethics rules that will apply—the CCBE Code or Model Rule 8.5? The companion inquiry is: Who should best decide?

Private international adjudication, due to the fact that it implicates the regulatory interests of multiple sovereigns, will inevitably encounter conflicting regulations. The real problem with conflicts of law is not resolving these conflicts but rather the potential for diversity in the approaches to the rules for resolving them. In order to obtain certainty, uniformity, and predictability, and to provide lawyers with notice as to the applicable ethical rules, arbitral tribunals must be clear in their application of choice of law rules. In the same way that the CCBE Code has “harmonized the ‘conflicts of laws’ choices facing a lawyer” engaged in cross-border practice in Europe, international arbitration needs to harmonize and clarify the application of conflict of laws rules so that all lawyers involved in the same arbitral proceeding will be governed by the same ethical regulations.<sup>123</sup>

As to the question of which conflicts of laws rules should be applied, there are a variety of possible answers. As discussed above, the Model Rules and the CCBE Code each provide approaches to conflicts issues. Arbitrators have the authority to develop and apply conflicts of laws rules. This authority comports fully with their adjudicatory role. Furthermore, given the deference of national ethics rules to rules of specific tribunals, arbitrator authority to determine conflicts of laws rules does not undermine the regulatory interests of the nations whose lawyers practice before those tribunals. The comment to Model Rule 8.5 supports placing the authority to determine choice of law rules with the tribunal insofar as it anticipates and defers to the tribunal’s choice of law rule: “The lawyer shall be subject only to the rules of the jurisdiction in

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Hoc Comm. on Multijurisdictional Practice, Approved by the Executive Comm. NYCLA, Report of January 29, 2001; NY CLS Jud. Appx Code Prof’l Resp. § 1200.5-a, DR 1-105 (2005).

<sup>123</sup>Terry Part I, *supra* note 52, at 45.



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which the tribunal sits, unless the rules of the tribunal, *including its choice of law rule*, provide otherwise.”<sup>124</sup> Also, a choice of law determination by the arbitral tribunal would indicate to the relevant nationally based disciplinary authority the standards against which the lawyer’s conduct should be measured in the event of a disciplinary proceeding.

There is precedent for allowing an arbitral tribunal to develop a conflicts of law rule in the context of the application of substantive law. A tribunal’s choice of law determination can either be invoked on an ad hoc basis, or it can be built into the rules of the tribunal. Certain tribunals exemplify the ad hoc approach by allowing the arbitrator to determine which law will govern in the event the party’s agreement does not specify the governing law.<sup>125</sup> ICSID provides an example where the rules of the arbitral tribunal stipulate the choice of law rule: “[A]rticle 42(1) of the ICSID rules mandates that, in the absence of party agreement, the arbitrators apply the ‘law of the Contracting State party to the dispute (including its conflict-of-laws) and such rules of international law as may be applicable’.”<sup>126</sup>

In sum, national ethics rules do apply to lawyer conduct in the context of international arbitration. It is consistent with the structure of arbitration proceedings to apply conflicts of laws rules to determine which ethics rules should apply to the conduct of the lawyers in the proceeding. Arbitral tribunals have the authority to make such conflicts determinations, and national rules make clear that disciplinary authorities will defer to such determinations in any subsequent disciplinary action against an attorney. In this way, lawyers practicing in international arbitration will benefit from the transparency and accessibility of rules specific to the tribunal and the equity and fairness of complying with the same ethics rules with which their

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<sup>124</sup>MODEL RULES OF PROF’L CONDUCT R. 8.5 cmt. 4.

<sup>125</sup>Rogers, *supra* note 3, at 421 n.382 (citing W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS, AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES (1997)).

<sup>126</sup>*Id.*

C. The Conflicts of Laws Approach to Ethical Regulation in International Arbitration Respects Both the Coequal Sovereignty of National Disciplinary Authorities and the Independence of the Legal Profession.

It is important to remember that the tribunals of the international arbitration system are not international or supranational courts.<sup>127</sup> They are privately administrated bodies that provide private dispute resolution to, in large part, private parties. One of the reasons that arbitration is such a highly prized form of dispute settlement is that national sovereigns respect the private nature of these tribunals by enforcing awards made by them largely without question.<sup>128</sup> Despite this, national sovereigns nevertheless maintain an interest in regulating the professional conduct of their lawyers practicing in private international adjudication.<sup>129</sup> Ethical regulation in the context of international arbitration must account for the coequal sovereignty of the nations implicated in the arbitration as well as the independence of the legal professions of those nations.

The principle of coequal sovereignty of nations is critical to the international legal sphere, including arbitration. Rogers asserts that “the goals of ethical regulation are to guide, punish, and deter attorney conduct in an effort to protect clients and third parties, and to ensure the proper functioning of the state adjudicatory apparatus.”<sup>130</sup> These goals are equally important and equally well-served by the application of state rules of ethics to lawyer conduct, regardless of whether the conduct is in the context of a domestic court, a domestic arbitration, or an international arbitration. The very nature of our federalist system at the domestic level and the

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<sup>127</sup>*Id.* at 342.

<sup>128</sup>New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

<sup>129</sup>Rogers, *supra* note 6, at 4 (“nation-states retain an interest in the regulation of the behavior of lawyers who are licensed in their jurisdictions and whose work affects the rights and obligations of their citizens”)

<sup>130</sup>Rogers, *supra* note 6, at 20 n.93 (quoting Joint Committee on Prof'l Discipline: “The purpose of lawyer discipline ... is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable to likely to be unable to properly discharge their professional duties”).

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system of Westphalian sovereignty at the international level allows for varied, conflicting, and from time to time completely incompatible ethical rules. The “coexistence” of national regulatory systems is simply part and parcel of the relations among nations on the international plane. If international arbitration is viewed as an example of the interaction of sovereign nations there is no way – feasible or desirable – to devise a way of avoiding conflicts between ethical rules that apply to the lawyers practicing in it. Even as the ABA Multijurisdictional Practice Commission prepared the new version of Model Rule 8.5 in an attempt to facilitate the ever-growing interstate practice, it “reaffirm[ed] the principle of state judicial regulation of lawyers.”<sup>131</sup> Both the ABA and the CCBE have provided tools to resolve inconsistencies in the interstate and inter-European context that deliberately allow for various interests of the disciplinary authorities to be accommodated.

International tribunals do not have an interest in regulating attorney conduct,<sup>132</sup> rather they merely have an interest in the fairness and equity of their proceedings. That interest can be satisfactorily fulfilled by invoking extant national rules and mechanisms through application of conflicts of laws principles.<sup>133</sup> Where Rogers’ observes that the tribunal is in the best position to discipline the lawyers before it because it is best acquainted with their conduct makes intuitive sense, Professor Vagts notes that the apparent practical convenience is illusory in that “[e]xercising that power [to discipline] might ... be diversionary and counterproductive.”<sup>134</sup>

The way in which Rogers’ functional approach contravenes the coequal sovereignty of nations can be best illustrated in terms of her proposed enforcement mechanism. In “Context

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<sup>131</sup>ABA Comm. on Multijurisdictional Practice, Report of August, 2002 at 6, <http://www.acca.com/advocacy/mjp/finalmjp.pdf>.

<sup>132</sup>This is not to say that an arbitral tribunal does not have an interest in having regulated attorneys appear before it, but simply that the tribunal’s interest does not extend to providing that regulation itself.

<sup>133</sup>As discussed above, in contrast to Rogers’ repeated assertion that “international arbitration is intentionally disassociated from sovereigns, [so that] there is no obvious source for regulating participating attorneys,” the current national rules expose a clear intention on the part of national regulatory authorities to extend the application of their rule to international arbitration. Rogers, *supra* note 6, at 2.

<sup>134</sup>Vagts, *supra* note 1, at 253. Contrast with Rogers’ assertion that “The fact that international arbitration is a private system does nothing to diminish [its] inherent need” to have the “tools” and “power” to regulate the attorneys before them.” Rogers, *supra* note 6, at 24.

and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration,”<sup>135</sup> Rogers argues that the functional approach should lead to ethical rules promulgated and enforced by the arbitral tribunals themselves. That enforcement should take the form of disciplinary “sanctions” and published reprimands. Under this regime, the arbitral tribunal, an organization with no international personality or sovereign authority, would effectively govern the conduct of citizens whose conduct is already regulated by their professional organizations. As I argued above, there is nothing fundamentally different about a lawyer’s international arbitration practice to warrant its exemption from the usual professional regulation. Rogers’ recommendation would displace sovereign regulation of lawyer conduct with a private regime under the sole authority of the arbitral tribunals. On the other hand, application of conflicts of laws rules to ethics in arbitral proceedings incorporates the sovereign authority of the nation of each lawyer’s citizenship by maintaining nationally based lawyer regulation. Conflicts of laws seeks to ensure that national regulations are invoked when the sovereign’s regulatory interest is implicated.

A conflicts of laws approach likewise respects the independence of the legal profession—a long-held and essential value of bars around the world.<sup>136</sup> Organized bars promulgate rules of professional conduct for the very purpose of maintaining their independence.<sup>137</sup> The very fact of the “professionalism” of the bar is intimately connected with its capacity of self-regulation.<sup>138</sup> Professor Daly invoked these principles in an unequivocal argument against a proposal for a unitary national bar association in place of the current state bar system:

“As a matter of policy, the proposal for a national bar *threatens the independence*

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<sup>135</sup>Rogers, *supra* note 6.

<sup>136</sup>Rogers, *supra* note 3, at 365–67; MODEL RULES OF PROF’L CONDUCT Preamble.

<sup>137</sup>Daly, *supra* note 2, at 749.

<sup>138</sup>Vagts, *supra* note 3, at 679–80.

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*of the legal profession and should be rejected on this basis alone. State-based regulation preserves liberty. . . . The creation of a national bar would . . . lessen[] the protection of individual liberty.”*<sup>139</sup>

The independence of the legal profession must likewise be maintained in the context of private international adjudication. Application of conflicts of law to ethics rules in international arbitration supports and furthers the independence of the national bars by maintaining nationally based lawyer regulation. By contrast, Rogers’ recommendation that international arbitrators should double as a disciplinary authorities and “sanction” attorney conduct that does not comply with the ethics rules promulgated by that tribunal completely contravenes this principle of independence.<sup>140</sup> Involving an adjudicator as a ground floor disciplinarian threatens both sovereign regulatory authority of the lawyers respective nations and also the independence of legal profession.

In this Part, I argued that the role of the lawyer in international arbitration is not fundamentally different from that her role in other contexts, as Rogers claims. I conclude, in contrast to Rogers, that the national ethical regulations should apply to international arbitration. I have demonstrated that national rules explicitly do apply to international arbitration and that they call for a conflicts of laws approach in that context. I have argued furthermore that conflicts of law incorporates the essential principles of coequal sovereignty of nations and the independence of the legal profession, whereas Rogers’ approach contravenes these principles.

### III. The Conflicts of Law Approach to Rule of Professional Conduct Is Practicable.

This final Part attempts to apply the conflicts of laws principles delineated above to a few different factual scenarios.<sup>141</sup> These hypothetical examples will illustrate the ways in which a conflicts of laws approach furthers the interests of the national regulatory authorities, the arbitral

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<sup>139</sup>Daly, *supra* note 2, at 784 (emphasis added).

<sup>140</sup>Rogers, *supra* note 6, at 3–4.

tribunals and the lawyers themselves. The examples should expose not only the complexity of conflicts of laws but the ultimate workability of the approach.<sup>142</sup>

A. Interstate Conflicts of Rules of Ethics Provide a Familiar Starting Point for Conflicts of Laws Analysis.

I begin with an example of an interstate conflict<sup>143</sup> to juxtapose against the international examples in an attempt to expose the fundamental similarity in application of conflicts of law, regardless of whether the conflict is between states or nations.

A law firm, “S & H” is based in New York and has a branch office in New Jersey for the sole purpose of providing services to a principle client, DX, a Delaware corporation which has its principle place of operations in New Jersey. S & H has one partner, who is admitted both in New York and New Jersey, and three associates based at the New Jersey branch. Two of the associates are admitted both in New York and New Jersey, and one is admitted only in New York. S & H transfers a second partner, admitted in California, to the office. DX reveals fraud it has committed to the partner in charge of its account. The California rule would prohibit disclosure, the New Jersey rule would require disclosure under certain circumstances and New York rule would either prohibit disclosure or leave it to the lawyer’s discretion under certain circumstances. The question is, of course: “Which jurisdiction's ethical rules govern the lawyers’ conduct?”<sup>144</sup>

Daly’s analysis and conclusion that the previous version of Model Rule 8.5 is wholly “unworkable” is based in large part on the centrality of the lawyer’s place of admission and

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<sup>141</sup>I have borrowed these hypotheticals from Professors Rogers, Daly and Vagts.

<sup>142</sup>Cf. Jay L. Krystinik, Comment: *The Complex Web of Conflicting Disciplinary Standards in Litigation*, 38 TEX. INT’L L. J. 815, 827 n.121 (2003) (citing Gene R. Shreve, *Conflicts of Law – State or Federal?*, 68 IND. J. L. 907, 911 (1993)) (“Those of us who study conflicts must regret that it is law frequently unpopular with lawyers, judges, law students, and even law professors .... Chief among the reasons must be the daunting nature of the subject: difficulties in framing issues, in deciding between complex and, at times, contradictory approaches to a solution, and in applying the approach selected to the facts of the case.”).

<sup>143</sup>This example is borrowed from Professor Daly. I’ve abbreviated the facts. Daly, *supra* note 2, at 717.

principle place of practice to the section of the rule governing conduct not related to a court proceeding.<sup>145</sup> These criticisms are no longer applicable under the new formation of the rule, which premises jurisdiction on the place of conduct. Her further contention that the lawyer attempting to ascertain place of the predominant effect of his conduct “has no assurance that either formula will be ultimately acceptable to the disciplinary authorities” has also been remedied under the new formula through the “reasonableness” safeguard provision, as discussed above at Part II(B)(1).<sup>146</sup>

The S & H lawyers’ evaluation of whether they must disclose DX’s fraud is undoubtedly a difficult task, but not an impossible one. The first step of the application of Model Rule 8.5, is to determine whether the conduct is in connection with a matter before a tribunal. It seems not to be. Therefore, the second step falls under section 8.5(b)(2) governing conduct not related to a court proceeding. That section requires that the lawyers pinpoint the place of conduct. The partner to whom the fraud was revealed must evaluate where the relevant conduct—in this case disclosure of the fraud—would occur. Probably the answer is New York or New Jersey, given that those are the jurisdictions in which this partner practices. The next step is to determine whether the disclosure would take predominant effect in a jurisdiction other than New York or New Jersey. As Daly reasons, the disclosure would likely have effects in all the states in which DX did business and so it is impossible to ascertain a place of predominant effect.<sup>147</sup> I would counter that given the partner’s intimate knowledge of DX’s operations, as well as the details of the fraud, that partner is probably in a position to make a *reasonable* determination as to the place where his disclosure of the company fraud would have its predominant effect. The answer

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<sup>144</sup>*Id.* at 776.

<sup>145</sup>*Id.* at 777.

<sup>146</sup>*Id.*

<sup>147</sup>*Id.*

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might be New Jersey (DX's primary place of operations), and it might be New York (the primary place of business of the banks affected by the fraud).

Ultimately, the question of whether the lawyer gets the answer right is made eminently less critical by the reasonable basis provision of the new Model Rule. Provided that the S & H attorneys approach the inquiry in good faith and formulate a reasonable basis for their ultimate decision as to the applicable rules, they will have assurance that any disciplinary authority that might eventually be confronted with their situation would apply those rules to their conduct.

This example further illustrates the way in which the new Rule 8.5 captures a conflicts of law approach founded in interest analysis. Although multiple states will be effected by the disclosure, or lack thereof, and therefore have an interest in applying their rule, the "predominant effect" standard seeks out the state with the greatest interest. The lawyer is the person in the best position to make this determination because she can assess the consequences of disclosing the fraud in the context of everything she knows about the client matter. It is therefore adventitious to assign the lawyer the task of making this determination.

B. International Conflicts Are Strikingly Similar to Interstate Conflicts.

Interestingly, Professor Vagts proposes nearly the same hypothetical in an international context.<sup>148</sup> In his scenario, an American lawyer working in the German office of an American firm discovers a client's plan to commit fraud. The German rule would require disclosure, and, as we saw in the preceding example, the American rules on the subject differ wildly. Elsewhere, Vagts notes that "the German lawyer's duty to report is contained within a provision that relates to obligations of all *Germans* to assist in the forestalling of crime."<sup>149</sup> Under interest analysis,

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<sup>148</sup>Detlev Vagts, *International Legal Ethics and Professional Responsibility*, 92 AM. SOC. INT'L L. PROC. 378, 379 (1998).

<sup>149</sup>Vagts, *supra* note 3, at 687.



then, the German rule would not apply to this American lawyer. The conduct of an American lawyer working for an American law firm does not implicate the purpose of the rule, which is to govern the conduct of German citizens within the German political community. If the disclosure of the client's fraud can be characterized as a matter of cross-border EU practice, the CCBE Code might apply. In this case Rule 2.3, "Confidentiality," unambiguously militates against disclosure of the fraud, as of any other client confidence.<sup>150</sup>

As one commentator observed, "[t]he discussion of which rules to apply becomes somewhat academic when one considers that the jurisdiction best able – and most likely – to pursue disciplinary action is the lawyer's home jurisdiction."<sup>151</sup> It is certainly possible to imagine that if the lawyer did make the disclosure, a disciplinary action might well be brought in the US before a state disciplinary committee that had adopted Model Rule 8.5. In this case, the lawyer could either argue that the rules of the jurisdiction where he made the disclosure, namely Germany, required that he do so, rendering the conduct permissible under the "place of conduct" provision of Rule 8.5. In the alternative, he could argue that he reasonably believed the predominant effect of the disclosure would occur in a jurisdiction that required the disclosure (whether that jurisdiction was New York or some other state). Again, as long as the lawyer considered the factors and structured his conduct to comply with the regulations that he reasonably determined should apply, the lawyer should be able to rest assured that he is immune from disciplinary action.

C. Conflicts in International Arbitration: Pre-trial Communication with Witnesses.

The two proceeding examples were intended to lay the groundwork for the application of conflicts of laws doctrine to ethics rules, I will now address a few examples specific to

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<sup>150</sup>CCBE CODE R. 2.3

<sup>151</sup>Krystinik, *supra* note 141, at 827.

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international arbitration. First, Rogers' "paradigmatic" conflict, introduced above, summarized neatly as the "witness preparation/tampering" issue.<sup>152</sup> Significantly, this issue has been addressed by the International Bar Association as part of their "Rules on the Taking of Evidence in International Commercial Arbitration."<sup>153</sup> Specifically, Rule 4.3 provides: "It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses."<sup>154</sup> This example sheds some light on a common sense solution to the purported problem of conflict between ethics and procedural rules. Clearly, if the rules of the tribunal provide for preparation of witnesses by attorneys, it should not contravene the ethics rules of any relevant jurisdiction for attorneys before that tribunal to do so. The combined effect of either the CCBE Code<sup>155</sup> or Model Rule 8.5 and the IBA evidence rules will allow both the civil law and the common law lawyer to engage in strategic pre-testimonial communication with their respective witnesses in a fully ethical manner. By standardizing this evidence rule applicable to international arbitration, the IBA has effectively harmonized the ethics rules regarding pre-testimonial communication with witnesses as well.

The principles underlying conflicts of law interest analysis provide a ready justification for resolving conflicts of ethics rules through the backdoor of procedural or evidentiary rules. The two regulatory bodies allegedly competing for prescriptive jurisdiction are the state<sup>156</sup> (which promulgated the ethical rule) and the arbitral tribunal (which promulgated the evidentiary rule). Let's assume that the arbitration takes place in a civil law jurisdiction where pre-testimonial communications are prohibited, but that the rules of the tribunal permit these

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<sup>152</sup>Rogers, *supra* note 3, at 360; Vagts, *supra* note 4, at 688.

<sup>153</sup>Block, *supra* note 8, at 18.

<sup>154</sup>INT'L BAR ASS'N RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATION R. 4.3.

<sup>155</sup>CCBE CODE R. 4.1 "Applicable Rules of Conduct in Court."

<sup>156</sup>Either the lawyer's home state or the location of the tribunal.

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communications. Can a lawyer, hailing from a civil law jurisdiction that likewise prohibits pre-testimonial communications, ethically take depositions and interview witnesses prior to the hearing? The first step in interest analysis is to look to the purposes of the laws of each regulatory entity. The purpose of the state's law prohibiting pre-testimonial communications is to maintain an untainted base of evidence to facilitate fact finding by the inquisitorial judge.<sup>157</sup> The state's interest, therefore, extends only to attorneys who are participating in the type of inquisitorial proceeding implicated by the rule. The arbitration proceeding, by its own definition, is not such an inquisitorial setting. Therefore, the state has no interest in preventing lawyers appearing before that tribunal from interviewing their witnesses before the fact. This situation presents the classic "false conflict" where only one regulatory entity – in this case the arbitral tribunal – has an interest in having its rule apply to the case.<sup>158</sup>

The only remaining issue is the practical question of whether lawyers from different backgrounds and training will prepare their witnesses equally well or in the same qualitative way.<sup>159</sup> Rogers recognizes this also, but claims that a "controlling rule" will bring different lawyers' practice styles into alignment.<sup>160</sup> Her conclusion that a uniform ethics code will create such alignment seems to underestimate the pervasive cultural differences among lawyers internationally. As one practitioner stated: "Although it may be hard for lawyers in some jurisdictions to get used to this, at least the rule is clear."<sup>161</sup> This comment expresses the important idea that homogenizing the differences in practice styles among lawyers of vastly different education and experience takes much more than a rule of conduct. One of the essential features of international arbitration is that it is *international*. Lawyers from different traditions

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<sup>157</sup>Rogers, *supra* note 3, at 399 (noting that the prohibition on pre-testimonial communications reflects the lawyer's role, not a tolerance for perjury).

<sup>158</sup>Kramer, *supra* note 102, at 1045.

<sup>159</sup>Block, *supra* note 8, at 18.

<sup>160</sup>Rogers, *supra* note 3, at 360 n.85

represent opposing parties and have different ways of thinking about litigation. I do not mean to declare the problem of conflicting ethical obligations insoluble, but merely to emphasize that a conflicts of law approach incorporates this reality, by respecting the regulatory authority of the implicated states while still allowing the tribunals' ability to shape the conduct of lawyers in their proceedings.

D. Conflicts in International Arbitration: Ex Parte Communications.

I take up Rogers' example of ex parte communications with arbitrators as a final illustration of the conflicts of law approach in action.<sup>162</sup> An American and a European represent opposing sides before an arbitral panel composed of two party-appointed and one neutral arbitrator in a proceeding under Swiss law. The question is "whether it is permissible for the lawyer for one of the parties to the arbitration to communicate ex parte with the arbitrator whom that party appointed."<sup>163</sup>

A conflicts of laws rule which applied the ethics rules of the situs of the tribunal would result in the application of the civil law rule allowing ex parte communications. Interest analysis would look to the purpose of the American rule prohibiting ex parte communications: to prevent one side from gaining an unfair advantage.<sup>164</sup> If the structure of the proceeding is intended to equip each side with an advocate on the arbitral panel and maintain the neutrality of the third panelist, then the purpose of the US rule is only implicated with respect to ex parte communications with the neutral arbitrator. The US rule would not bar communications with the party-appointed arbitrators. Furthermore, under the situs rule, the US lawyer would be fully

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<sup>161</sup>Block, *supra* note 8.

<sup>162</sup>Rogers, *supra* note 3, at 392. Since Rogers does not provide a specific factual scenario, I am borrowing the hypothetical from Professor Vagts. See Vagts, *supra* note 149, at 379.

<sup>163</sup>*Id.*

<sup>164</sup>Rogers, *supra* note 3, at 392

justified in engaging in such ex parte communications under the ABA Model Rule 8.5, as she would be complying with the rules of the jurisdiction where the tribunal sits.<sup>165</sup>

The practice has developed in the opposite direction, however. Ex parte communications are “not the norm in international arbitration.”<sup>166</sup> Several organizations that issue arbitration rules and guidelines have come down on the side prohibiting ex parte communications and, therefore, encouraging the neutrality of all arbitrators.<sup>167</sup> The CCBE Code has also resolved this conflict in favor of prohibiting ex parte communications, except where they are permitted “under the relevant rules of procedure.”<sup>168</sup>

Professor Menkel-Meadows refers to this situation as a “conflict of role.”<sup>169</sup> Whereas Rogers’ functional approach emphasizes the derivation of the ethics rule from the role of the lawyer in a given procedural framework, this example of ex parte communications betrays the fact that the rub might actually be in ascertaining the role in the first place. The debate about ex parte communications with party-appointed arbitrators exposes differing views about whether arbitrators should properly serve a partisan or a neutral role. The counterpart to this debate regards the lawyer’s role and the extent to which the lawyer should advocate before a neutral panel or work with a member of that panel as a team – conflict of role, indeed. As international arbitration grows and develops the roles lawyers play before its tribunals will surely develop and change as well. As procedural and evidentiary rules are drafted and revised, they will reflect these developments in the notions of the lawyer’s role. The conflicts among ethical rules can be best resolved by weighing the interests of the relevant regulatory authorities in the context of the particular procedural and evidentiary rules of an international proceeding.

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<sup>165</sup>MODEL RULES OF PROF’L CONDUCT 8.5 (b)(1).

<sup>166</sup>Menkel-Meadows, *supra* note 1, at 957.

<sup>167</sup>Menkel-Meadows, *supra* note 1, at 957 nn.42–43; Cf. Vagts, *supra* note 2, at 259 (calling for “uniform standards” in this area).

<sup>168</sup>CCBE CODE Rule 4.2. Terry Part I, *supra* note 52, at 53.

<sup>169</sup>Menkel-Meadows, *supra* note 1, at 957.

Conclusion

Catherine Rogers' article "Fit and Function" provides a novel approach to the analysis of conflicting rules of professional conduct in the context of international arbitration. Her analysis of the interconnectedness of procedural rules, ethics and the lawyer's role falls short, however, of compelling her recommendation that a code of ethics be developed especially for international arbitration. I have argued that differing ethical rules across jurisdictions do not necessarily indicate fundamentally different roles of the lawyers in those jurisdictions. Ethical rules are partly a function of the development of the legal profession over time. Further, lawyers practicing in international arbitration do not take on a profoundly different role in that context. They bring their culturally specific professional outlook with them and the conflicts among ethical standards that arise in this setting are a necessary part of the continued development and professionalization of international arbitration. A conflicts of laws approach to ethical dilemmas in international arbitration incorporates these complexities and accounts for the coequal sovereignty of the regulating states and the independence of the legal profession. Application of conflicts of laws principles to resolve the ethical dilemmas that arise in the context of international arbitration will ensure that the standards for professional conduct in this venue support its reputation as a neutral and efficient method of adjudication that furthers both party and state interests.