

## E-LAWYERING, THE ABA'S CURRENT CHOICE OF ETHICS LAW RULE & THE DORMANT COMMERCE CLAUSE: WHY THE DORMANT COMMERCE CLAUSE INVALIDATES MODEL RULE 8.5(b)(2) WHEN APPLIED TO ATTORNEY INTERNET REPRESENTATIONS OF CLIENTS

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*“The global nature of the Internet and the jurisdictional limitations on the practice of law following geographical boundaries raise troubling issues for lawyers of regulatory compliance, jurisdiction and choice of law.”*<sup>2</sup>

### **Abstract**

The Internet is becoming the primary manner in which some attorneys serve clients. States have already taken differing views on whether it is acceptable for an attorney to engage in electronic representations of clients. Thus, determining what jurisdiction's law applies to such attorney conduct can be very important in deciding whether this activity constitutes the unauthorized practice of law, and, if not, the exact duties of an attorney in such representations.

This article argues that the current version of Model Rule of Professional Responsibility 8.5(b), which governs choice of ethics law, can be interpreted to apply the legal ethics rules of the state in which the attorney is located to all electronic representations. However, the dormant commerce clause prohibits a state from regulating activity that does not occur or have a significant effect in its physical boundaries. It is not clear that the state in which the lawyer is located has a significant enough interest, under a dormant commerce clause analysis, to prohibit, or even regulate, this type of representation in most situations. Often, the effect of an electronic representation will be born wholly in the other state where the client is located, and this state's ethical regime would be ignored under the likely interpretation of Model Rule 8.5(b)(2).

Therefore, jurisdictions should either eliminate the language from the rule that results in the application of the ethics regime of the attorney's home jurisdiction in all situations or define key terms in the rule to focus the analysis on the location of the client affected and the jurisdiction where the legal advice provided is acted upon. Either option will allow for the application of the ethics rules of the jurisdiction where the client is physically located when the most significant effect from the representation is felt in the client's home jurisdiction. Because this state has a much more significant interest in protecting the resident client from potentially damaging legal representations, this jurisdiction more properly should determine the manner in which attorneys can represent its residents and whether any constraints should be placed on electronic representations.

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<sup>1</sup> Assistant Professor of Law, Appalachian School of Law. This article is dedicated to my sons, Max, Alex and Ben, who were born shortly before I began to write this article. You will probably never be able entirely to understand what your mother and I went through to have, raise and love you all. The author would like to thank Professor Catherine Lanctot and Professor Allan Ides for reviewing earlier drafts of this article and providing helpful comments.

<sup>2</sup> Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l, Informal Op. 98-85, at 1 (1998).

## TABLE OF CONTENTS

I.	INTRODUCTION.....	3
II.	GROWTH OF E-LAWYERING.....	9
	A.    The Different Types of E-Lawyering.....	9
	B.    Demand for E-Lawyering.....	12
	C.    Formation of Attorney-Client Relationship Through E-Lawyering.....	15
III.	HISTORICAL TREATMENT OF CHOICE OF LEGAL ETHICS LAW BY MODEL CODE AND MODEL RULES.....	23
	A.    Model Code of Professional Responsibility and the Original 1983 Version of Model Rule 8.5.....	23
	B.    1993 Version of Model Rule 8.5.....	25
	C.    2002 Version of Model Rule 8.5.....	29
IV.	CASE LAW AND ETHICS OPINIONS AIDING IN INTERPRETING THE CURRENT LANGUAGE OF MODEL RULE 8.5(b)(2).....	32
V.	THE DORMANT ASPECT OF THE COMMERCE CLAUSE.....	43
VI.	APPLICATION OF THE DORMANT COMMERCE CLAUSE TO STATE REGULATION OF THE INTERNET.....	47
	A.    Case Law Applying Dormant Commerce Clause to State Regulation of Internet Activity.....	47
	B.    Reconciling the Cases Dealing with State Regulation of the Internet According to the Degree of Anonymity and Interactivity of the Particular Internet Communication Affected by the Regulation at Issue.....	56
VII.	DORMANT COMMERCE CLAUSE ANALYSIS OF CURRENT ABA CHOICE OF ETHICS LAW RULE, MODEL RULE 8.5(b)(2), WHEN APPLIED TO E-LAWYERING.....	60
	A.    The Burden on E-Lawyering of Complying with Different State Ethical Regimes.....	63
	B.    The Benefits to Potential Jurisdictions of Applying Their Ethical Regimes to E-Lawyering.....	66
	1.    Interest of Jurisdiction Where Client Resides in Regulating Electronic Representation.....	67
	2.    Lack of Interest of Attorney's Home Jurisdiction in Applying Its Ethics Law to an Electronic Representation that Affects a Resident of Another State.....	72
	C.    The Safe Harbor Language of Model Rule 8.5(b)(2) Invalidates the Choice of Ethics Law Rule Under the Dormant Commerce Clause Because It Allows the Ethics Law of the Attorney's Home Jurisdiction to Apply to All Electronic Representations.....	74
VIII.	CONCLUSION.....	77

## I. INTRODUCTION

The Internet<sup>3</sup> has changed the manner in which many attorneys serve and procure clients. For example, e-mail<sup>4</sup> now allows attorneys to respond to clients more quickly and with less cost.<sup>5</sup> Attorneys also can file a document electronically now in many

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<sup>3</sup> “The Internet” is a term coined from the “interconnected network” that makes up this computer system. Ari Lanin, Note, *Who Controls The Internet? States’ Rights and the Reawakening of the Dormant Commerce Clause*, 73 S. CAL. L. REV. 1423 n.1 (2000). “The Internet is a diverse set of independent networks, interlinked to provide its users with the appearance of a single, uniform network.” Comm. on the Internet in the Evolving Info. Infrastructure et al., *The Internet’s Coming of Age* 29 (2001). One commentator defines the “Internet” as “the worldwide ‘network of networks’ that are connected to each other, using IP [Internet Protocol] and other similar protocols.” Paul S. Jacobsen, *Net Law: How Lawyers Use the Internet* 217 (1997).

<sup>4</sup> Also known as “electronic mail,” e-mail is computer software that allows people with an Internet connection to send “messages documents, and graphics to other people connected to the Internet.” Jacobsen, *supra* note 3, at 215.

<sup>5</sup> See John A Wetenkamp, Note, *The Impact of E-mail on Attorney Practice and Ethics*, 34 McGeorge L. Rev. 135, 136 (2002) (stating that e-mail can “save clients money because it tends to streamline communications and it costs less than a telephone call”); Brett R. Harris, *Counseling Clients Over the Internet*, 18 Computer & Internet Law. 4, 4 (2001) (noting that e-mail “can be transmitted quickly and without undue expense” and that e-mail “at times [is] more practical and economical than telephone or facsimile transmissions”). Additionally, the use of e-mail attachments can speed up client review of document drafts and consequently increase the speed at which attorneys can draft and have documents filed. See Harris, *supra*, at 4 (stating that e-mail attachments can “be revised by the recipients electronically and then returned to the sender, in effect creating a collaborative effort to get documents into final form”).

Attorney use of e-mail to communicate with clients originally was controversial. See Jason Krause, *Guarding the Cyberfort*, ABA J., July 2003, at 42-43 (discussing the “debate in the legal community” from 1995 to 1999 “about whether it was safe to practice law over the Internet” and stating that some firms even issued bans on attorney use of e-mail). In 1999, the American Bar Association (“ABA”) issued an ethics opinion stating that a lawyer could transmit client information by e-mail under most circumstances without violating professional ethics rules. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 99-413 (1999) (finding that an attorney can “transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet” without violating professional ethics rules “because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint”). Many attorneys now routinely communicate with clients through e-mail. See ABA Legal Technology Resource Center, *June 2000 Telephone Survey: How Attorneys Use E-Mail*, at <http://www.lawtechnology.org/surveys/june2000.html> (indicating that, according to a June 2000 telephone survey, 94 percent of attorneys used e-mail in their practices and 71 percent used e-mail to communicate with clients).

Despite the current widespread use of e-mail by attorneys to communicate with clients, some commentators still point out the confidentiality risks posed by communicating with clients in this manner due to the risk of unauthorized interception of e-mail. Robert M. Battress & Joseph D. Harbaugh, *Taking the Lawyer’s Craft into Virtual Space: Computer-Mediated Interviewing, Counseling & Negotiating*, 10 Clinical L. Rev. 115, 151 (2003) (“Concerns continue to exist regarding the ability of hackers and persons with ulterior motives to intercept emails and also the capacity of service providers to intrude on communications.”); R. Scot Hopkins & Pamela R. Reynolds, *Redefining Privacy and Security in the Electronic Communication Age: A Lawyer’s Ethical Duty in the Virtual World of the Internet*, 16 Geo. J. Legal Ethics 675, 676 (2003) (“[T]he ease with which email communications may be intercepted make it a

courts.<sup>6</sup> Additionally, the World Wide Web (the “Web”)<sup>7</sup> allows attorneys to market themselves on a more widespread basis through law firm Web sites.<sup>8</sup> The marketing of legal services on the Web has become so pervasive that several freestanding Web sites now exist with the purpose of matching potential clients with attorneys.<sup>9</sup> Often, allowing people to make their initial inquiry to an attorney through an e-mail or a client intake form provided on a Web site eases an attorney’s screening of potential clients.<sup>10</sup>

In a more dramatic development, the Internet is becoming the primary, or in some cases sole, manner in which particular attorneys serve clients. For example, some of the Web sites designed to match clients with attorneys also allow attorneys to provide legal

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particular ripe target for even unsophisticated email thieves, and that this attribute is unique to Internet email.”).

<sup>6</sup> Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 N.M. L. Rev. 49, 54 (2003) (describing the federal courts’ Case Management/Electronic Case Files program that “allows attorneys to log in to court web sites with a court-issued password and submit documents to the court electronically”).

<sup>7</sup> The Web is a “hypertext-based system for finding and accessing Internet resources.” Jacobsen, *supra* note 3, at 223. The Web uses “Hypertext Markup Language,” or HTML, to tell a computer exactly how to display a document so that a page on a computer screen appears exactly how it appears in its printed version. Michael W. Loudenslager, *Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause*, 17 BYU J. Publ. Law 191, 262 (2003).

<sup>8</sup> Beyond just providing general information about the firm and its attorneys, law firm Web sites often provide information or articles on particular legal issues or topics concerning the firm’s practice areas that would be of interest to potential clients or the general public. See *Make the Most of the Web to Expand Your Practice* 1 (LexisNexis/Martindale Hubbell 2004) (providing a checklist for law firm Web sites that includes “recent articles written” as a way to “showcase your firm’s credentials”); William Hornsby, *Improving the Delivery of Affordable Legal Services Through the Internet: A Blueprint for the Shift to a Digital Paradigm* 6 (Nov. 1999) in *The Changing Face of Legal Practice: A National Conference on “Unbundled” Legal Services*, Conference Materials (2000), at <http://www.unbundledlaw.org/program/program.htm> (stating that law firm Web sites typically include “material that demonstrate the firm’s capacity, such as articles”). As of September 2004, Hornsby was staff attorney to the ABA Standing Committee on the Delivery of Legal Services. Mark Hansen, *Helping Self-Helpers*, A.B.A. J., Sept. 2004, at 72.

<sup>9</sup> See, e.g., [www.lawyers.com](http://www.lawyers.com), [www.legalmatch.com](http://www.legalmatch.com), [www.attorneypages.com](http://www.attorneypages.com). “Many online directories are contained within web sites as parts of other information and services. In other words, the directories that help consumers find lawyers are a subsidiary part of a site with general consumer information about legal issues or the subject matter of interest to the consumer.” Hornsby, *supra* note 8, at 7.

<sup>10</sup> See Terry Carter, *Casting for Clients*, A.B.A. J., Mar. 2004, at 35, 37 (discussing an attorney who screens potential clients through e-mail “which has added the value of being more efficient than fielding phone calls” and a Web site, [www.legalmatch.com](http://www.legalmatch.com), that allows potential clients to “fill out forms online detailing their circumstances and problems” for lawyer review); Hornsby, *supra* note 8, at 12 (stating that “law firms are using web sites for automated intake and screening in several different practice settings”).

advice to clients directly through the site.<sup>11</sup> On Internet “bulletin boards” or “newsgroups,”<sup>12</sup> potential clients post questions seeking legal advice under various legal topics, and attorneys can provide legal advice by posting a reply. The potential also exists for attorneys to participate in Internet “chat rooms”<sup>13</sup> where they would respond in real time to posts seeking legal information.<sup>14</sup> In addition to these third party operated Web sites, some attorneys are developing practices where they communicate with clients solely through their firm Web site or e-mail.<sup>15</sup>

Electronic representations of clients, or what this article loosely terms “e-lawyering,” are part of a larger, emerging trend among the legal profession to segment or “unbundle”<sup>16</sup> legal services in an attempt to serve the largely unmet legal needs of people with moderate to low incomes.<sup>17</sup> In the past, states have had differing views on the

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<sup>11</sup> See, e.g., [www.lawyers.com](http://www.lawyers.com), [www.legalmatch.com](http://www.legalmatch.com). For a discussion of how an attorney-client relationship can be created through such Web sites, see *infra* Section II. C.

<sup>12</sup> An Internet “bulletin board” is “an electronic bulletin board on a network where electronic messages may be posted and browsed by users or delivered to e-mail boxes.” Ill. State Bar Ass’n Advisory Op. 96-10 (1997). See also Brad Hunt, Comment, *Lawyers in Cyberspace: Legal Malpractice on Computer Bulletin Boards*, 1996 U. Chi. Legal F. 553, 554 (1996) (describing “bulletin boards” as “notice boards in cyberspace where people discuss legal issues and ask and answer questions about the law”). A “newsgroup” is an online discussion forum “categorized by subject, in which people post and read messages” on a Web site. Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace*, 49 Duke L.J. 147, 151 (1999). See also Ill. State Bar Ass’n Advisory Op. 96-10 (describing a “newsgroup” as “a type of bulletin board service in which users can exchange information on a particular subject”). Effectively, “bulletin boards” and “newsgroups” are terms for very similar, if not exactly the same, Internet activity. Therefore, this article will use the term Internet “bulletin board” to refer to both types of activity from this point forward.

<sup>13</sup> A “chat room” is a “simultaneous or ‘real time’ bulletin board or newsgroup among users who send their questions or comments over the Internet.” Ill. State Bar Ass’n Advisory Op. 96-10. See also Lanctot, *supra* note 12, at 152 (describing a “chat room” as a different version of a newsgroup “in which two or more individuals may communicate in ‘real time,’ receiving responses on the screen as soon as they are typed in”).

<sup>14</sup> See *infra* Section II. A. for a more in-depth description of electronic bulletin boards and chat rooms that allow attorneys to provide legal advice to users.

<sup>15</sup> See *infra* notes 38–42 and accompanying text.

<sup>16</sup> “Unbundling” of legal services involves “a lawyer and client [agreeing] to limit representation to discrete, specified tasks.” Deborah L. Rhode, *Access to Justice* 100 (2004). See also Hansen, *supra* note 8, at 72 (describing unbundling of legal services as situations where a “lawyer contracts to perform specific, limited work for the client without taking on responsibility for the entire case”).

<sup>17</sup> See Hansen, *supra* note 8, at 72 (noting that “since 2000, six states[, California, Colorado, Florida, Maine, Washington and Wyoming,] have formally adopted various changes in their ethics codes or civil

acceptability of nontraditional forums for attorneys to provide advice to clients.<sup>18</sup> States have already taken differing views on whether it is acceptable for an attorney to engage in electronic representations of clients.<sup>19</sup> Furthermore, practices in which attorneys predominantly use the Internet to communicate with clients enable attorneys more easily to represent people that are physically located in other jurisdictions where the attorney may not have a license to practice law. Therefore, determining what jurisdiction's law applies to such attorney conduct could be very important in deciding whether this activity constitutes the unauthorized practice of law. Even if states allow such representations, various states may afford clients with different protections and require attorneys to take different precautions when involved in an electronic representation of a client. Therefore, the particular jurisdiction's ethics rules that apply to such electronic representations can be further important in determining the exact duties of an attorney.

The American Bar Association (“ABA”) recently amended the Model Rules of Professional Conduct (“Model Rules”) to deal with various attorney multi-jurisdictional

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procedure rules to accommodate unbundling and assisted pro se representation” and “at least 11 other states have begun to study the issue actively”).

<sup>18</sup>See Lanctot, *supra* note 12, at 218 (stating that “each time that lawyers have sought to adapt existing media to answer legal questions posed by laypeople, the organized bar has moved to regulate—potentially out of existence—such activity” and going on to examine how different states have treated nontraditional forums for attorneys to provide legal advice where the attorney has limited ability to follow up on the advice given or to ask follow up questions of the client).

<sup>19</sup> Compare D.C. Bar Legal Ethics Comm. Op. 316 (2002) (allowing “lawyers to take part in online chat rooms and similar arrangements through which attorneys engage in back-and-forth communications, in ‘real time’ or nearly real time, with Internet users seeking legal information,” but advising attorneys that “if an attorney-client relationship is formed through cyberspace communications” the “relationship brings to bear all of the responsibilities and benefits defined under the D.C. Rules governing attorney-client relationships”), and N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 709 (1998) (finding that “using the Internet to take orders for trademark searches, conduct trademark searches, render legal opinions and file trademark applications is analogous to conducting a law practice by telephone or facsimile machine and is likewise permissible, subject to the same restrictions applicable to communication by those means”) with Ariz. Comm. on Rules of Prof’l Conduct, Formal Op. 97-04 (1997) (stating that “lawyers should not answer specific legal questions from lay people through the Internet unless the question presented is of a general nature and the advice given is not fact-specific”), and Fla. Bar Comm. on Prof’l Ethics, Op. A-00-1 (prohibiting “an attorney’s participation in a chat room” as a direct, “in person” solicitation).

practice issues, including Model Rule 8.5(b), which governs choice of ethics law.<sup>20</sup> Given how courts and state ethics committees have construed prior versions of Model Rule 8.5(b),<sup>21</sup> courts likely will interpret the current language of this rule and its safe harbor provision to apply the legal ethics rules of the state in which the attorney is located to all electronic representations.<sup>22</sup> This raises concerns under the “dormant” aspect of the Commerce Clause.

The dormant commerce clause prevents states from promulgating legislation or regulations that frustrate or inhibit trade between states, even in the absence of Congressional legislation.<sup>23</sup> When a state’s regulations prohibit activity that does not occur or have significant effect within its physical boundaries, this often violates the dormant commerce clause.<sup>24</sup> If in the context of Internet representations courts construe Model Rule 8.5(b)(2) always to apply the legal ethics rules of the state in which the lawyer is physically located, it is not clear that state has a significant enough interest, under a dormant commerce clause analysis, to prohibit, or even regulate, this type of representation in most situations.<sup>25</sup> This occurs because often the effect of an electronic representation will be born wholly in the other state where the client is located, and this is

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<sup>20</sup> Model Rules of Prof’l Conduct R. 5.5, 8.5 (2002). *See also infra* Section III. D. (explaining the recent amendments to Model Rule 8.5(b)).

<sup>21</sup> *See infra* Section IV.

<sup>22</sup> *See infra* notes 181–184 and accompanying text.

<sup>23</sup> *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945) (“For hundreds of years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, [the United States Supreme Court], and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.”)

<sup>24</sup> *See infra* notes 194, 209–210 and accompanying text.

<sup>25</sup> *See infra* Section VII. B. 2.

the state whose ethical regime would end up being ignored under the likely interpretation of the current language of Model Rule 8.5(b)(2).<sup>26</sup>

A more sound choice of ethics rule under the dormant commerce clause would be to use the current language of Model Rule 8.5(b)(2) without the safe harbor language that will result in the application of the ethics regime of the attorney's home jurisdiction in all situations.<sup>27</sup> Another option would be to retain the safe harbor but define key terms in the rule to focus the analysis on the location of the client affected by the legal representation and the jurisdiction where the legal advice provided in the representation is acted upon and takes effect.<sup>28</sup> Either option would allow for the application of ethics rules of the jurisdiction where the client is physically located in situations when the most significant effect from the representation is felt in the client's home jurisdiction.<sup>29</sup> This state has a much more significant interest in protecting the resident client from incompetent and potentially damaging legal representations.<sup>30</sup> Consequently, this jurisdiction more properly should determine the manner in which attorneys can represent its residents and whether any constraints should be placed on circumscribed and non-traditional representations, if it decides to allow them at all.<sup>31</sup> In this manner, the state of the client's residence, more often than not, would balance the risks of this more limited type of Internet legal representation against the potential to more effectively meet the legal needs of moderate and low income residents.

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<sup>26</sup> See *infra* Section VII. C.

<sup>27</sup> See *infra* Section VIII.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *infra* Section VII. B. 1.

<sup>31</sup> See *infra* Section VIII.



## II. THE GROWTH OF E-LAWYERING

### A. The Different Types of E-Lawyering

Attorney conduct on the Internet can occur in four main type of contexts: in chat rooms, on bulletin boards, through a law firm web site or through e-mail communications. In some electronic representations of a client, an attorney might even engage in a combination of these activities. Activity in an Internet chat room or on an Internet bulletin board involves a potential client posting a question seeking advice on a particular legal topic and then receiving responses in subsequent posts from other individuals who have registered with the web site.<sup>32</sup> Examples of the particular legal topics into which a bulletin board may be divided include “Accident and Injury Law,” “Consumer & General Practice Law,” “Family Law,” and “Real Estate Law,” among others.<sup>33</sup> After having received a response, the person making the initial post then can respond to questions presented in the subsequent posts or ask for clarification of information that others have provided. On some sites, such as on [freadvice.com](http://freadvice.com), the person making the initial legal inquiry is required to indicate the jurisdiction in which they are located.<sup>34</sup> Some Web sites providing chat rooms or bulletin boards are free to visitors of the site, often such sites provide other services such as a directory of attorneys in a particular area,<sup>35</sup> while others charge a fee to users of the site.<sup>36</sup>

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<sup>32</sup> See, e.g., [www.freadvice.com](http://www.freadvice.com). See also D.C. Bar Legal Ethics Comm., Op. 316 (2002) (describing a chat room exchange between an individual seeking advice on immigration law and a responsive post from an attorney); Lanctot, *supra* note 12, at 152-53 (describing Web sites with bulletin boards that “encourage laypeople to post legal questions, identifying their state of residence, and suggest that lawyers who are licensed to practice in those states post responses”); Hunt, *supra* note 12, at 554 (“Legal bulletin boards are notice boards in cyberspace where people discuss legal issues and ask and answer questions about the law.”).

<sup>33</sup> These examples are provided from [www.freadvice.com](http://www.freadvice.com).

<sup>34</sup> [www.freadvice.com](http://www.freadvice.com).

<sup>35</sup> See, e.g., [www.lawyers.com](http://www.lawyers.com), [www.legalmatch.com](http://www.legalmatch.com).

The difference between an Internet chat room and an Internet bulletin board is that the communications in the chat room occur in real time.<sup>37</sup> Thus, the posts in a chat room occur very rapidly one after another. On an Internet bulletin board, posts occur more slowly over several hours or even days. Therefore, the amount of time in which an attorney would have to consider a potential client's post and then form and post an answer to the request for legal information would be much quicker in a chat room than on an Internet bulletin board.

In addition to communicating with potential clients in chat rooms or bulletin boards, some attorneys are engaging in electronic lawyering in a more formal manner by allowing clients to communicate with an attorney through a particular part of the firm's web site or filling out a client intake form for potential clients on the firm web site or a web site run by a third party.<sup>38</sup> Some Web sites allow clients to fill out their own legal forms in a "decision-tree format" and then have an attorney review the documents before

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<sup>36</sup> See D.C. Bar Legal Ethics Comm., Op. 316 n. 3 (2002) (describing one "multi-purpose site" offering real time chats with attorneys for \$15 for a single chat or an annual subscription to the chat room for \$30 per month and another Web site that "charged \$10 for a one-week subscription"); Darren Franklin, *Hanging a Shingle on the Information Superhighway: Legal Advice on the Internet and Problems of Prohibited Client Solicitation and Unintended Attorney-Client Relationships*, 2001 Stan. Tech. L. Rev. 2, ¶4, [http://stlr.stanford.edu/STLR/Articles/01\\_STLR\\_2/index.htm](http://stlr.stanford.edu/STLR/Articles/01_STLR_2/index.htm) (describing USLaw.com which "offers a \$9.95 single-use (\$24.95 annual subscription) 'Ask a Lawyer' feature that lets users have 'private one-on-one live chats with licensed lawyers'").

<sup>37</sup> See Fla. Bar Comm. on Prof'l Ethics, Op. A-00-1 (2000) (stating that "the term 'chat room' refers to a real time communication between computer users"); Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 96-10 (1997) (stating that a "'chat' group is a simultaneous or 'real time' bulletin board or newsgroup among users who send their questions or comments over the Internet"); Utah State Bar Ethics Advisory Comm., Op. 97-10 (1997) (stating that communication in a "chat room" involves "simultaneous participation of several users in a real-time exchange of written messages" that "is more analogous to an in-person conversation due to its direct, confrontational nature").

<sup>38</sup> See Cal. Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2005-168 (2005) (describing a hypothetical firm web site that allows prospective clients to make their initial inquiry to the firm by fill out an electronic form asking for the inquirer's name and contact information as well as a short description of his or her legal problem and any initial questions the inquirer has); The client intake forms available on Web sites can range from a one page form asking for very basic information, see the intake form on [www.njdebtrelease.com](http://www.njdebtrelease.com), to several screens that ask for, among other things, a detailed description of the client's situation and needs, see the intake screens for [www.legalmatch.com](http://www.legalmatch.com).

the client receives the documents.<sup>39</sup> Other sites allow clients to question attorneys on discrete questions for a flat fee.<sup>40</sup>

Furthermore, some attorneys are engaging in more traditional practices where the attorney provides a fuller array of legal services but all of the communications with a client occur through the firm Web site or through e-mail.<sup>41</sup> Some attorneys are finding that such practices are more efficient and also allow them to find new clients without having to battle for clients in a more limited and immediate geographic area.<sup>42</sup> However, engaging in such representations increases the likelihood that the client will be located in a different jurisdiction and have a legal question pertaining to the law of that particular jurisdiction rather than the law of the jurisdiction in which the attorney is located and licensed.<sup>43</sup>

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<sup>39</sup> Terry Carter, *Law Tech Generations: Newer Versions of Firm Web Sites Boldly Go Where Few Law Firms Have Gone Before*, A.B.A. J., Feb. 2004, at 22.

<sup>40</sup> See Franklin, *supra* note , at ¶¶ 5-6 (describing “www.legalmatch.com, where visitors can get legal advice for \$39.95 a question” and “the LegalEase Home Page” which “charges visitors \$25 to answer their immigration law questions”).

<sup>41</sup> See, e.g., Fla. Bar Comm. on Prof'l Ethics, Op. 00-4 (2000) (allowing attorney “to provide limited, on-line legal services to Florida residents on simple matters not requiring office visits or court appearances” such as “simple wills, incorporation papers, real estate contracts, residential leases and uncontested marital agreements” as long as “the attorney complies with the ethics rules”). N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 709 (1998) (finding that “using the Internet to take orders for trademark searches, conduct trademark searches, render legal opinions and file trademark applications is analogous to conducting a law practice by telephone or facsimile machine and is likewise permissible, subject to the same restrictions applicable to communication by those means”); Va. State Bar Standing Comm. on Legal Ethics, Op. 1791 (2003) (allowing an attorney to engage in a bankruptcy practice in which he would communicate with clients without any face-to-face meetings but “via electronic communication so long as the content and caliber of those services otherwise comport with the duties and competence and communication”).

<sup>42</sup> See Carter, *supra* note 10, at 35 (discussing an attorney who screens potential clients through e-mail “which has added the value of being more efficient than fielding phone calls”); Hornsby, *supra* note 8, at 13, 16 (stating that providing “on-line advice overcomes geographic obstacles and provides a convenient alternative to a face-to-face encounter” and that “using a digital strategy to expand the geographic area would allow the lawyer access to a larger volume of unbundled cases without consuming a larger percentage of the marketplace for the immediate jurisdiction”).

<sup>43</sup> Hunt, *supra* note 12, at 556 (“[L]awyers in cyberspace will probably receive many questions from people who live in states (or even nations, given the international nature of cyberspace) other than those in which they are licensed to practice law.”).

## B. Demand for E-Lawyering

The demand for legal services delivered over the Internet springs from the great unmet need for legal representation of poor and moderate income Americans. As far as citizens of little means are concerned, legal services offices only are able to address “less than a fifth of the needs of eligible clients.”<sup>44</sup> Of the poor who are able to obtain legal assistance through such offices, many “must wait over two years before seeing a lawyer for matters like divorce,” which don’t qualify as emergencies.<sup>45</sup> Furthermore, such services are not available at all for many people “just over the poverty line” who cannot afford an attorney but who do not meet income eligibility requirements.<sup>46</sup>

With regard to the middle class, one survey indicated that less than half of moderate income households with a legal need actually consulted an attorney.<sup>47</sup> According to the same survey, less than forty percent of moderate income households used the courts to address their legal problems.<sup>48</sup> Almost a quarter of the households surveyed handled the problem on their own while a little over a quarter took no action at all.<sup>49</sup> Moreover, “[t]wo thirds of surveyed Americans [agreed] that it [was] ‘not affordable to bring a case in court.’”<sup>50</sup> Another survey conducted in Maryland indicated

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<sup>44</sup> Rhode, *supra* note 16, at 13.

<sup>45</sup> *Id.*

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

<sup>47</sup> Hornsby, *supra* note 8, at 2 (citing the results of a 1992 survey conducted by the ABA indicating that 43 percent of moderate income households with a legal need consulted an attorney). *See also* Rhode, *supra* note 16, at 79 (citing same survey and stating that “about two-thirds of the civil legal needs of moderate-income consumers were not taken to lawyers or the judicial system”).

<sup>48</sup> Hornsby, *supra* note 8, at 2. *See also* Modest Means Task Force, ABA Section of Litig., *Handbook on Limited Scope Legal Assistance* 10 (2003) (referring to ABA study finding that “7 out of 10 low-income households and 6 out of 10 moderate-income households that had legal problems did *not* use our legal system to resolve them”).

<sup>49</sup> Hornsby, *supra* note 8, at 2 (citing ABA survey indicating that twenty-three percent (23%) of households surveyed dealt with the legal problem on their own and twenty-six percent (26%) of households took no action at all).

<sup>50</sup> Rhode, *supra* note 16, at 80. *See also* Cristina L. Underwood, Comment, Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law, 79 Wash. L. Rev. 437,

that almost three quarters of the people in the middle class “no longer [contacted] an attorney when faced with a legal problem.”<sup>51</sup>

The lack of affordability of legal counsel has resulted in a large increase in the number of people filing cases *pro se*.<sup>52</sup> Especially in the areas of housing, bankruptcy and family law, as well as in small claims court, more people than not handle their lawsuits without using an attorney.<sup>53</sup> “In some jurisdictions, over four-fifths of cases involving these matters involve self-represented ‘pro se’ individuals.”<sup>54</sup> This increase in self-representation further enhances individuals’ dissatisfaction with the legal system. Only approximately one-half of people of middle income were happy with the result when they handled their legal problems on their own, and only one-third of the individuals who took no action were pleased with the result.<sup>55</sup> This contrasts with the two-thirds of people satisfied with the outcome among those who consulted attorneys to deal with their legal problems.<sup>56</sup>

One effort to address the unmet legal needs of so many Americans has been to develop technological solutions.<sup>57</sup> The use of Internet representations is one way in which technology can help middle, and even many low, income individuals obtain some

442 (2004) (“Many low- and moderate-income households simply cannot afford the cost of personal legal services.”).

<sup>51</sup> Rhode, *supra* note 16, at 79.

<sup>52</sup> See Hornsby, *supra* note 8, at 3 (citing same Maryland survey that found that “57 percent of *pro se* litigants [in Maryland] proceeded *pro se* because they could not afford an attorney”).

<sup>53</sup> Rhode, *supra* note 16, at 14. In uncontested divorces, between sixty and ninety percent of cases involve at least one *pro se* party. *Id.* at 82. See also Modest Means Task Force, *supra* note 48, at 8 (stating that “[n]ationally, in three or four out of every five [domestic relations] cases one of the two parties is unrepresented” and that “both parties are unrepresented in two or three out of every five cases”).

<sup>54</sup> Rhode, *supra* note 16, at 14.

<sup>55</sup> *Id.* at 80. See also Modest Means Task Force, *supra* note 48, at 14 n.30 (referring to Oregon survey indicating that about seventy-five percent (75%) of people with a legal need who didn’t retain counsel were “dissatisfied with the outcome of the case”).

<sup>56</sup> Rhode, *supra* note 16, at 80.

<sup>57</sup> See Henry H. Perritt, Jr., *How to Practice Law with Computers* 59 (3d ed. 1998) (noting that the lack of affordability of legal services by middle class Americans has created the potential “for deploying computer technology creatively to define entirely new legal services products for ordinary citizens”).

degree of legal advice instead of addressing their legal problems wholly on their own.<sup>58</sup> Many types of e-lawyering that currently exist represent part of a larger attempt to serve unmet legal needs by “unbundling” legal services.<sup>59</sup> Under such arrangements, an attorney agrees with a client to complete discrete legal tasks rather than carrying out a whole case from beginning to end.<sup>60</sup> The idea is that many people who now proceed *pro se*, or opt out of the legal system altogether, would be able to afford and would use reasonably priced limited representations if this were an option.<sup>61</sup> The ABA recently modified the Model Rules to better allow for such discrete task representations,<sup>62</sup> and

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<sup>58</sup> See D.C. Bar Legal Ethics Comm., Op. 316 (2002) (“Advocates of the provision of low-cost legal advice through on-line chat rooms and similar innovative services make the important point that these services offer great potential for providing low-cost legal services to low and moderate income persons.”); Lanctot, *supra* note 12, at 250 (stating that providing legal advice over the Internet “has the potential to serve the unmet legal needs of millions of Americans of low and moderate income who cannot afford to hire attorneys, at a time when the number of lawyers in the United States continues to expand”); Hunt, *supra* note 12, at 555 (“Legal information is also considerably less expensive when obtained in cyberspace rather than in person.”)

<sup>59</sup> See Lanctot, *supra* note 12, at 253 (stating that “[i]n many ways, giving specific legal advice to clients online, while expressly disclaiming any additional responsibilities, is a classic example of discrete task representation” and that “[b]y unbundling these services, the lawyer can give at least limited assistance to the person who needs help . . . and the client can obtain recourse that he otherwise could not obtain”).

<sup>60</sup> See Modest Means Task Force, *supra* note 48, at 4 (describing “limited scope legal assistance” as “a designated service or services, rather than the full package of traditionally offered services”); Rhode, *supra* note 16, at 100 (describing unbundling of legal services as where “a lawyer and client agree to limit representation to discrete, specified tasks”); Lanctot, *supra* note 12, at 253 (“The model is that of a menu of legal tasks from which the client, in consultation with the lawyer, is permitted to purchase only the services that he needs or can afford.”); Hansen, *supra* note 8, at 72 (describing unbundling of legal services as a “lawyer [contracting] to perform specific, limited work for the client without taking on responsibility for the entire case”).

Several other terms are used to describe this type of representation including “discrete task representation, ‘limited scope assistance’, or just ‘limited assistance’ or ‘limited representation.’” Modest Means Task Force, *supra* note 48, at 5. “Common forms of unbundled legal services involve court appearances or trial representation; telephone, Internet or brief in-person advice; and assistance with negotiations, pretrial discovery, or document preparation.” Rhode, *supra* note 16, at 100.

<sup>61</sup> Modest Means Task Force, *supra* note 48, at 9, 11 (stating that “[m]any *pro se* litigants have enough disposable income to pay for the *limited* representation they need” and that “[m]any of those who opt out, or who are forced out, of the legal system would use the legal system to resolve their disputes, and retain lawyers to represent them, if lawyers offered them reasonable limited-service options”). “Limited representation, therefore, is an important means to provide people with access to justice.” *Id.* at 11.

<sup>62</sup> Model Rules of Prof’l Conduct Rule 1.2(c) (2002) (stating that a “lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent”); ABA Comm’n on Evaluation of the Rules of Prof’l Conduct, Report with Recommendation to the House of Delegates 23 (Aug. 2001) (stating that the intent of revising Rule 1.2(c) was “to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless

more and more state disciplinary authorities formally are approving of such representations.<sup>63</sup> Therefore, providing limited legal advice to clients over the Internet potentially could become an important part of the effort to satisfy unmet legal needs through the unbundled or discrete task representation model.

### C. Formation of Attorney-Client Relationship Through E-Lawyering

When attorneys interact over the Internet in a more limited manner with potential clients, such as in an Internet chat room or on a bulletin board, the issue arises of when the interaction between the attorney and the potential client forms an actual attorney-client relationship. This is important because if an attorney-client relationship is not formed several of the ethical obligations owed to a client will not apply.<sup>64</sup>

Consequently, at least one jurisdiction's ethics opinion on electronic representations advises attorneys to post disclaimers stating that an attorney-client relationship is not

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valuable legal service to low or moderate-income persons who otherwise would be unable to obtain counsel"). Moreover, many of the ethics opinions dealing with unbundled legal services "identify Model Rule 1.2 as the source of authority for limited-service agreements." Modest Means Task Force, *supra* note 48, at 86.

<sup>63</sup> See, e.g., Ariz. Comm. on Rules of Prof'l Conduct, Op. 05-06 at 5-6 (2005) (approving of "limited scope representations" as long as certain conditions are met); Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998) (allowing an attorney to provide "unbundled legal services in both litigation and non-litigation matters" as long as the attorney can make a sufficient "inquiry into and analysis of" the applicable law and facts); Tenn. Bd. of Prof'l Responsibility, Formal Op. 2005-F-151 (2005) (acknowledging that Rule 1.2(c) "allows a lawyer to limit the scope of a client's representation if the client consents and if the limitation is reasonable under the circumstances" and approving of *Pro Se* clinic where attorneys provide "limited advice and assistance without becoming counsel of record" to domestic relations litigants). See also Modest Means Task Force, *supra* note 48, at 116-20, 124-27 (describing how Colorado, Maine and Washington have revised their ethics rules to facilitate the provision of unbundled legal services); Hansen, *supra* note 8, at 72 (noting that "since 2000, six states[, California, Colorado, Florida, Maine, Washington and Wyoming,] have formally adopted various changes in their ethics codes or civil procedure rules to accommodate unbundling and assisted pro se representation" and "at least 11 other states have begun to study the issue actively").

<sup>64</sup> Restatement (Third) of the Law Governing Lawyers § 14 (2000) (Introductory Note) ("A fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe fewer duties. . . . Prospective and former clients receive certain protections, but not all of those due to clients.").

created through the activity on the Web site concerned.<sup>65</sup> However, Professor Catherine Lanctot has concluded that such disclaimers will be ineffective if the subsequent activity of the attorney and client indicate that the parties actually have formed an attorney-client relationship.<sup>66</sup>

Moreover, Professor Lanctot concludes that much of the activity that occurs between attorneys and clients in chat rooms and bulletin boards would be sufficient to form an attorney-client relationship.<sup>67</sup> Generally, an attorney-client relationship arises when: (1) an individual manifests an intent for an attorney to provide legal services to them; and (2) that attorney either (a) manifests to the individual an intent to provide the legal services or (b) the attorney “fails to manifest a lack of consent” to provide the legal services to the individual knowing, or under the circumstances reasonably should know, that the individual “reasonably relies on the lawyer to provide the services.”<sup>68</sup> Much of the activity on Internet chat rooms and bulletin boards likely will form an attorney

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<sup>65</sup> See D.C. Bar Ethics Comm., Op. 302 (2000) (suggesting the use of disclaimers “on ‘click through’ boxes or pages, which require visitors to verify that they have read important information by clicking on a specified area of the screen before proceeding” in an opinion addressing an Internet Web site seeking plaintiffs for class action lawsuits).

<sup>66</sup> Lanctot, *supra* note 12, at 193 (“I expect that neither courts nor bar disciplinary authorities are likely to be sympathetic to cyberspace attorneys who rely on disclaimers as all-purpose shields. In my view, if the legal advice given is specifically tailored to the factual circumstances presented, that conduct will suffice to create an attorney-client relationship, regardless of what boilerplate disclaimers the lawyer attaches to the advice.”).

However, Professor Lanctot goes on to conclude that disclaimers might be effective in limiting the scope of an electronic representation. *Id.* at 195 (“[A] disclaimer that limited the online lawyer’s obligations to providing a competent legal response, without further requiring the lawyer to take steps to protect the client’s interest, arguably could be consistent with [the ABA’s Model Rules of Professional Conduct and the Restatement (Third) of the Law Governing Lawyers], if the circumstances of the exchange reflected informed consent.”). Nevertheless, “there are core attributes of the attorney-client relationship, such as basic competency, that cannot be bargained away.” *Id.* See also Modest Means Task Force, *supra* note 48, at 8 (stating that “lawyers owe the same duties of loyalty, confidentiality, diligence, and competence to limited-service clients that they do to full-service clients”).

<sup>67</sup> See Lanctot, *supra* note 12, at 184 (“In short, lawyers who provide specific legal advice online may find it difficult at some future point to persuade a court or bar counsel that they did not intend to incur any professional obligations by answering questions in cyberspace.”).

<sup>68</sup> Restatement (Third) of the Law Governing Lawyers § 14 (2000). See also Lanctot, *supra* note 12, at 168-69 (setting out and explaining the Restatement test for formation of an attorney-client relationship).



relationship in the following manner. First, the site user posts a legal question manifesting an intent to have a lawyer perform legal services, specifically by asking for legal advice and a recommendation on a course of action given the facts of the poster's situation.<sup>69</sup> Second, an attorney manifests his or her intent to perform the requested legal services by actual performance, particularly by providing specific legal advice in response to the original user's post.<sup>70</sup> Alternatively, an attorney could form an attorney-client relationship by posting a reply to the original site user's post knowing that the user will rely on the legal advice provided.<sup>71</sup> Thus, as long as the attorney is providing legal advice specifically tailored to the user's situation, an attorney-client relationship will be formed.<sup>72</sup> Moreover, even if an attorney limits the objectives in the representation, this does not do away with the obligations that an attorney owes a client with regard to those specific objectives.<sup>73</sup>

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<sup>69</sup> Lanctot, *supra* note 12, at 169 (“[T]he online posting of a specific legal question by a layperson manifests the intent to have a lawyer perform legal services—specifically, to provide legal advice.”).

<sup>70</sup> *Id.* (“The lawyer can also manifest consent by performance—that is, by providing the requested legal advice.”).

<sup>71</sup> *Id.* at 169-70 (“[F]urnishing specific legal advice in response to the question, without more, can constitute consent regardless of the lawyer’s subjective intent” because the attorney can “still incur the obligations of a professional relationship if the lawyer knows or should reasonably know that the questioner is reasonably relying on the lawyer’s advice.”). *See also* Franklin, *supra* note 36, at 14 (“An attorney-client relationship, therefore, does not require an explicit agreement; it may arise by implication from a Web site visitor’s reasonable expectation of legal representation and the online attorney’s failure to dispel those expectations.”).

<sup>72</sup> Lanctot, *supra* note 12, at 183 (“[G]iving specific legal advice in response to a set of particular facts is the hallmark of the practice of law, while providing general information is not. Second, it is reasonable for a putative client to rely on advice that is specifically tailored to his [or her] particular request, and the courts are clear that it is the reasonable belief of the client that will govern.”). *See also* Ill. State Bar Ass’n Comm. on Prof’l Conduct, Advisory Op. 96-10 (1997) (“[L]awyers participating in chat groups or other on-line services that could involve offering personalized legal advice to anyone who happens to be connected to the service should be mindful that the recipients of such advice [sic] are the lawyer’s clients, with the potential benefits and burdens of that relationship.”); Or. State Bar Ass’n Bd. of Governors, Formal Op. 1991-101 (1991) (“In essence, the practice of law involves the application of a general body of legal knowledge to the problem of a specific entity or individual.”); Underwood, *supra* note 50, at 450-52, 462-63 (2004) (describing the test that the majority of state courts use to determine whether the practice of law has occurred as examining whether the advice provided is tailored to the specific circumstances of the consumer).

<sup>73</sup> *See* Modest Means Task Force, *supra* note 48, at 8 (stating that “lawyers owe the same duties of loyalty, confidentiality, diligence, and competence to limited-service clients that they do to full-service clients”);

Even if an attorney-client relationship is not formed, though, an attorney may still owe certain duties of confidentiality and loyalty to prospective clients. With regard to information learned from a prospective client in the initial consultation, Model Rule 1.18 states that an attorney owes a prospective client the same duty of confidentiality owed to former clients.<sup>74</sup> The attorney also cannot represent someone with materially adverse interests to the prospective client in “the same or a substantially related matter” if the attorney received “significantly harmful” information from the prospective client.<sup>75</sup> The rule further imputes this disqualification to other members of the attorney’s firm.<sup>76</sup> An attorney’s firm can avoid disqualification if the attorney “took reasonable steps to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,” the attorney is appropriately screened, the attorney receives no part of the fee from the matter, and the prospective client receives

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Hansen, *supra* note 8, at 72 (stating that in the larger context of unbundled legal services generally “[m]any of the [ethics] opinions also agree that an attorney-client relationship still exists when legal services are provided on a limited basis”). *But see* Model Rules of Prof’l Conduct Rule 1.2 cmt. 7 (2002) (“Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

<sup>74</sup> Model Rules of Prof’l Conduct R. 1.18(b) (2003) (“Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to the information of a former client.”). *See also* Restatement (Third) of the Law Governing Lawyers § 15(1)(a) (2000) (stating that when an attorney has discussions with a prospective client about “the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues,” the attorney must “not subsequently disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client”).

Model Rule 1.18 defines a “prospective client” as a “person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” Model Rules of Prof’l Conduct R. 1.18(a) (2003). Comment 2 to the rule goes on to state that someone who communicates “unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client.’” Model Rules of Prof’l Conduct R. 1.18 cmt. 2 (2003).

<sup>75</sup> Model Rules of Prof’l Conduct R. 1.18(c) (2003).

<sup>76</sup> Model Rules of Prof’l Conduct R. 1.18(c) (2003).

written notice.<sup>77</sup> Disqualification alternatively can be avoided if the attorney receives written “informed consent” from both parties concerned.<sup>78</sup> Comment 5 to the rule further states that an attorney can avoid disqualification if the attorney expressly conditions discussions with the prospective client upon that individual’s “informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.”<sup>79</sup> Furthermore, an attorney can avoid the duty of confidentiality if the client expressly agrees to the attorney’s “subsequent use of information received from the prospective client.”<sup>80</sup>

Therefore, when an attorney has contact with an individual seeking legal advice over the Internet, he or she potentially can avoid incurring the obligations owed to prospective clients in one of two ways. First, the attorney can make sure that he or she initially learns only enough information to engage in a proper conflicts check regarding the matter. Such information could be restricted to the potential party names, any other significant actors concerned in the matter, and the general subject matter of the representation.<sup>81</sup> Presumably, this will decrease the chance that the attorney will receive “significantly harmful” information before discovering that a conflict with a current or previous client exists.<sup>82</sup>

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<sup>77</sup> Model Rules of Prof’l Conduct R. 1.18(d)(2) (2003). *See also* Restatement (Third) of the Law Governing Lawyers § 15(2)(a) (2000) (stating that an attorney’s firm may avoid disqualification due to contact with a prospective client if the “personally prohibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client” and the firm properly screens the attorney).

<sup>78</sup> Model Rules of Prof’l Conduct R. 1.18(d)(1) (2003).

<sup>79</sup> Model Rules of Prof’l Conduct R. 1.18 cmt. 5 (2003).

<sup>80</sup> Model Rules of Prof’l Conduct R. 1.18 cmt. 5 (2003).

<sup>81</sup> *See* Cal. Bar Standing Comm. on Prof’l Responsibility and Conduct, Formal Op. 2005-168 (2005) (stating that when a prospective client contacted an attorney through an intake form on the firm’s web site about a potential divorce representation, the attorney would need to know information such as “the names of the parties, children, [and] former spouses” in order to perform a proper conflicts check).

<sup>82</sup> *See* Model Rules of Prof’l Conduct R. 1.18 cmt. 4 (2003) (“In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter

Second, the attorney could have the prospective client expressly consent to waive the obligations which Model Rule 1.18 imposes. On an intake form on a firm Web site, this could be accomplished by requiring the prospective client to click on a button directly under language waiving these obligations in order for that individual's information to be transmitted to the law firm.<sup>83</sup> However, language simply disclaiming any "attorney-client relationship" or "confidential relationship" may be insufficient to do away with the Rule 1.18 obligations.<sup>84</sup> Instead, one state's ethics committee has stated that to be effective a waiver must be written in "plain-language" and expressly state that "the attorney will have no duty to keep confidential the information" transmitted by the prospective client.<sup>85</sup> Therefore, unless an attorney acts proactively to either limit the amount of information received or to have the individual seeking legal advice waive such obligations under express and plain language, an attorney that has contact with an individual seeking legal advice through the Internet at a minimum would incur the duties owed to prospective clients, irrespective of whether an actual attorney-client relationship is formed. Moreover, it may be difficult for an attorney to implement either method discussed above in the context of an Internet chat room or bulletin board. Nevertheless, for the purposes of the analysis in the rest of this article, I will assume that an attorney-

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should limit the initial interview to only such information as reasonably appears necessary for that purpose.").

<sup>83</sup> See Cal. Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2005-168 (2005) (providing an example of some waiver language on an Internet client intake form).

<sup>84</sup> See Cal. Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2005-168 (2005) ("We do not believe that a prospective client's agreement to Law Firm's terms prevented a duty of confidentiality from arising on the facts before us, because Law Firm's disclosures to [the prospective client] were not adequate to defeat her reasonable belief that she was consulting Law Firm for the purpose of retaining Law Firm."). Cf. *Barton v. U.S. Dist. Ct.*, 410 F.3d 1104, 1107, 1109-12 (9th Cir. 2005) (holding that attorney-client privilege applied to information submitted through Internet questionnaire seeking information on potential members of class action despite disclaimer stating that filling out the questionnaire did "not constitute a request for legal advice and [the person filling out the form was] not forming an attorney-client relationship by submitting this information").

<sup>85</sup> See Cal. Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2005-168 (2005).

client relationship is formed by the Internet activity of the attorney and potential client concerned.

In deciding whether to allow such representations to occur through the Internet, disciplinary authorities must wrestle with the following issues: (1) whether the initial communications between the parties constitute an improper solicitation by an attorney of a potential client;<sup>86</sup> (2) whether the attorney can conduct a proper conflicts check before the attorney enters into the representation;<sup>87</sup> (3) if the communications occur in a forum

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<sup>86</sup> Compare Ariz. Comm. on Rules of Prof'l Conduct, Op. 97-04 at 3 (1997) ("Communication with a potential client via cyberspace should not be considered either a prohibited telephone or in-person contact because there is not the same element of confrontation/immediacy as with prohibited mediums. A potential client reading his or her e-mail, or even participating in a 'chat room' has the option of not responding to unwanted solicitations."); D.C. Bar Ethics Comm., Op. 302 ("The potentially greater immediacy of 'real time' communications in chat rooms, as opposed to other forms of written communications, may give rise to concerns similar to those about 'in person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions' D.C. Rule 7.1, comment [5]. . . . On the other hand, attorney communications with potential clients in chat rooms are probably less potentially coercive than face-to-face communications."); Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 96-10 (1997) ("On the other hand, lawyer participation in an electronic bulletin board, chat room, or similar service, may implicate Rule 7.3, which governs solicitation, the direct contact with prospective clients. The Committee does not believe that merely posting general comments on a bulletin board or chat group considered solicitation."); and Phila. Bar Ass'n Prof'l Guidance Comm., Op. 98-6 (1998) ("In the opinion of the Committee, conversation interactions with persons on the Internet do not constitute improper solicitations, but in any one particular case the interaction may evolve in such a way that it could be considered as such.") with Fla. Bar Comm. on Prof'l Ethics, Op. A-00-1 (2000) (prohibiting "an attorney's participation in a chat room in order to solicit professional employment" as a in-person solicitation); Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-276 (1996) ("[I]f a lawyer is participating in interactive communication on the Internet, carrying on an immediate electronic conversation. If the communication was initiated by the lawyer without invitation, such 'real time' communications about the lawyer's services would be analogous to direct solicitation, outside the activity permitted by MRPC 7.3."); Utah State Bar Ethics Advisory Opinion Comm., Op. 97-10 (1997) (finding "that an attorney's advertising and solicitation through a chat group are 'in person' communications under Rule 7.3(a) and are accordingly restricted by the provisions of that rule" although finding that postings to "newsgroups" are "analogous to placing an advertisement for legal services in a narrow-interest magazine or newspaper" and are allowable); and W.Va. Lawyer Disciplinary Bd., Op. 98-03 (1998) (finding "that solicitations via real time communications on the computer, such as a chat room, should be treated similar to [prohibited] telephone and in-person solicitations").

<sup>87</sup> See Ariz. Comm. on Rules of Prof'l Conduct, Op. 97-04 at 4 (stating that attorneys probably should not respond to specific legal questions posted in "chat rooms" or "news groups" because, in part, of "the inability to screen for a potential conflict with an existing client (in violation of ER 1.7)"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 709 (1998) ("Practicing law for clients by means of the Internet does not give rise to any exemption from this fundamental obligation to avoid conflicts and not to undertake a new representation without checking to assure that it does not create an impermissible conflict."); Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 99-9 (1999) ("As an attorney checks for conflicts when a client calls or comes to his office seeking legal services, an attorney must check for conflicts when a client e-mails seeking legal advice. The on-line intake form should provide a way for the law firm to make a

open to the public, whether the attorney can adequately protect client confidences or alternatively whether the client can waive his or her right to confidentiality in an informed manner, or at all, in this setting;<sup>88</sup> and (4) whether an attorney can competently represent a client in this manner.<sup>89</sup> If after grappling with these concerns a jurisdiction decides to allow electronic representations, the jurisdiction must decide what precautions to require an attorney to take to deal with these issues and protect consumers in the best manner possible. Furthermore, it is very possible that different jurisdictions will place

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conflicts check prior to reviewing the legal question.”); Phila. Bar Ass’n Prof’l Guidance Comm., Op. 98-6 (stating that “in the course of an interaction with any person on the Internet an attorney/client relationship may begin with all that such relationship implies including creation of potential conflicts of interest (see Rules 1.7 and 1.9”); S.C. Ethics Advisory Comm., Op. 94-27 (stating that in an electronic representation the “attorney must obtain sufficient information to identify his client in order to make a complete conflicts inquiry”); Utah State Bar Ethics Advisory Opinion Comm., Op. 97-10 (stating that an attorney “[a]dvertising and [communicating] over the Internet . . . may be unable to screen for potential conflicts as required by Rules 1.7, 1.8, 1.9, and 1.10”).

<sup>88</sup> See Ariz. Comm. on Rules of Prof’l Conduct, Op. 97-04 at 4 (stating that attorneys probably should not respond to specific legal questions posted in “chat rooms” or “news groups” because, in part, of “the possibility of disclosing confidential information (in violation of ER 1.6”); D.C. Bar Ethics Comm., Op. 302 (stating that an attorney engaging in an electronic representation of a client “must also safeguard the secrets and confidences of that client under Rule 1.6” which may require the attorney “even if a communication begins as a public communication in a chat room or similar exchange service, . . . to reserve his or her communications for the eyes of a particular advice seeker only”); Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 99-9 (1999) (stating that in a legal representation through e-mail the “confidences and secrets of the e-mail attachments must be protected under DR 4-101”); Phila. Bar Ass’n Prof’l Guidance Comm., Op. 98-6 (stating that “in the course of an interaction with any person on the Internet an attorney/client relationship may begin” which would include “expectations of confidentiality”); S.C. Ethics Advisory Comm., Op. 94-27 (stating that “the confidentiality requirements of Rule 1.6 are implicated by any confidential communication which occurs across electronic media, absent express waiver by the client”); Utah State Bar Ethics Advisory Opinion Comm., Op. 97-10 (stating that in communicating with a client or prospective client over the Internet “it may be difficult to protect confidential communications under Rules 1.6 and 1.9”).

<sup>89</sup>D.C. Bar Ethics Comm., Op. 302 (stating that in an electronic representation of a client an “attorney must ensure that such requirements as that of competence under D.C. Rule 1.1, diligence and zeal under Rule 1.3 and adequate communication under Rule 1.4 are met); Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 99-9 (“In providing answers to e-mail questions a lawyer must act competently under DR 6-101(A).”); Va. State Bar Standing Comm. on Legal Ethics, Op. 1791 (2003) (stating that with regard to a legal representation in which an attorney communicates with a client by e-mail without in-person meetings “[s]o long as the requisite information is given, received, analyzed and acted upon, the attorney has met his duty of competency.”). See also Model Rules of Prof’l Conduct Rule 1.2 cmt. 7 (2002) (stating that brief consultation with a client before rendering legal advice may be appropriate unless “the time allotted is insufficient to yield advice upon which the client could rely.”); Lanctot, *supra* note 12, at 252-53 (exploring whether a lawyer can meet his or her duty of diligence under Model Rule 1.3 “when a lawyer gives a client specific legal advice, but does not volunteer additional information about other legal issues that might lurk beneath the surface”).

different requirements on attorneys when engaging in electronic representations of clients.<sup>90</sup>

### III. HISTORICAL TREATMENT OF CHOICE OF LEGAL ETHICS LAW BY MODEL CODE AND MODEL RULES

The American Bar Association's ("ABA") model ethics rules have gone from not addressing choice of ethics law at all to basing the choice of ethics law on the jurisdiction or jurisdictions where an attorney is licensed to basing the choice of ethics law on where the attorney's conduct occurred or where the predominant effect of the attorney's conduct arises.<sup>91</sup> The following section discusses the history of the ABA's treatment of choice of ethics law in attorney disciplinary actions, or lack thereof, first in the Model Code of Professional Conduct ("Model Code") and then in subsequent versions of the Model Rules of Professional Conduct ("Model Rules"). This history should help a reader appreciate why there is little case or administrative law discussing this issue and illuminate somewhat the current language of the Model Rule's choice of law rule.

#### A. Model Code of Professional Responsibility and the Original 1983 Version of Model Rule 8.5

The Model Code, which the ABA adopted in 1969,<sup>92</sup> ignored inter-jurisdictional conflicts of ethics law and did not contain a rule addressing choice of ethics law.<sup>93</sup>

However, this was understandable because conflicts among state ethical rules were minimal during the period of time in which the Model Code served as the basis for most

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<sup>90</sup> See J.T. Westermeier, *Ethics and the Internet*, 17 Geo. J. Legal Ethics 267, 311 (2004) (stating that "[t]he variances among states and countries in ethical rules applicable to websites and electronic communications greatly complicates any analysis of ethical considerations" and that "there is little likelihood that uniformity on a multi-jurisdictional basis could be achieved").

<sup>91</sup> See *infra* notes 93–127 and accompanying text.

<sup>92</sup> Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 1.11, at 1-19 (3d ed. 2003). Although adopted in 1969, the Model Code was not to become effective until 1970. *Id.*

<sup>93</sup> Ronald D. Rotunda & John S. Dzienkowski, *Professional Responsibility: A Student's Guide 2005-2006* 1108 (2005) (noting that the Model Code had no counterpart to Model Rule of Professional Conduct 8.5).

states' regulation of attorney conduct.<sup>94</sup> Soon after the ABA adopted the Model Code, 49 states had adopted or taken significant steps toward adopting the Model Code in substantial part.<sup>95</sup> Therefore, with considerable continuity existing between state's ethical rules during this time, choice of ethics law was not a significant issue.<sup>96</sup>

The original 1983 version of the Model Rules of Professional Conduct also largely ignored choice of law issues.<sup>97</sup> Model Rule 8.5, entitled "Jurisdiction," simply dealt with a state's disciplinary jurisdiction and stated: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere."<sup>98</sup> Nevertheless, two comments to this version of Rule 8.5 obliquely dealt with choice of law issues. Comment 2 stated that if rules of

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<sup>94</sup> See Hazard, *supra* note 92, § 1.11, at 1-18 ("Within a few years, the Code was officially adopted – by the courts, not merely by the bar associations – in virtually all American jurisdictions."); Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, Or No Answer at All?*, 36 S. Tex. L. Rev. 715, 747 (1995) (stating that "[n]o reason existed to think about amending the Code to address multijurisdictional conflicts since the professional standards were identical from state to state"). However, while 49 states eventually adopted the original version of the Model Code, many states rejected or adopted substantially different amendments to the Code than those subsequently recommended by the ABA. Charles W. Wolfram, *Modern Legal Ethics* 56-57 (1986).

<sup>95</sup> Wolfram, *supra* note 94, at 56-57 (1986). Wolfram notes that this number includes states where the Model Code "had received only unofficial state bar approval." *Id.* at 56 n. 45. "Official versions of a revised Code were not adopted in Illinois and Maine, for example, until 1980." *Id.* Furthermore, some states adopted the Model Code's Disciplinary Rules and not its Ethical Considerations, while other states adopted the Ethical Considerations "as legally and enforceable norms." Hazard, *supra* note 92, § 1.11, at 1-20. See also Wolfram, *supra* note 94, at 56 ("Not at all states adopted all parts of the Code. Several states omitted the Ethical Considerations.").

The Model Code contained three different types of statements: "[B]road general 'axiomatic' principles ('Canons'), aspirational and explanatory provisions ('Ethical Considerations,' referred to as 'ECs'), and black letter rules ('disciplinary Rules,' referred to as 'DRs')." Hazard, *supra* note 92, § 1.11, at 1-20. Wolfram notes that the Canons embodied "general concepts from which the Disciplinary Rules and Ethical Considerations derive," the Disciplinary Rules were "directly prescriptive," and the Ethical considerations were "aspirational in character" and "may provide 'interpretive guidance'" for courts or agencies attempting to construe a Disciplinary Rule. Wolfram, *supra* note 94, at 58-59 (quoting the Preliminary Statement of the Model Code).

<sup>96</sup> See Daly, *supra* note 94, at 747 (stating that because "professional standards were identical from state to state . . . the number of conflict issues brought to the attention of courts, disciplinary bodies, and state bar associations was extremely small").

<sup>97</sup> See Hazard, *supra* note 92, § 66.4 n.1, at 66-23 ("As originally promulgated in 1983, Model Rule 8.5 did not address the choice of law issue at all, leaving courts and disciplinary authorities to develop conflicts of law principles on a case-by-case basis.").

<sup>98</sup> Model Rules of Prof'l Conduct R. 8.5 (1983).



professional conduct in two states differed then “principles of conflicts of law may apply.”<sup>99</sup> Comment 3 further stated that where a lawyer “is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation.”<sup>100</sup> Consequently, Rule 8.5 and its comments largely were silent on which jurisdiction’s ethics law should apply to an attorney admitted to practice in one state but not admitted to the bar in another state in which the attorney rendered legal services.<sup>101</sup>

#### B. 1993 Version of Model Rule 8.5

In 1993, the ABA amended Model Rule 8.5.<sup>102</sup> The title of the rule was changed to “Disciplinary Authority; Choice of Law.”<sup>103</sup> Section (b) dealing with choice of law issues was added<sup>104</sup> while section (a) essentially contained the original language of the rule dealing with disciplinary jurisdiction.<sup>105</sup> The purpose of section (b) was to subject any particular instance of attorney conduct to “one set of rules of professional conduct.”<sup>106</sup> This section of the rule divided attorney conduct into that undertaken “in

<sup>99</sup> Model Rules of Prof’l Conduct R. 8.5 cmt. 2 (1983).

<sup>100</sup> Model Rules of Prof’l Conduct R. 8.5 cmt. 3 (1983).

<sup>101</sup> *Cf.* Daly, *supra* note 94, at 749 (stating that the original version of Model Rule 8.5 “is strikingly silent about a jurisdiction’s right to discipline a lawyer not admitted to the bar who nonetheless renders legal services within the jurisdiction.”).

<sup>102</sup> Hazard, *supra* note 92, § 66.2, at 66-5; Daly, *supra* note 94, at 756.

<sup>103</sup> Model Rules of Prof’l Conduct R. 8.5 (1993).

<sup>104</sup> Hazard, *supra* note 92, § 66.2, at 66-5 (“The ABA amended Rule 8.5 in 1993 to add a new section (b) addressing choice of law issues that can arise in lawyer discipline cases.”).

<sup>105</sup> Model Rules of Prof’l Conduct R. 8.5 (1993). *See also* Daly, *supra* note 94, at 757 (“Subsection (a) of the new Model Rule 8.5 essentially [tracked] the language of the prior rule.”). In the 1993 version of Rule 8.5, subsection (a) stated:

Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

Model Rules of Prof’l Conduct R. 8.5(a) (1993).

<sup>106</sup> Model Rules of Prof’l Conduct R. 8.5 cmt. 3 (1993). *See also* Hazard, *supra* note 92, § 66.4 n.1, at 66-23 (stating that the 1993 version of Model Rule 8.5(b) was “designed to ensure that, generally speaking, only a single conduct standard will be applied, no matter which jurisdiction disciplines a respondent lawyer”).

connection with a proceeding in a court,” which was dealt with in subsection (b)(1), and “any other conduct,” which was dealt with in subsection (b)(2).<sup>107</sup>

For attorney conduct in a court proceeding, the rule applied “the rules of the jurisdiction in which the court sits.”<sup>108</sup> For all attorney conduct outside of court proceedings, the rule applied the ethical rules of the jurisdiction where the attorney was licensed to practice if the attorney was admitted in just one jurisdiction.<sup>109</sup> If an attorney was licensed to practice in more than one jurisdiction, the rule applied the ethical rules of the jurisdiction where “the lawyer principally practices.”<sup>110</sup> However, if “particular conduct” of an attorney “clearly [had] its predominant effect in another jurisdiction in which the lawyer [was] licensed to practice the [ethics] rules of that jurisdiction” applied to such conduct.”<sup>111</sup>

<sup>107</sup> Model Rules of Prof'l Conduct R. 8.5(b) (1993).

<sup>108</sup> Model Rules of Prof'l Conduct R. 8.5(b)(1) (1993). This was “unless the rules of the court [provided] otherwise.” *Id.* One commentator described this portion of the rule as applying the “substance/procedure distinction” in making choice of law decisions “dealing with litigation conduct.” Geoffrey J. Ritts, *Professional Responsibility and the Conflict of Laws*, 18 J. Legal Prof. 17, 87(1993).

<sup>109</sup> Model Rules of Prof'l Conduct R. 8.5(b)(2)(i) (1993).

<sup>110</sup> Model Rules of Prof'l Conduct R. 8.5(b)(2)(ii) (1993).

<sup>111</sup> Model Rules of Prof'l Conduct R. 8.5(b)(2)(ii) (1993). One commentator has characterized this as a “harmonization” approach to making choice of law decisions that weighs the interests of the various jurisdictions and parties involved and attempts to accommodate those interests to the extent possible. Ritts, *supra* note 108, at 85-86, 87. *See also id.* at 70 (stating that “[h]armonization” appears to allow for sensitive case-by-case analysis of conflicts problems in the ethics area—analysis that can be responsive to the interests of states as coequal sovereigns in a federal system, and also to the needs of individual lawyers who may have reasonable fear of being whipsawed between the inconsistent rules of the states”).

In its entirety, the 1993 version of Model Rule 8.5(b) stated:

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

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for the purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules

The rule did not define the terms “principally practices” or “predominant effect.”<sup>112</sup> Comment 4 to the rule did state that the “predominant effect” exception was intended “to be a narrow one.”<sup>113</sup> The comment went on to provide two examples of the application of that language. The language would apply to the situation where an attorney admitted and principally practicing in State A, but also admitted in State B, “handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company.”<sup>114</sup> However, the language would not apply “if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.”<sup>115</sup> The comment did not address more difficult scenarios.

Moreover, neither the language of this version of Rule 8.5 nor its comments dealt explicitly with which state’s ethics law would apply when a jurisdiction was prosecuting an attorney for conducting activity in a jurisdiction where the attorney was not admitted to practice.<sup>116</sup> Presumably, in such situations, the law of the jurisdiction where the attorney was licensed to practice would apply, assuming he or she was licensed in only

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to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Model Rules of Prof’l Conduct R. 8.5(b) (1993).

<sup>112</sup> Daly, *supra* note 94, at 760 (“Although ‘principally practices’ and ‘predominant effect’ are the central concepts in subsection (b)(2), Model Rule 8.5 fails inexplicably to define them.”).

<sup>113</sup> Model Rules of Prof’l Conduct R. 8.5 cmt. 4 (1993).

<sup>114</sup> Model Rules of Prof’l Conduct R. 8.5 cmt. 4 (1993).

<sup>115</sup> Model Rules of Prof’l Conduct R. 8.5 cmt. 4 (1993).

<sup>116</sup> See Hazard, *supra* note 92, § 66.4, at 66-8 (stating that under the 1993 version of Model Rule 8.5(b) “[o]utside of the litigation context, resolving the choice of professional responsibility rules is more difficult”).

one state.<sup>117</sup> But this results seems counterintuitive when the attorney is being prosecuted for conduct that occurred in a different state, especially if the conduct concerned is prohibited in that state, but allowed in the licensing state.

Similarly, the rule was unclear as to what state's ethics rules would apply to the prelitigation conduct of an attorney. The rule applies the ethics rules of the applicable court once a lawsuit is filed, but the rule is unclear as to whether that court's ethics rules apply to the attorney's conduct in representing the same client regarding the subject matter of the ultimate lawsuit prior to filing a complaint.<sup>118</sup> Thus, the 1993 version of Rule 8.5 determined the law applicable to an attorney's conduct largely according to the jurisdiction in which the attorney was admitted to practice law, but was fairly unclear about what jurisdiction's ethics laws applied to out of court conduct when an attorney was licensed in more than one jurisdiction. Furthermore, the rule left something of a gap as to what law applied to an attorney's conduct prior to filing a lawsuit for a client.

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<sup>117</sup> See *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 178 F. Supp. 2d 9, 19 (D. Mass. 2001) (stating that with regard to attorneys licensed by only one state, "the choice-of-law analysis is simply that the lawyer is *always* subject to the ethical obligations of the state that licensed him, regardless of where the conduct occurs"); Hazard, *supra* note 92, § 66.4, at 66-8 (stating that in a situation where an attorney is licensed only in State A and is representing a "client based in State A" in "a transaction related to property located in State B," according to the 1993 version of Rule 8.5 "the lawyer is governed only by the rules of State A").

<sup>118</sup> See Hazard, *supra* note 92, at 66-8 (stating that "Rule 8.5 does not directly address the issue of prelitigation conduct such as advertising or solicitation"); Daly, *supra* note 94, at 759 (noting that subsection (b)(1) of the 1993 version of Rule 8.5 "leaves unanswered the question [of] which jurisdiction's profession standards apply to the lawyer's conduct prior to the lawyer's admission" either generally or *pro hac vice* only for the purposes of the specific lawsuit concerned). "Subsection (b)(1) also ignores the possibility that a lawyer will undertake representation 'in connection with a proceeding in a court' without have been admitted either generally or *pro hac vice*." *Id.* at 760.

### C. 2002 Version of Model Rule 8.5

In August 2002, the ABA adopted amendments to the Model Rules recommended by its Commission on Multijurisdictional Practice.<sup>119</sup> Among the amendments adopted were changes to Model Rule 8.5(b).<sup>120</sup> The comments retain the stated purpose of applying “one set of rules of professional conduct” to “any particular conduct of an attorney.”<sup>121</sup> The substance of subsection (b)(1), which originally dealt with conduct in court, stayed the same, applying the ethics rules of the jurisdiction where the proceeding concerned takes place, but its language was changed to apply to attorney conduct related to matters “pending before a tribunal”<sup>122</sup> in order to cover alternative dispute resolution as well as court proceedings.<sup>123</sup> Subsection (b)(2) dealing with “any other conduct” was changed to apply “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.”<sup>124</sup> Again, the text of the rule, as well as its comments, leaves important language undefined, such as “conduct occurred” and “predominant effect.”

In an apparent attempt to help fill one of the gaps left by the 1993 version of the rule, Comment 4 uses the “predominant effect” language of the rule to address the ethics

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<sup>119</sup> ABA Commission on Multijurisdictional Practice Statement, at <http://www.abanet.org/cpr/mjp-home.html> (“On August 12, 2002, the American Bar Association House of Delegates adopted all nine recommendations contained in the Commission’s Final Report.”).

<sup>120</sup> The ABA also added language to Model Rule 8.5(a), governing disciplinary jurisdiction, that gives a state explicit authority to discipline attorneys who provide legal services in that state without a license to practice in that state. This new language provided: “A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.” Model Rules of Prof’l Conduct R. 8.5(a) (2002).

<sup>121</sup> Model Rules of Prof’l Conduct R. 8.5 cmt. 3 (2002).

<sup>122</sup> Model Rules of Prof’l Conduct R. 8.5(b)(1) (2002).

<sup>123</sup> ABA Comm’n on Evaluation of the Rules of Prof’l Conduct, Report with Recommendation to the House of Delegates 277 (Aug. 2001) (“Recognizing the increasing use of alternative dispute-resolution processes, the Commission has broadened a number of Rules that formerly applied to ‘courts’ to make them apply to ‘tribunals,’ which include binding arbitration and other methods of formally adjudicating the rights of parties.”).

<sup>124</sup> Model Rules of Prof’l Conduct R. 8.5(b)(2) (2002).

rules that apply to attorney conduct in representing a client before a lawsuit is filed or alternative dispute resolution is used. The comment states that “[i]n the case of conduct of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.”<sup>125</sup>

Furthermore, a safe harbor provision was added to subsection (b)(2) stating that a “lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”<sup>126</sup> Comment 5 to the rule explains that this safe harbor provision is to apply “[w]hen a lawyer’s conduct involves significant contacts with more than one jurisdiction” and it is not “clear whether the predominant effect of the lawyer’s conduct will occur in a jurisdiction other than the one in which the conduct occurred.”<sup>127</sup>

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<sup>125</sup> Model Rules of Prof’l Conduct R. 8.5 cmt. 4 (2002).

<sup>126</sup> Model Rules of Prof’l Conduct R. 8.5(b)(2) (2002). In its entirety, the text of the 2002 version of Model Rule 8.5 states:

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

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

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

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

Model Rules of Prof’l Conduct R. 8.5 (2002).

<sup>127</sup> Model Rules of Prof’l Conduct R. 8.5 cmt. 5 (2002).

Therefore, under the current version of Model Rule 2002 in order generally to determine the state ethics law to apply to an attorney representing a client in a jurisdiction where the attorney is not admitted, the new Rule 8.5 looks to the state where “the lawyer’s conduct occurred” or where the conduct’s “predominant effect” arises. However, due to the safe harbor provision if it is unclear in which state the “predominant effect” of the attorney’s conduct arose, the applicable law is that of any jurisdiction where the attorney can plausibly argue he or she reasonably believed the predominant effect occurred.

The current language of the rule leaves it unclear as to which jurisdiction’s ethics rules apply to electronic representations of clients. To start, it is not clear where an attorney’s “conduct occurred” when he or she posts a reply in an Internet chat room, on an Internet bulletin board or responds to client e-mails, for example, from a computer in Ohio and the client receives these communications at a computer located in Virginia. The attorney’s conduct could be construed to occur in the attorney’s home state, Ohio, where he or she has an office because that is where the attorney is located when posting in the chat room or on the bulletin board or drafting and then sending the e-mail.

Alternatively, the attorney’s conduct could be interpreted as occurring in the client’s jurisdiction, Virginia in this example, because that is where the advice presumably has an effect and where client acts on the advice. It further seems that if the client acted upon the attorney’s advice in Virginia, Virginia would be where the “predominant effect” of the attorney’s conduct occurred. However, under the safe harbor provision in the rule if the attorney can argue that he or she “reasonably believed” that the “predominant effect” of the electronic representation was in Ohio, Ohio’s ethics laws would apply. Thus, due to the safe harbor, the current version of Model Rule 8.5(b)(2)

may end up, at least in the context of an attorney’s electronic representation of a client located in a different state, applying the ethics law of the state where the attorney is licensed, the same result that would have occurred under the 1993 version of the rule.

#### IV. CASE LAW AND ETHICS OPINIONS AIDING IN INTERPRETING THE CURRENT LANGUAGE OF MODEL RULE 8.5(b)(2).

Only a handful of cases and ethical opinions have interpreted the “principally practices” and “predominant effect” language from the 1993 version of Model Rule 8.5(b)(2)(ii).<sup>128</sup> Nevertheless, these cases and opinions indicate that when the attorney and client reside in different jurisdictions the “predominant effect” of an attorney’s conduct can be viewed as occurring in either the jurisdiction where the attorney’s office is located or the jurisdiction where the client resides depending on the facts involved.<sup>129</sup>

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<sup>128</sup> A few other cases have used choice of ethics law rules with almost identical language to the 1993 version of Model Rule 8.5(b)(2)(i), which applies the ethics rules of the jurisdiction where the attorney is licensed to practice law if the attorney is licensed in only one jurisdiction. *See Philin Corp. v. Westhood, Inc.*, No. CV-04-1228-HU, 2005 WL 582695, at \*10 (D. Or. Mar. 11, 2005) (finding alternatively under Oregon choice of ethics law rule that because the attorney concerned was “apparently admitted only in Oregon,” Oregon law applied to motion to disqualify); *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 178 F. Supp. 2d 9, 19 (D. Mass. 2001) (“All five jurisdictions follow Model Rule 8.5 with respect to the treatment of lawyers licensed by only one state. For such lawyers, the choice-of-law analysis is simply that the lawyer is *always* subject to the ethical obligations of the state that licensed him, regardless of where the conduct occurs.”); *O’Brien v. Stolt-Nielsen Transp. Group*, 36 Conn. L. Rptr. 645, 2004 WL 304318, at \*5 (Conn. Super. Ct. 2004) (applying New York’s choice of ethics law rule and holding that New York ethics rules applied to whether attorney was precluded ethically from prosecuting constructive discharge case because it would require the attorney to divulge client secrets when attorney was only licensed to practice law in New York during time concerned). A couple of cases also have used choice of ethics law rules with almost identical language to the 1993 version of Model Rule 8.5(b)(1) which applies the ethical “rules of the jurisdiction in which the court sits” to attorney conduct in court proceedings. *See Philin Corp.*, 2005 WL 582695, at \*\*9-10 (applying ethics rules of the jurisdiction where it sits, Oregon, to conduct of attorney in lawsuit in the United States District Court for the District of Oregon when considering motion to disqualify the attorney as counsel for the plaintiff); *In re Gonzalez*, 773 A.2d 1026, 1029 (D.C. 2001) (holding that Virginia ethics law applied to conduct of attorney “in connection with a proceeding in a Virginia court” in determining whether attorney should be disciplined for revealing client secrets).

<sup>129</sup> *See infra* notes 130–184 .



*In re Complaint as to Conduct of Summer* dealt with whether Idaho or Oregon ethics law applied to the conduct of an attorney licensed to practice in both states.<sup>130</sup> An attorney had been found guilty of attempting grand theft by deception under Idaho law while representing a client pursuant to two separate automobile accidents.<sup>131</sup> The client had been involved in an automobile accident in Idaho a little less than two weeks prior to an Oregon accident.<sup>132</sup> In settling with the insurer of the other driver in the Idaho accident, the attorney had represented that his client had not been injured in the subsequent Oregon accident.<sup>133</sup> Despite this, the attorney, one week after settling his client's claim for the Idaho accident, sent a demand letter to the claims adjuster for the company whose driver was involved in the Oregon accident.<sup>134</sup> In the letter, he stated that his client did not suffer any symptoms until after the second accident, and he attached some of the same medical records that he had submitted to the previous insurer in settling the claim for the Idaho accident.<sup>135</sup>

The Supreme Court of Oregon first found that the attorney “principally [practiced] law in Idaho.”<sup>136</sup> After becoming a member of the bars in both Oregon and Idaho, the attorney had “assumed a heavy caseload at a high volume personal injury law firm in Nampa, Idaho.”<sup>137</sup> However, the attorney's firm maintained an office in Oregon where the attorney occasionally worked.<sup>138</sup> Moreover, in analyzing where the predominant effect of the attorney's conduct occurred with regard to the Oregon accident

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<sup>130</sup> 105 P.3d 848, 849, 851 (Or. 2005).

<sup>131</sup> 105 P.3d at 850, 851.

<sup>132</sup> 105 P.3d at 850.

<sup>133</sup> 105 P.3d at 850.

<sup>134</sup> 105 P.3d at 850 & n.4

<sup>135</sup> 105 P.3d at 850.

<sup>136</sup> 105 P.3d at 851.

<sup>137</sup> 105 P.3d at 850.

<sup>138</sup> 105 P.3d at 850 n.3, 851.

representation, the court noted that while the company whose driver was involved in that accident was “principally an Idaho company, . . . its claims adjuster was located in Oregon.”<sup>139</sup> Furthermore, the claims adjuster had obtained information about the accident from the attorney’s client in Oregon, and the claims adjuster in Oregon had been the first to receive the demand letter from the attorney.<sup>140</sup> “It follows, then, that the effects of the [attorney’s] conduct were felt in both Oregon and Idaho. It could be argued that the [attorney’s] acts had approximately equal impact in each jurisdiction.”<sup>141</sup>

This, presumably, would have called for application of Idaho law because the court had already determined the attorney principally practiced in Idaho and the “predominant effect” of his conduct was not “clearly” in Oregon, as required under the 1993 version of Model Rule 8.5(b)(2)(ii) to apply the law of a jurisdiction other than the one where the attorney “principally practices.” Furthermore, with the attorney’s primary office being located in Idaho and the party who the attorney’s representations potentially would have damaged potentially being located in Idaho, it seems that, of the two jurisdictions concerned, the largest effect from the attorney’s conduct would be in Idaho. However, the court noted that “the parties have litigated this proceeding as if the [attorney’s] acts had their predominant effect in Oregon. Where that conclusion is at least plausible, we will accept it and proceed accordingly by applying Oregon’s disciplinary rules.”<sup>142</sup>

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<sup>139</sup> 105 P.3d at 851.

<sup>140</sup> 105 P.3d at 851. After receiving the demand letter, the claims adjuster forwarded it to the company’s principal office in Idaho. 105 P.3d at 850 n.4.

<sup>141</sup> 105 P.3d at 851.

<sup>142</sup> 105 P.3d at 851-52. Most likely whether the court applied Oregon or Idaho law would not have affected the outcome of the action because defrauding a potential litigant most likely would subject the attorney to discipline under the ethics laws of either jurisdiction. *See* Model Rules of Prof’l Conduct R. 4.1 (2003) (“In the course of representing a client a lawyer shall not knowingly : (a) make a false statement of material

*In re Disciplinary Proceedings Against Marks* involved an attorney who was licensed to practice law in both Wisconsin and Michigan.<sup>143</sup> However, he maintained an office only in Michigan and “75 percent of his practice [was] based in Michigan.”<sup>144</sup> A Wisconsin client retained the attorney to represent him in a personal injury action.<sup>145</sup> The client’s wife had been killed and his daughter and granddaughter were injured in a Wisconsin automobile accident.<sup>146</sup> The other driver involved in the accident was a Michigan resident.<sup>147</sup> The client terminated the attorney’s representation after about a week.<sup>148</sup> At this point, the attorney had already done substantial work on the case, but had not commenced a lawsuit.<sup>149</sup> The parties’ retainer agreement stated that the attorney would be paid for legal services performed at an hourly rate plus expenses upon termination of the representation prior to resolution of the case.<sup>150</sup> Despite this language, the attorney represented to two insurance companies that he maintained a lien in the amount of twenty-five percent (25%) of any settlement of the former client’s claims.<sup>151</sup> The client’s new attorney subsequently moved for a court order in Wisconsin state court declaring that the client’s former attorney was not entitled to any legal fees beyond the amount that he had originally invoiced the client and calculated at an hourly rate.<sup>152</sup> The former attorney then filed a lawsuit in Michigan state court against the former client, the

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fact or law to a third person.”). The court noted that Idaho had also commenced disciplinary action against the attorney. 105 P.3d at 851.

<sup>143</sup> 665 N.W.2d 836, 838 (Wis. 2003).

<sup>144</sup> 665 N.W.2d at 838.

<sup>145</sup> 665 N.W.2d at 838.

<sup>146</sup> 665 N.W.2d at 838.

<sup>147</sup> 665 N.W.2d at 838.

<sup>148</sup> 665 N.W.2d at 839.

<sup>149</sup> 665 N.W.2d at 839. The court noted that the attorney had “contacted the district attorney’s office and the sheriff’s department, met with his clients, and began to prepare pleadings.” *Id.*

<sup>150</sup> 665 N.W.2d at 838-39.

<sup>151</sup> 665 N.W.2d at 840.

<sup>152</sup> 665 N.W.2d at 840. The attorney initially indicated that the amount due to him pursuant to the language in the retainer agreement was a little over one thousand eight hundred dollars (\$1,800). 665 N.W.2d at 839.

new attorney and the insurance companies “asserting a ‘charging lien,’” among other grounds.<sup>153</sup>

Once the two actions were settled, the former client and his subsequent attorney filed a grievance in Wisconsin against the original attorney for representing to the insurers that he had a twenty-five percent (25%) lien on the proceeds of the client’s personal injury claims, for filing a complaint asserting breach of contract after the client had terminated the representation, and filing an amended complaint alleging that his bill had not been paid when the amount of the bill had already been tendered.<sup>154</sup> The first ground was brought under both the Wisconsin and Michigan attorney ethics rules while the second and third grounds were brought only under the Michigan Rules of Professional Conduct.<sup>155</sup> The referee who initially heard the action dismissed all grounds based wholly on Michigan ethics rules, leaving only the first ground based on Wisconsin ethics rules.<sup>156</sup>

With regard to the first ground concerning the attorney’s representations that he was entitled to twenty-five percent (25%) of the proceeds of the client’s claims, the referee determined that the “predominant effect” of the attorney’s conduct “occurred in Wisconsin because it affected the Koivistos, who are Wisconsin residents.”<sup>157</sup> Therefore, Wisconsin law applied to this ground.<sup>158</sup> The Wisconsin Supreme Court did not expressly review this determination by the referee noting only that “[n]either party appears to dispute that the Wisconsin disciplinary rule was properly applied to this

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<sup>153</sup> 665 N.W.2d at 840. The former attorney also alleged tortious interference with a contract. *Id.*

<sup>154</sup> 665 N.W.2d at 842.

<sup>155</sup> 665 N.W.2d at 842.

<sup>156</sup> 665 N.W.2d at 842.

<sup>157</sup> 665 N.W.2d at 842.

<sup>158</sup> 665 N.W.2d at 842.

count.”<sup>159</sup> The referee’s analysis apparently would determine that the predominant effect of an attorney’s conduct occurs in the jurisdiction where the client resides. Another argument supporting the “predominant effect” occurring in Wisconsin, although not mentioned in the opinion, would be that a Wisconsin accident would have been at issue in any lawsuit filed on the client’s behalf. However, in determining where the “predominant effect” of an attorney’s conduct occurred, the courts in both *Marks* and *Summer* appear to have weighed heavily where the clients resided. This resulted in the courts applying the ethics law from the client’s jurisdiction to the attorney’s conduct, which incidentally also was the jurisdiction of the courts making the choice of law determination.

Two New York ethics opinions have addressed to some extent the “principally practices” and “predominant effect” language in New York Code of Professional Responsibility Disciplinary Rule (“DR”) 1-105(B)(2)(b), which is almost identical to the 1993 version of Model Rule 8.5(b)(2)(ii).<sup>160</sup> In the first opinion, an attorney’s law firm

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<sup>159</sup> 665 N.W.2d at 842. The Wisconsin Supreme Court, however, did hold explicitly that the referee erred in dismissing the second and third grounds alleging violations of the Michigan Rules of Professional Conduct due to the attorney filing the lawsuit in Michigan. 665 N.W.2d at 845. Applying Wisconsin’s choice of law rule, which is almost identical to the 1993 version of Model Rule 8.5(b), the court held that under subsection (b)(1) of that rule Michigan’s ethics rules applied to the attorney’s conduct in filing and proceeding with the Michigan action because it was “conduct in connection with a proceeding in a court before which a lawyer has been authorized to appear.” 665 N.W.2d at 846.

The court also found that under Wisconsin’s version of Model Rule 8.5(a), Wisconsin had disciplinary jurisdiction such that the Wisconsin’s Office of Lawyer Regulation could proceed with a complaint against an attorney licensed to practice in Wisconsin alleging violations of Michigan ethics rules in a proceeding in Michigan state court. 665 N.W.2d at 846.

<sup>160</sup> New York Code of Professional Responsibility Disciplinary Rule 1-105(B)(2) states that with regard to which jurisdiction’s ethics rules should be applied to attorney conduct not in connection with a proceeding in a court:

- a. If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
- b. If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in

had prepared immigration forms for a husband and wife and then submitted those forms to the Immigration and Naturalization Service (“INS”) office in New Jersey where the clients lived.<sup>161</sup> Included among the documents submitted was a form by which the firm entered its appearance as the couple’s “attorney of record.”<sup>162</sup> The husband and wife subsequently became involved in litigation, and the attorney sought information on how much of the wife’s file the law firm had to provide to the husband after he requested her complete file.<sup>163</sup>

In a footnote, the ethics committee of the New York City Bar Association dealt with what jurisdiction’s law applied to this issue.<sup>164</sup> The committee first noted that the attorney’s letterhead indicated that “the attorney’s firm maintained its practice of law in the State of New York.”<sup>165</sup> Moreover, the committee emphasized that “all services rendered by the firm in this engagement were performed in or from New York,” although it recognized that the firm submitted the clients’ INS documents to the New Jersey immigration office.<sup>166</sup> The committee concluded that the New York Code of Professional Responsibility governed the law firm’s “professional activities” because New York was the “state in which the firm maintains its practice and in which we assume the attorney and any others in the firm who worked on the engagement are admitted to practice.”<sup>167</sup>

The committee presumably could have left the analysis there using New York’s DR 1-

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which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

N.Y. Code of Prof’l Responsibility DR 5-101(B)(2) (2003) (effective June 30, 1999).

<sup>161</sup> N.Y. City Bar Ass’n Comm. on Prof’l and Judicial Ethics, Formal Op. 1999-07.

<sup>162</sup> *Id.*

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

<sup>164</sup> N.Y. City Bar Ass’n Comm. on Prof’l and Judicial Ethics, Formal Op. 1999-07 n.1.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

105(B)(2)(a), which is almost identical to the 1993 version of Model Rule 8.5(b)(2)(i), dealing with the choice of ethics law when an attorney is licensed in only one jurisdiction. Assuming that the attorneys that worked on the couple's INS forms were only licensed to practice in New York, this provision would call for the application of New York's ethics rules.<sup>168</sup>

However, possibly due to the lack of information on whether any of the attorneys concerned were also licensed to practice in New Jersey and the fact that the firm submitted the INS forms in New Jersey, the committee went on to address the language in DR 1-105(B)(2)(b), which is almost identical to the 1993 version of Model Rule 8.5(b)(2)(ii), dealing with the applicable jurisdiction's ethics rules to use when an attorney is licensed in two states. The committee stated that “[u]nder DR 1-105(B)(2), because the lawyer principally practices in New York, the New York rules would apply to his conduct in this instance.”<sup>169</sup> The committee, though, did not go on to address whether or not the attorneys' “conduct clearly [had] its predominant effect in another jurisdiction,”<sup>170</sup> in this situation New Jersey. Thus, the committee appears to have stopped its analysis halfway through the applicable choice of law provision.

Arguably the law firm's conduct clearly had its predominant effect in New Jersey where both clients lived and where the firm had filed INS documents on the clients' behalf and entered an official appearance as the clients' attorneys. Alternatively, although not mentioning the “predominant effect” language, the opinion could be interpreted as implicitly determining that the “predominant effect” of the attorneys'

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<sup>168</sup> See N.Y. Code of Prof'l Responsibility DR 5-101(B)(2)(a) (stating that “[i]f the lawyer is licensed to practice only in this state, the rule to be applied shall be the rules of this state”).

<sup>169</sup> *Id.*

<sup>170</sup> N.Y. Code of Prof'l Responsibility DR 5-101(B)(2)(b) (2003).

conduct was in New York where the firm was located and where the attorneys prepared the legal documents involved in the INS representation. This was also the jurisdiction where the client file concerned was located. Under this view, the clients' residence and the jurisdiction where the law firm submitted the documents would be of little consequence. While perhaps constituting a misreading of the "predominant effect" language in the choice of law rule, this interpretation is at least consistent with an application of the entire test set out in New York's DR 1-105(B)(2)(b).

In a second New York ethics opinion, an immigration law attorney licensed to practice in both New York and Illinois, but who practiced in Chicago, raised a conflict of interest issue concerning one former and one current client.<sup>171</sup> After quoting New York's DR 1-105(B)(2),<sup>172</sup> the ethics committee of the New York State Bar Association concluded that Illinois ethics rules applied to the attorney's conduct because "the jurisdiction in which the attorney principally practices [was] Illinois."<sup>173</sup> Perhaps more interestingly, the committee went on to state that even if the attorney had principally practiced in New York, the Illinois ethics rules would apply because the "particular conduct in the inquiry [had] its predominant effect in Illinois."<sup>174</sup> The opinion did not state explicitly what the specific "conduct in the inquiry" was, except for earlier noting that the attorney represented "individuals in immigration matters."<sup>175</sup> Assuming that the attorney's conduct at issue dealt with an immigration representation in Illinois, the opinion can be interpreted as concluding that the "predominant effect" of such a

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<sup>171</sup> N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 750 (2001).

<sup>172</sup> The committee also noted that New York's DR 1-105 is based on Model Rule 8.5. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 750 n.1.

<sup>173</sup> N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 750.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*



representation clearly would occur in Illinois, even if the attorney's office was in New York. This is a more accurate interpretation of this language than in the prior ethics opinion from the New York City Bar Association committee, and the opinion evidences a complete application of the test set out in DR 1-105(B)(2)(b), dealing with attorneys licensed in two states.<sup>176</sup>

As evidenced by the cases and ethics opinions dealing with the terms “predominant effect” in the 1993 version of Model Rule 8.5(b)(2)(ii), a more deliberate and explicit application by courts and ethics committees of the test presented both in the 1993 and current version of the model choice of ethics law rule is necessary to bring more predictability to this area. However, the available authority illustrates some significant factors in determining where the “predominant effect” of an attorney's conduct occurs. While the courts in *Summers* and *Marks* ultimately acquiesced to the wishes of the parties and applied the law of the jurisdiction where the court sat,<sup>177</sup> in both cases, this was the jurisdiction where the clients apparently lived and where the underlying accident occurred that was the reason for the attorney's representation.<sup>178</sup> So, the client's residence and the location of underlying events causing the need for legal representation undoubtedly are important factors to consider in the “predominant effect” determination. Additionally, the opinion of the New York State Bar Association ethics

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<sup>176</sup> Two other recent New York ethics opinions note the possible existence of a choice of ethics law issue with regard to a particular attorney's conduct without specifically resolving the issue. See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 768 (2003) (noting that “in the context of a federal government agency in which a lawyer may be rendering services beyond or outside the boundaries of this State, then the choice of law provisions of DR 1-105 may apply” but assuming “[f]or the purposes of this opinion” that “the New York Code of Professional Responsibility governs the conduct in question”); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 742 (2001) (noting with regard to attorney licensed to practice in New York but employed overseas that “[w]hether the rules of professional conduct that would be applied are those of New York or some other jurisdiction depends on whether the lawyer is also admitted in another jurisdiction and, if so, the place where the lawyer ‘principally practices’ or where the lawyer's conduct has its ‘predominant effect’” and then applying New York ethics law to the attorney's conduct without analysis).

<sup>177</sup> *In re Summers*, 105 P.3d at 851-52; *In re Marks*, 665 N.W.2d at 842.

<sup>178</sup> *In re Summers*, 105 P.3d at 850; *In re Marks*, 665 N.W.2d at 838.

committee apparently placed importance on the location of the court or agency office before which the attorney represented the client.<sup>179</sup> So, this also is a potentially significant factor.<sup>180</sup>

Nevertheless, the ethics opinion from the New York City Bar ethics committee would give an attorney grounds for arguing that where the attorney conducted the actual legal work, in other words physically drafted documents and conducted research concerned in the representation, is a factor in the “predominant effect” analysis.<sup>181</sup> Furthermore, the *Summers* case also considered the location of an opposing party and where an opposing party’s claims adjuster collected information regarding the accident underlying the potential litigation.<sup>182</sup>

The New York City ethics committee’s interpretation of the “predominant” effect language, as well as the additional factors considered in *Summer*, are potentially problematic especially considering the safe harbor language included in the 2002 version of Model Rule 8.5(b). The safe harbor language states that an attorney will not be subject to discipline if his or her conduct “conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”<sup>183</sup> Given the current sparseness of authority on where the “predominant effect” of an attorney’s conduct occurs, the opinion of the New York City ethics committee and *Summers* provide an attorney with grounds to argue that he or she reasonably believed

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<sup>179</sup> N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 750 (stating that even if an immigration law attorney had principally practiced in New York the “particular conduct in the inquiry [had] its predominant effect in Illinois); *supra* notes 174–176 and accompanying text (analyzing this part of the ethics opinion).

<sup>180</sup> Obviously, this factor would be less helpful, if not completely irrelevant, if a transactional representation was involved.

<sup>181</sup> See *supra* notes 166, 169–170 and accompanying text (discussing the implications of the conclusion by the New York City Bar’s ethics committee that New York ethics law applied to a New York City law firm’s representation of a New Jersey couple in an immigration matter).

<sup>182</sup> 105 P.3d at 851.

<sup>183</sup> Model Rules of Prof’l Conduct R. 8.5(b)(2) (2002).

that the “predominant effect” of any representation involving multiple jurisdictions occurred in his or her home jurisdiction where the attorney’s office is physically located and where he or she actually drafted documents, conducted research or investigated the legal matter concerned. This argument might especially be persuasive when an electronic representation is involved and the attorney never leaves his or her office in representing the client, despite the fact that the client that feels the consequences of the representation is located in a different jurisdiction and that where the attorney drafted documents or conducted legal research has little to no relevance to where the effect of the representation is felt. As explained below, this outcome likely invalidates the current version of Model Rule 8.5(b)(2) under dormant commerce clause principles when applied to attorney Internet representations.<sup>184</sup>

## V. THE DORMANT ASPECT OF THE COMMERCE CLAUSE

The dormant commerce clause is an implicit facet of the Commerce Clause in the United States Constitution.<sup>185</sup> Because the Commerce Clause gives the United States Congress the power to regulate commerce among the states,<sup>186</sup> state governments, under the dormant aspect of the Commerce Clause, cannot inhibit or frustrate trade between states through legislation, even in the absence of Congressional legislation.<sup>187</sup>

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<sup>184</sup> See *infra* Section VII. C.

<sup>185</sup> Loudenslager, *supra* note 7, at 193.

<sup>186</sup> U.S. Const. art. I, § 8 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.”).

<sup>187</sup> Loudenslager, *supra* note 7, at 193, 208. The Commerce Clause arose from the recognized need for the national government to have the ability to promote trade between the states after the nation’s experience with the Articles of Confederation when states erected internal trade barriers through taxes and duties. See *Granholt v. Head*, 125 S. Ct. 1885, 1895 (2005) (stating that the dormant commerce clause “reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles

This power to promote trade between the states, however, is balanced against the federalist system of government created in the Constitution where states and their citizens retained powers not expressly given to the federal government.<sup>188</sup> For example, states possess “police powers” allowing them to “regulate activities affecting the health, safety, security and general welfare of their residents.”<sup>189</sup> Assuming a state is not attempting to further an improper purpose,<sup>190</sup> the basic question in a dormant commerce clause analysis is whether state legislation inhibits interstate commerce to such an extent that the state’s interest should give way to the national interest in promoting trade between the states.<sup>191</sup>

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of Confederation.”) (alteration original)(quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)); *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (“Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills.”); *Loudenslager*, *supra* note 7, at 208 (“The Commerce Clause was written in order to avoid the ‘Balkanization’ of the United States economy that resulted after the institution of Articles of Confederation.”).

<sup>188</sup> See U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited to it to the States, are reserved to the States respectively, or to the people.”).

<sup>189</sup> *Loudenslager*, *supra* note 7, at 209. See also *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“As long as a State does not needlessly obstruct interstate trade or attempt to ‘place itself in a position of economic isolation,’ it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.”) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-32 (1949) (recognizing “the broad power in the State to protect its inhabitants against the perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce”); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Propose Unitary Framework*, 21 Harv. J.L. & Pub. Pol’y 395, 418 n.102 (1998) (“The Court has long recognized the idea that states have an inherent ‘police power’ that allows them to regulate for the health, safety, and welfare of its citizens.”).

<sup>190</sup> Courts have recognized the intent to discriminate against interstate commerce as an improper purpose of state legislation under the dormant commerce clause. See *Granholm v. Head*, 125 S. Ct. 1885, 1895 (2005) (“States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.”); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.”); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (“Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor its residents.”). If a court can infer that the state had such an intent in enacting legislation, this constitutes a “per se” violation of the dormant commerce clause. Lawrence, *supra* note 189, at 426; *Loudenslager*, *supra* note 7, at 214.

<sup>191</sup> Lea Brilmayer, *Conflict of Laws* 145 (2d ed. 1995) (“[T]he commerce clause has caused courts to balance the forum’s concededly legitimate interest against the needs of the interstate commercial system” and “compares an existing local interest to the interests of other states.”); Lawrence, *supra* note 189, at 410 (“[T]he resolution of a particular case today will turn in large part on a consideration of the local (state) interests in regulating local affairs as it relates to the national interest in promoting interstate commerce.”).

Therefore, the United States Supreme Court under its modern dormant commerce clause test balances the benefits of the state regulation against the burden that such regulation places on interstate commerce.<sup>192</sup> The test from *Pike v. Bruce Church, Inc.* states that even-handed or non-discriminatory regulations that promote “a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>193</sup> Additionally, the Court has invalidated “state regulations that have the effect, intended or not, of regulating commerce that occurs ‘wholly outside of the State’s borders’ as *per se* violations of the Commerce Clause.”<sup>194</sup> Finally, at times when analyzing state statutes under dormant commerce clause principles, the Supreme Court has examined whether the statute “adversely affects interstate commerce by subjecting activities to inconsistent regulations.”<sup>195</sup> However, a close reading of the cases dealing with state regulation of the nation’s highway and railroad systems, the major context in which the Court has examined this concern, indicates that the Court still has used a *Pike* balancing analysis in these situations.<sup>196</sup>

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Brilmayer states that the Constitution’s “prohibition on overreaching essentially compels a state not to treat [a] person, business, or dispute as local when the state would prefer to do just that.” Lea Brilmayer, *supra*, at 134. The Constitution prohibits such state overreaching because “a state may find it is in its interest to apply its law, or employ its judicial authority, in situations where it has no legitimate concern.” *Id.*

<sup>192</sup> Loudenslager, *supra* note 7, at 213-214 (explaining the Supreme Court’s modern dormant commerce clause test). “[T]he intrusive conduct that [the dormant commerce clause] prohibits is conduct that is too costly in its impact on out-of-state activity considering the limited domestic benefits it seeks to achieve.” Brilmayer, *supra* note 191, at 137.

<sup>193</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). “The commerce clause is violated when the state has a legitimate reason for regulating, but in doing so it imposes severe burdens on conduct in other states.” Brilmayer, *supra* note 191, at 136.

<sup>194</sup> Loudenslager, *supra* note 7, at 215 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion)). For a more extensive discussion of Supreme Court cases using this test, see generally Loudenslager, *supra* note 7, at 215-19.

<sup>195</sup> *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987).

<sup>196</sup> Loudenslager, *supra* note 7, at 219-20. See, e.g., *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 441 (1978) (“Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.”); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 770-71 (1945) (“[T]he matters for

Several commentators have recognized the relevance of the dormant commerce clause principles to conflicts of law analysis.<sup>197</sup> Both conflicts of law and dormant commerce clause principles compare competing state interests and analyze when the application of a jurisdiction's substantive law is appropriate,<sup>198</sup> and both ultimately are concerned with how the various sovereign states in the American federalist structure of government relate to one another, especially with regard to facilitating commerce between states.<sup>199</sup> Thus, it is natural to examine the limits that the dormant Commerce Clause puts on the choice of law decisions of states.

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ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce and . . . the relative weights of the state and national interests involved.”). For an extensive discussion of the Supreme Court's “transportation cases,” see Loudenslager, *supra* note 7, at 219-226.

<sup>197</sup> See Brilmayer, *supra* note 191, at 136-37, 144-48, 158-59 (discussing the limitations that the Commerce Clause puts on the application of state substantive law to interstate activity); Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. Ill. L. Rev. 683, 690, 713-715 (discussing dormant commerce clause cases “bearing on extraterritorial applications of forum law when the forum may have only a ‘fractional interest’ in applying its law”); P. John Kozyris, *Some Observations on State Regulation of Multistate Takeovers—Controlling Choice of Law Through the Commerce Clause*, 14 Del. J. Corp. L. 499, 505 (1989) (discussing under dormant commerce clause principles “the extent to which states other than the state of incorporation may apply their laws to the transfer of control of multistate corporations which have some local contacts” and “the scope of state authority to regulate multistate transactions in securities”); Harold W. Horowitz, Comment, *The Commerce Clause as Limitation on State Choice-of-Law Doctrine*, 84 Harv. L. Rev. 806, 824 (1971) (discussing how the “[r]ecognition of the commerce clause as a limitation on state choice-of-law doctrine” serves “the federal interest in promoting uniform and unburdensome patterns of regulation”).

<sup>198</sup> See Brilmayer, *supra* note 191, at 147 (stating that the dormant commerce clause analysis identifies the forum's interests and “explicitly considers the interest of the other states as well and forms a comparative judgment” in determining “how much of the statute's effect is legitimate and how much of it cannot be justified by a legitimate forum interest.”).

<sup>199</sup> See Restatement (Second) of Conflicts of Law § 6 cmt. e (1971) (“Probably the most important function of choice of law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them.”).

Professor Brilmayer states that “perhaps the most obvious benefits” of states joining with other states in a federal government “are the increased commercial prospects integration offers.” Brilmayer, *supra* note 191, at 131. “One purpose of federalism was to establish a ‘common market’ nationwide, in which the products in one state would not be discriminated against in others.” *Id.* “When one thinks of protection from discrimination against the business interests of other states, the constitutional provision that immediately comes to mind is the commerce clause.” *Id.* at 132. See also *supra* note 187, and authorities cited therein (discussing the purpose of the Commerce Clause to promote trade between states and prevent states from erecting internal trade barriers). “Whether the subject is people, business, or legal decisions, it is clear that one of the primary themes in constitutional law of interstate relations is achieving the benefits of mutual cooperation on the basis of state lines.” Brilmayer, *supra* note 191, at 132.

However, while the various conflicts of law regimes seek to decide which single jurisdiction's law is most appropriate to apply to the activities of a particular actor, dormant commerce clause principles seek to determine only whether the application of a state's law fails to meet the minimum thresholds required under the Constitution.<sup>200</sup> Therefore, under the dormant commerce clause, at least in theory, it is possible that the application of several states' laws may be appropriate.<sup>201</sup> The dormant commerce clause analysis then would allow a conflicts of law regime to determine which particular jurisdiction's law, out of those that pass Constitutional muster, most appropriately should control the rights of parties in specific circumstances.

## VI. APPLICATION OF THE DORMANT COMMERCE CLAUSE TO STATE REGULATION OF THE INTERNET

### A. Case Law Applying Dormant Commerce Clause to State Regulation of Internet Activity

Cases analyzing state regulation of Internet activity under the dormant commerce clause mainly have dealt with two different types of state statutes. The first type of statute criminalizes knowingly posting material on the Internet that would be "harmful to minors."<sup>202</sup> These statutes often can be construed to hold the operator of a Web site

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<sup>200</sup> See Brilmayer, *supra* note 191, at 164 (stating that one of the manners in which constitutional determinations are different from traditional conflicts state choice of law determinations is that constitutional determinations "impose a minimal threshold rather than singling out one state's law as the best."); Horowitz, *supra* note 197, at 824 (describing "the commerce clause as a limitation on state choice-of-law doctrine"). The federal constitutional standard "is a minimal rather than an ideal test." Brilmayer, *supra* note 191, at 165.

<sup>201</sup> See Brilmayer, *supra* note 191, at 165 ("[C]urrent constitutional doctrine asks only whether a state might reasonably find that it has interest or that application of its law is fair. A state need not have a greater interest than other states, . . . It need only make a decision that falls within reasonable limits."). Thus, it is possible in any given circumstance that more than one state might reasonably have an interest in regulating an activity.

<sup>202</sup> See, e.g., *PSINet, Inc. v. Chapman*, 362 F.3d 227, 230 (4th Cir. 2004) (invalidating under the dormant commerce clause a Virginia statute making it unlawful to "knowingly display for commercial purposes in a manner whereby juveniles may examine or peruse" images or an "electronic file or message containing an image" or an "electronic file or message containing words or sound recording" depicting or describing

criminally liable simply for making such material available on a Web site whether or not the operator was aware of specific instances when minors accessed such material.<sup>203</sup>

Courts overwhelmingly have held that such statutes violate the dormant Commerce Clause.<sup>204</sup> The second type of statute criminalizes the use of the Internet to intentionally “lure,” “seduce” or “solicit” minors into engaging in sexual activity with an adult.<sup>205</sup>

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“sexually explicit nudity or sexual conduct” that “is harmful to juveniles”); *Am. Bookseller Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003) (holding unconstitutional under the dormant commerce clause Vermont statute prohibiting the use of the Internet to distribute to minors sexually explicit materials “harmful to minors”); *ACLU v. Johnson*, 194 F.3d 1149, 1152 (10th Cir. 1999) (holding that statute prohibiting dissemination of materials harmful to minors by computer was unconstitutional under the dormant commerce clause); *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 163 (S.D.N.Y. 1997) (invalidating under the dormant commerce clause a New York statute making it a felony to “intentionally [] use any computer communication system” to communicate to a minor material of a sexual nature “which is harmful to minors”) (alteration in original). One commentator has termed these laws “dissemination statutes.” Chin Pann, iBrief, *The Dormant Commerce Clause and State Regulation of the Internet: Are Laws Protecting Minors from Sexual Predators Constitutionally Different Than Those Protecting Minors from Sexually Explicit Materials?*, 2005 Duke L. & Tech. Rev. 8, ¶ 1, <http://www.law.duke.edu/journals/dltr/articles/PDF/2005DLTR0008.pdf>.

In defining “harmful to minors,” these statutes often rely on the United States Supreme Court’s First Amendment obscenity test and require that the material: (1) predominantly appeals to the prurient interest of minors, (2) be patently offensive to the prevailing standards of the adult community, and (3) lack serious artistic, political and scientific value. See, e.g., *PSINet, Inc.*, 362 F.3d at 231 (describing Virginia statute’s definition of “harmful to juveniles”); *Am. Booksellers Found.*, 342 F.3d at 100 n.1 (setting out Vermont statute “[h]armful to minors” definition); *Am. Libraries Ass’n*, 969 F. Supp. at 163 (describing New York statute’s definition of “harmful to minors”).

<sup>203</sup> See *PSINet, Inc.*, 362 F.3d at 235 (explaining that publishers on the Web generally make their material “publicly available to users around the world, regardless of age, and lack any practical or reliable means for preventing minors from gaining access to the information on their sites or for verifying the true age of users of their Web sites”) (quoting district court opinion); *Am. Booksellers Found.*, 342 F.3d at 100 (stating that the terms of the Vermont statute at issue “can be easily read to apply to material placed on a website or shared with an e-mail or internet discussion group”); *Am. Libraries Ass’n*, 969 F. Supp. at 168 (stating that under the New York statute at issue a web site operator might be subject to “regulation by states that the actor never intended to reach and possibly was unaware were being accessed” and was not limited to “person-to-person” communications). See also Loudenslager, *supra* note 7, at 254 (explaining that by interpreting broadly the New York statute at issue in *Am. Libraries Ass’n*, it “could reach a person or entity that simply intended to post or communicate the material considered ‘harmful to minors’ and did not intend for such material to reach a minor”).

<sup>204</sup> See *infra* notes 209–217 and accompanying text (explaining main grounds courts have used to invalidate statutes criminalizing posting of material harmful to minors on the Internet).

<sup>205</sup> See, e.g., *Hatch v. Super. Ct.*, 94 Cal. Rptr. 2d 453, 464 (Cal. Ct. App. 2000) (examining California statute making it a felony for a person to use the Internet to distribute “any harmful matter to a minor” knowing that a minor is receiving the matter with the intent of arousing or appealing to the “passions or sexual desires of that person or of a minor” and with the purpose or intent of seducing a minor); *Cashatt v. State*, 873 So. 2d 430, 433 (Fla. Dist. Ct. App. 2004) (analyzing Florida statute making it a felony for a person to “knowingly” use the Internet “to seduce, solicit, lure, or entice,” or to attempt any of these with, “a child or another person believed by the person to be a child, to commit any act . . . relating to sexual battery; . . . lewdness and indecent exposure;” or “child abuse”); *People v. Foley*, 731 N.E.2d 123, 127 (N.Y. 2000) (scrutinizing New York statute prohibiting “disseminating indecent material to minors” in



These cases often involve an adult initially communicating with a police officer posing as a minor in an Internet chat room or bulletin board and engaging in sexually explicit discussions with the supposed minor.<sup>206</sup> Often the adult attempts to meet the intended minor victim in person for the purpose of engaging in sexual activity.<sup>207</sup> Courts

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order “to importune[], invite[] or induce[] a minor to engage in” sexual activity); *State v. Snyder*, 2003-Ohio-6399, ¶ 7, 801 N.E.2d 876, 880-81 (Ohio Ct. App.) (examining Ohio statute prohibiting use of the Internet to “solicit” another person “to engage in sexual activity” when the solicitor is an adult and “believes that the other person is thirteen years of age or older but less than sixteen years of age”).

Although not nearly as prevalent as the two contexts mentioned in the text, a few courts have also dealt with whether state regulation of e-mail violates the dormant commerce clause. *See Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr. 2d 258, 260, 264-69 (Cal. Ct. App. 2002) (holding that a California statute regulating “conduct by persons or entities doing business in California who transmit unsolicited advertising materials” through electronic mail and fax machines was valid under the dormant commerce clause); *MaryCLE, LLC v. First Choice Internet, Inc.*, Cv. No. 248514, 2004 WL 3141311, at \*6 (Md. Cir. Ct. Dec. 3, 2004) (holding Maryland statute regulating electronic mail was invalid under the dormant commerce clause because it did not “provide the email must be received in Maryland, instead the statute pertains to situations where an email sender in one states [sic] sends an email to a Maryland resident living or working in another state” and therefore the statute sought “to regulate the transmission of commercial email between persons in states outside of Maryland, even when the email never enters Maryland”); *State v. Heckel*, 24 P.3d 404, 407, 409-13 (Wash. 2001) (upholding under the dormant commerce clause a Washington statute that prohibited “sending a commercial e-mail message from a computer located in Washington or to an e-mail address held by a Washington resident” that misrepresented or disguised “the message’s point of origin or transmission path or [used] a misleading subject line”). Another court also has held that the application of a state’s motor vehicle code to a car manufacturer’s use of a Web site to sell cars in that state did not violate the dormant commerce clause. *Ford Motor Co. v. Texas Dep’t of Transp.*, 264 F.3d 493, 505 (5th Cir. 2001).

<sup>206</sup> *See, e.g., Hatch*, 94 Cal. Rptr. 2d at 460-61 (setting out the Internet communications between the defendant and a woman posing as two different thirteen year-old girls); *Cashatt*, 873 So. 2d at 433 (providing details concerning defendant’s Internet communications with a police officer posing as a fourteen year-old boy “by means of a ‘bulletin board’ posting and ensuing e-mail messages”); *State v. Backlund*, 2003 ND 184, ¶ 2, 672 N.W.2d 431, 433 (describing Internet chat room communications between defendant and a police officer posing as a fourteen year-old girl); *State v. Bolden*, 2004-Ohio-2315, ¶¶ 5-6, 2004 WL 1043317 at \*1 (Ohio Ct. App.) (summarizing communications between defendant and a police officer posing as a fifteen year-old girl in an Internet chat room).

One commentator has described the crimes that these statutes proscribe as “‘Internet luring’ or ‘enticement.’” Julie Sorenson Stanger, Comment, *Salvaging States’ Rights to Protect Children from Internet Predation: State Power to Regulate Internet Activity Under the Dormant Commerce Clause*, 2005 B.Y.U. L. Rev. 191, 192. *See also* Pann, *supra* note 202, at ¶ 1 (describing such laws as “luring statutes”). “Such a crime is patterned after the traditional crimes of solicitation and attempt but specifically addresses the sexual solicitation of a minor over the Internet.” Stanger, *supra*, at 192.

<sup>207</sup> *See, e.g., Hatch*, 94 Cal. Rptr. 2d at 462 (defendant met with woman posing as thirteen year-old at a hotel pool); *Cashatt*, 873 So. 2d at 433 (defendant arranged to meet with supposed boy and “showed up at the meeting place at the time agreed upon”); *Backlund*, 2003 ND 184, ¶ 2, 672 N.W.2d at 433 (defendant arranged to meet with police officer posing as a fourteen year-old girl at a convenience store where the defendant ultimately was arrested); *Snyder*, 2003-Ohio-6399, ¶ 4, 801 N.E.2d at 880 (defendant and police officer posing as a fourteen year-old girl arranged to meet at a restaurant where defendant was arrested).

overwhelming have held that these statutes do not violate the dormant Commerce Clause.<sup>208</sup>

In dealing with the first category of statutes that hold Web site operators liable for making harmful material available to minors on the Internet, courts have used three main grounds to invalidate such statutes under the Commerce Clause. First, courts have asserted that such statutes project a state's legislative regime outside of the state by affecting operators of Web sites who are physically located outside of the state and who may or may not have people from within the state visit their Web site.<sup>209</sup> Therefore, the legislation affects commerce that occurs outside of the state or, in other words, operates extraterritorially. The site operator must comply with another state's statute to avoid criminal prosecution despite being physically located in a different state whether or not residents of the other state actually visit the site.<sup>210</sup> Second, using the *Pike* balancing test,

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<sup>208</sup> See *infra* notes 222–231 and accompanying text (explaining analysis of courts holding that statutes preventing use of Internet to seduce or lure minors into engaging in sexual activity do not violate the dormant Commerce Clause).

Some commentators have noted that the opinions invalidating statutes criminalizing the posting of material harmful to minors on the Internet largely have come from federal courts while the cases holding constitutional the statutes prohibiting the use of the Internet to lure minors into sexual activity with an adult are from state courts. Pann, *supra* note 202, at ¶¶ 2-3 (explaining that this likely has occurred because “a multitude of interested parties seeking to protect their speech” initiated the cases dealing with “dissemination statutes” in federal court as “preemptive requests for injunctions” while state authorities brought the criminal charges against the defendants who challenged the “luring statutes”); Stanger, *supra* note 206, at 203, 211 (noting that “[a]lthough federal courts have not yet reviewed the validity of state Internet luring statutes, they have struck down other statutes intended to protect minors from sexually explicit and harmful Internet materials” while “state courts have consistently . . . upheld state police power to regulate Internet activity harmful to minors”).

<sup>209</sup> *PSINet, Inc.*, 362 F.3d at 240 (“Given the broad reach of the Internet, it is difficult to see how a blanket regulation of Internet material, such as [the Virginia statute at issue], can be construed to have only a local effect.”); *Am. Booksellers Found.*, 342 F.3d at 104 (“In practical effect, Vermont [through the statute at issue] ‘has ‘projected its legislation’ into other States, and *directly regulated* commerce therein,’ in violation of the dormant Commerce Clause.”) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986)); *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (finding that the New Mexico statute at issue “represents an attempt to regulate interstate conduct occurring outside New Mexico’s border, and is accordingly a per se violation of the Commerce Clause”); *Am. Libraries Ass’n*, 969 F. Supp. at 177 (“New York has deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net.”) (citations omitted).

<sup>210</sup> See *Am. Libraries Ass’n*, 969 F. Supp. at 177 (“The nature of the Internet makes it impossible to restrict the effects of the New York act to conduct occurring within New York . . . [C]onduct that may be legal in

courts have found that the burden placed on interstate commerce by such legislation outweighs its putative benefits.<sup>211</sup> These cases, although recognizing that states have a legitimate interest in protecting minors from harm,<sup>212</sup> have minimized the benefits of such a statute due to jurisdictional restraints that prevent a state from prosecuting operators of Web sites who physically are located outside of the state.<sup>213</sup>

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the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user's home state's policy . . . to New York's local concerns." The Second Circuit described the effect of such legislation in the following manner:

A person outside Vermont who posts information on a website or on an electronic discussion group cannot prevent people in Vermont from accessing the material. If someone in Connecticut posts material for the intended benefit of other people in Connecticut, that person must assume that someone from Vermont may also view the material. This means that those outside Vermont must comply with [the Vermont statute] or risk prosecution by Vermont. Vermont has "project[ed]" [its statute] onto the rest of the nation.

*Am. Booksellers Found.*, 342 F.3d at 103.

<sup>211</sup> *PSINet, Inc.*, 362 F.3d at 240 (holding that the Virginia statute at issue "fails under the Dormant Commerce Clause analysis of *Pike v. Bruce Church*"); *ACLU*, 194 F.3d at 1161 ("[U]nder the balancing test of *Pike v. Bruce Church, Inc.*, the burdens on interstate commerce imposed by [the New Mexico statute at issue] exceed any local benefits conferred by the statute."); *Am. Libraries Ass'n*, 969 F. Supp. at 181 ("The severe burden on interstate commerce resulting from the New York statute is not justifiable in light of the attenuated local benefits arising from it.").

<sup>212</sup> *PSINet, Inc.*, 362 F.3d at 240 ("There is no question that Virginia has a compelling interest in protecting the physical and psychological well-being of minors."); *ACLU*, 194 F.3d at 1161 ("We agree that the protection of minors from [harmful] materials is an undeniably compelling governmental interest."); *Am. Libraries Ass'n*, 969 F. Supp. at 177 ("[T]he protection of children against pedophilia is a quintessentially legitimate state objective.").

<sup>213</sup> *PSINet, Inc.*, 362 F.3d at 240 (noting that if the Virginia statute only reached intrastate communication, "it will have no local benefit given the vast number of other communication options available to a juvenile seeking them"); *ACLU*, 194 F.3d at 1162 (noting the "practical difficulties" of New Mexico prosecuting parties for violating the statute concerned "but whose only contact with [New Mexico] occurs via the Internet") (alteration original) (quoting *Am. Libraries Ass'n*, 969 F. Supp. at 178); *Cyberspace Comm'ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999) ("[T]he [Michigan] Act will be wholly ineffective in achieving the asserted goal because nearly half of all Internet communications originate overseas."); *aff'd*, 238 F.3d 420 (6th Cir. 2000); *Am. Libraries Ass'n*, 969 F. Supp. at 178 ("The local benefits likely to result from the New York Act are not overwhelming. The Act can have no effect on communications originating outside of the United States. . . . Further, in the present case, New York's prosecution of parties from out of state who have allegedly violated the Act, but whose only contact with New York occurs via the Internet, is beset with practical difficulties, even if New York is able to exercise criminal jurisdiction over such parties.").

Third, some courts have gone beyond analysis of the particular statute at hand and asserted more broadly that only the federal government may regulate the Internet under dormant commerce clause principles.<sup>214</sup> Courts generally have made this argument in the following manner. The interstate nature of the Internet necessitates consistent treatment of Internet activity,<sup>215</sup> and thus, to avoid inconsistent state regulatory regimes from “[paralyzing] the development of the Internet altogether” only federal Internet regulation is appropriate.<sup>216</sup> Because Web site operators cannot cut off access to their sites from particular states, allowing states to regulate the Internet would require a Web site operator to comply with the most stringent state regulation that existed, which would inevitably stunt the growth of some types of commercial activity on the Internet.<sup>217</sup>

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<sup>214</sup> *Am. Booksellers Found.*, 342 F.3d at 104 (“We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they ‘imperatively demand[] a single uniform rule.’”) (alteration in original) (quoting *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851)); *ACLU*, 194 F.3d at 1162 (“[C]ertain types of commerce have been recognized as requiring national regulation. The Internet is surely such a medium.”) (citations omitted); *Am. Libraries Ass’n*, 969 F. Supp. at 181 (“The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global cooperation.”).

Some courts have described this effectively as a preemption argument. *Hatch v. Sup. Ct.*, 94 Cal. Rptr. 2d 453, 471 (Cal. Ct. App. 2000) (“*Pataki’s* [argument] . . . is sort of a preemption argument: that logging on the Internet automatically places one beyond the reach of state criminal prosecution.”); *People v. Hsu*, 99 Cal. Rptr. 2d 184, 191 (Cal. Ct. App. 2000) (describing this analysis as “essentially a preemption analysis”).

<sup>215</sup> *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997) (stating that the Internet “requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations”). See also *Am. Booksellers Found.*, 342 F.3d at 103 (“Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without ‘project[ing] its legislation in to other States.’”) (alteration in original) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 334 (1989)).

<sup>216</sup> *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997). See also *Cyberspace Commc’ns, Inc.*, 55 F. Supp. 2d at 752 (“The [Michigan] Act, and other statutes like it, would subject the Internet to inconsistent regulations across the nation. Information is a commodity and must flow freely.”).

<sup>217</sup> *Am. Libraries Ass’n*, 969 F. Supp. at 183. See also *Am. Booksellers Found.*, 342 F.3d at 103 (“Although Vermont aims to protect only Vermont minors, the rest of the nation is forced to comply with its regulation or risk prosecution.”); *Cyberspace Commc’ns, Inc.*, 55 F. Supp.2d at 751 (“A New York speaker must comply with the Act in order to avoid the risk of prosecution in Michigan even though (s)he does not intend his [or her] message to be read in Michigan.”). This part of the third ground for invalidating statutes criminalizing the mere posting of material on the Internet appears to “double dip” because it uses the supposed extraterritorial reach of state regulation to argue for national regulation of the Internet. Therefore, this actually is not a separate ground, as stated by these courts, but just a continuation of the argument for the first ground.

However, the cases that have made this sweeping argument ignore that the Supreme Court has still used the *Pike* balancing test in the major context in which the Court has mentioned the consistency of state regulation as a concern, the cases dealing with regulation of the United States' highway and railway systems.<sup>218</sup> Therefore, in the instances when the Court ultimately determined that state regulations of highway and railways were unconstitutional, this resulted from the burden created by compliance with the different regulations of several states outweighing the benefit derived by the states concerned from regulating the activity at issue.<sup>219</sup> Cases setting out this argument also ignore that on Web sites that are more interactive, the site operator will have opportunities to learn the physical location of the site user.<sup>220</sup>

Courts have held that the second category of statutes prohibiting adults from using the Internet to lure, seduce or solicit minors into engaging in sexual activity do not operate extraterritorially or overburden commerce.<sup>221</sup> First, these courts have reasoned that these "luring" statutes regulate conduct that, at least partially, occurs within the prosecuting state.<sup>222</sup> Generally, a defendant must commit at least part of a crime in a state in order to be subject to a state's criminal jurisdiction.<sup>223</sup> In determining whether a

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<sup>218</sup> See *supra* note 196 and accompanying text (discussing the ultimate test applied by the Supreme in the "transportation cases"). See also Loudenslager, *supra* note 7, at 250 (refuting the argument asserting the necessity of consistent Internet regulation as a grounds for invalidating state Internet regulations under the dormant commerce clause).

<sup>219</sup> See *id.* ("[T]he Court has tended to invalidate a state's regulation of railways and highways when the regulation is widely out of step with most other states' regulation of the subject matter, thus greatly raising the cost of compliance with the regulation.")

<sup>220</sup> See *infra* notes 238–240 and accompanying text (explaining how the interactivity of a Web site affects the potential burden of complying with different state regulations).

<sup>221</sup> See *infra* notes 222–231 and accompanying text (explaining reasoning of courts faced with "luring" Internet statutes for holding that such statutes do not violate the dormant Commerce Clause).

<sup>222</sup> See *infra* notes 223–227 and accompanying text (explaining courts' reasoning that defendants having acted within the jurisdiction through Internet communications with residents).

<sup>223</sup> See *People v. Hayne*, No. F036401, 2002 WL 470853, at \*9 (Cal. Ct. App. Mar. 27, 2002) (finding that the California "seducing" statute at issue "in the context of the [California] Penal Code as a whole, only penalizes acts that occur within the state"); *Hatch v. Super. Ct.*, 94 Cal. Rptr. 2d 453, 472 (Cal. Ct. App.

state has criminal jurisdiction over a defendant who communicated electronically with a state resident while physically located outside of the prosecuting state, several courts recently have held that the criminal conduct is not complete until “the offending words are heard by another person” or received electronically inside the state of prosecution.<sup>224</sup> Thus, the defendant acts, at least partially, in the prosecuting state when he or she intentionally transmits electronic communications to a minor located into the prosecuting state.<sup>225</sup> Additionally, in many of these cases, the adult, in order to achieve his or her ultimate objective, needs to obtain information about the minor’s geographic location and often travels to the prosecuting state in order to meet the minor face-to-face.<sup>226</sup>

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2000) (stating that “the assumption that extraterritorial enforcement of state criminal statutes is normative is incorrect” and that in order to be subject to California’s criminal jurisdiction a person must have committed part of the crime within California); *State v. Cunningham*, 2004-Ohio-1935, ¶ 51, 808 N.E.2d 488, 494 (Ohio Ct. App.) (“Ohio has jurisdiction to prosecute crimes that are partially committed in the state also where the object of the crime is located in Ohio.”).

<sup>224</sup> *People v. Ruppenthal*, 771 N.E.2d 1002, 1008 (Ill. Ct. App. 2002). *See also* *State v. Backlund*, 2003 ND 184, ¶¶ 9-10, 672 N.W.2d 431, 435-36 (quoting *Ruppenthal* and holding that “a person who, while outside of this state, solicits criminal action within this state and is thereafter found in this state” is subject to criminal jurisdiction); *Commonwealth v. John*, 2004 WL 1557622, at \*4 (Pa. Super. Ct. July 12, 2004) (holding that a defendant who sent e-mail communications from Maryland and Delaware to a Pennsylvania police officer posing as a thirteen year-old girl made solicitations in Pennsylvania “where they were received”).

Courts have treated telephone communications in a similar manner. *See* *United States v. Pezzino*, 535 F.2d 483, 484 (9th Cir. 1976) (holding that federal statute prohibiting the “transmission” of bets or wagers on sporting events over interstate communication facilities included both the “use of interstate facilities for sending or receiving wagering information.”); *United States v. Synodinos*, 218 F. Supp. 479, 481 (D. Utah 1963) (holding that Utah was a proper venue for a prosecution for “transmission” of bets or wagers on sporting events over interstate facilities because “the District of Utah [was] where the use of the interstate wire facilities had its ultimate impact, i.e., it was here that the messages . . . were actually received”); *State v. Meyers*, 825 P.2d 1062, 1064-65 (Haw. 1992) (upholding conviction in Hawaii for terrorist-like-threats made by defendant located in California through a telephone call to a probation officer in Hawaii).

<sup>225</sup> *See* *Cunningham*, 2004-Ohio-1935, ¶ 57, 808 N.E.2d at 495 (finding Ohio’s criminal jurisdiction appropriate because, among other things, the defendant’s “intended victim was located in Ohio” and “the recipient of the Defendant’s Internet communications was located in Ohio, and the Defendant was given notice of this during the communications.”); *John*, 2004 WL 1557622, at \*4 (“Certainly, a person who receives a criminal solicitation while sitting at her computer terminal in Pennsylvania is being solicited within this Commonwealth.”)

<sup>226</sup> *See supra* note 207 (providing examples of cases where the defendant attempted to meet the intended victim in person).

Therefore, courts have held that these “luring” statutes prosecute activity that occurs within that jurisdiction and do not operate extraterritorially.<sup>227</sup>

Second, courts have found that the burden placed on interstate commerce by such statutes is very slight. This is largely because these statutes do not regulate legitimate commerce.<sup>228</sup> Moreover, the intent requirements of these statutes greatly reduce the number of electronic communications affected by the regulations.<sup>229</sup> In order to be criminally liable, a defendant must intentionally send material to a known minor with the intent to seduce or lure the minor into engaging in sexual activity.<sup>230</sup> Thus, courts have

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<sup>227</sup> *People v. Hsu*, 99 Cal. Rptr. 2d 184, 191 (Cal. Ct. App. 2000) (“When [the California statute at issue] is harmonized with the entire California penal scheme, it does not effectively regulate activities beyond California.”); *Hatch*, 94 Cal. Rptr. 2d at 473 (“[T]here is no reason to suppose California would attempt to impose its policies on other states in light of the relevant California penal statutes covering jurisdiction over public offenses which generally bar punishment for wholly extraterritorial offenses”); *Cunningham*, 2004-Ohio-1935, ¶ 57, 808 N.E.2d at 495 (holding that the defendant’s “over-extension and over-breadth arguments do not apply to this case”).

<sup>228</sup> *E.g.*, *Cashatt v. State*, 873 So. 2d 430, 438 (Fla. Dist. Ct. App. 2004) (“[N]o legitimate commerce is burdened by penalizing the transmission of harmful sexual material to known minors in order to seduce them.”); *People v. Foley*, 731 N.E.2d 123, 127 (N.Y. 2000) (“We are hard pressed to ascertain any legitimate commerce that is derived from the intentional transmission of sexually graphic images to minors for the purpose of luring them into sexual activity. Indeed, the conduct sought to be sanctioned by [the New York statute at issue] is of the sort that deserves no ‘economic’ protection.”); *Backlund*, 2003 ND 184, ¶ 17, 672 N.W.2d at 438 (“[I]t is difficult to ascertain any legitimate commerce that is derived from the willful transmission of explicit or implicit sexual communications to a person believed to be a minor in order to willfully lure that person in to sexual activity.”).

One commentator has gone a step further and asserted that “luring a minor over the Internet” does not involve commerce at all, “and, as such, should not be subject to the dormant Commerce Clause blocking power.” Stanger, *supra* note 206, at 220. *But see* Pann, *supra* note 202, at ¶ 29 (stating that “the state courts have overstated their position when contending that no legitimate commerce is burdened, as states may have different policies on what conduct is prohibited”).

<sup>229</sup> *People v. Hayne*, No. F036401, 2002 WL 470853, at \*8 (Cal. Ct. App. Mar. 27, 2002) (“[T]he intent to seduce requirement greatly narrows the scope of the law and its effect on interstate commerce.”); *Hatch v. Super. Ct.*, 94 Cal. Rptr. 2d 453, 472 (Cal. Ct. App. 2000) (“While a ban on simple *communication* of certain materials may interfere with an adult’s legitimate rights, a ban on communication of specified matter to a minor *for the purposes of seduction* can only affect the rights of a very narrow class of adults who intend to engage in sex with minors.”); *Cashatt*, 873 So. 2d at 436 (“[T]he statute does not burden Internet users with inconsistent regulations because of the ‘intent to seduce’ element, which makes it much narrower than the statute invalidated by *American Libraries Association*.”); *People v. Foley*, 692 N.Y.S.2d 248, 256 (N.Y. App. Div. 1999) (noting that “[t]he inclusion of the second [‘luring’] prong [of the New York statute at issue] narrows its scope and lessens any burden on commerce”), *aff’d*, 731 N.E.2d 123 (N.Y. 2000); Stanger, *supra* note 206, at 227 (“[L]uring statutes are unlikely to have any type of ‘chilling effect’ on Internet commerce because they proscribe only a narrow range of Internet activity.”)

<sup>230</sup> *Hsu*, 99 Cal. Rptr. 2d at 191 (“Only when material is disseminated to a *known* minor with the *intent* to arouse the prurient interest of the sender and/or minor and with the *intent* to seduce the minor does the

held that states' compelling interest in protecting minors from harm outweighs the burden, if any, that these statutes place on interstate commerce.<sup>231</sup>

B. Reconciling the Cases Dealing with State Regulation of the Internet According to the Degree of Anonymity and Interactivity of the Particular Internet Communication Affected by the Regulation at Issue

The two main categories of cases examining state regulation of the Internet under the dormant commerce clause illustrate how the degree of anonymity between Web site users and operators affects the burden of complying with different state regulations. The anonymity of Internet communications is one of the major characteristics of the operation of the Internet that can make compliance with different state regulations especially difficult.<sup>232</sup> Often times, Internet users are unable to

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dissemination become a criminal act."); *State v. Bolden*, 2004-Ohio-2315, ¶47, 2004 WL 1043317 at \*7 (Ohio Ct. App.) (explaining that the Ohio statute at issue "does not regulate the mere transmission of pictures, images, or messages that are deemed harmful to children" instead the statute "regulates the conduct of adults who seek to solicit minors to engage in sexual activity in conversations by means of the Internet.")

<sup>231</sup> *Hatch*, 94 Cal. Rptr. 2d at 473 ("[N]o rational analysis supports the proposition that [the California statute at issue] imposes any burden on interstate commerce."); *Cashatt*, 873 So. 2d at 436 ("The effect of [the Florida statute at issue] on interstate commerce is incidental at best and is far outweighed by the state's interest in preventing harm to minors."); *Foley*, 731 N.E.2d at 127 (holding that the New York "luring" statute at issue was "a valid exercise of the State's general police powers"); *Bolden*, 2004-Ohio-2315, ¶47, 2004 WL 1043317 at \*7 (holding that Ohio "soliciting" statute "[did] not unduly interfere with interstate commerce").

A recent case used reasoning similar to the two arguments set out in the text above to hold constitutional under the Commerce Clause a California statute prohibiting the use of "an electronic communication device" to "willfully threaten [] to commit a crime which will result in death or great bodily injury to another person." *People v. Vijay*, No. H024123, 2003 WL 23030492, at \*\*6, 9-10 (Cal. Ct. App. Dec. 19, 2003) (alteration original). The defendant had threatened the husband of an ex-girlfriend with bodily harm in an e-mail. *Vijay*, 2003 WL 23030492, at \*\*4-5. The court found that: "California prosecutes only those criminal acts that occur wholly or partially within the state. . . . Thus, [the criminal threat statute at issue] cannot be enforced beyond that which is jurisdictionally allowed." *Id.* at \*10. Furthermore, the court found that the intent requirement of the statute greatly narrowed the effect of the statute on Internet activity: "To violate [the statute] the offender must willfully threaten to commit a crime that would result in death or great bodily injury, and he must make the threat with the specific intent that the statement be taken as a threat." *Id.* The court stated that it could not "envision any legitimate commerce involving the sending of messages that threaten death or great bodily injury to the recipient such that that person is put in sustained fear for his or her own safety." *Id.* n.7.

<sup>232</sup> Transience is another significant characteristic of Internet communications that potentially makes compliance with different state regulations problematic. Loudenslager, *supra* note 7, at 242. Transience refers to "the almost infinite number of paths, through numerous states, that data can travel when two computers on the Internet communicate with one another." *Id.* Transience results from the distributed network and packet-switching technology used to transport computer data across the Internet. *Id.* at 203-



determine the physical location of the computers that facilitate Internet communications because the Domain Name System (“DNS”)<sup>233</sup> and Universal Resource Locator (“URL”)<sup>234</sup> used to tell computers where to retrieve or transport data do not necessarily correspond to any specific geographic location.<sup>235</sup> Instead, the DNS and URL provide a hierarchical structure for computers to translate textual names into computer addresses.<sup>236</sup> Consequently, Web site operators are often unaware of the physical location of users of the site.<sup>237</sup>

However, the degree of interactivity of the Internet communications involved determines how much anonymity ultimately will remain between users. For example, operators of “passive” Web sites that simply “publish information which others can view

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04. *See also id.* at 195-97 (providing a more in-depth explanation of the distributed network and packet-switching technology used in Internet communications).

However, two factors decrease the potential burden of transience. First, a state has very little incentive to regulate activity when transient data travels through computers located in that state en route to an end recipient in another state because such activity “does not cause any practical effect in the first state.” *Id.* at 247. “A state only has an incentive to regulate Internet communications that either originate or are received physically within the geographic boundaries of that state because those are the situations when the activity can cause harmful effects in that state.” *Id.* at 247-48. Second, criminal jurisdiction limits the ability of a state to enforce its regulations on the Internet. *Id.* at 248. Criminal jurisdiction requires that a defendant commit at least part of an offense within the prosecuting state. *Id.* Moreover, in order to prosecute an individual, a state normally “would have to extradite a person located in another state.” *Id.* “[E]xtradition from one state to another is limited to individuals who have fled the state that seeks extradition.” Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *Yale L.J.* 785, 815 (2001). “Thus, it seems very unlikely that ‘[a] Web site operator who has never had a presence in the regulating state’ would face prosecution there.” Loudenslager, *supra* note 7, at 248 (quoting Goldsmith & Sykes, *supra*, at 815). *See also id.* at 247-49 (providing a more in-depth explanation of how the lack of a state incentive to regulate Internet activity involving transient computer data and criminal jurisdiction decrease the potential extraterritorial effect of state Internet regulations).

<sup>233</sup> Douglas E. Comer, *Internetworking with TCP/IP: Principles, Protocols, and Architectures* 465 (4th ed. 2000) (describing the “mechanism that implements a machine name hierarchy” for Internet computers to communicate with each other “is called the *Domain Name System (DNS)*”).

<sup>234</sup> Christos J.P. Moschovitis et al., *History of the Internet* 164 (1999) (stating that Universal Resource Locators are known as “URLs”).

<sup>235</sup> Loudenslager, *supra* note 7, at 204. “Some authorities refer to the URL as the *Uniform Resource Locator* as opposed to the *Universal Resource Locator*.” *Id.* at 202 n.71. *See also* *Shea v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996); Joe Habraken, *Absolute Beginner’s Guide to Networking* 236 (3d ed. 2001); Comer, *supra* note 233, at 528.

<sup>236</sup> Loudenslager, *supra* note 7, at 204. For a more in-depth explanation of how computers transport computer data over the Internet and the World Wide Web, *see id.* at 198-203.

<sup>237</sup> Loudenslager, *supra* note 7, at 205 (“By itself, the transporting of computer data across the Web from a server to a computer using Web-browser software does not provide the site operator with any information about the location of the person using the Web browser.”).

on the site” and do nothing else will have little opportunity to learn of the physical location of users of the site.<sup>238</sup> On the other hand, operators of more “interactive” Web sites that allow, or in some instances require, users to exchange information with the operator’s computer server have more ability to discover the user’s physical location.<sup>239</sup> Presumably, “[t]he more interactions that occur between the user and the Web site, the more opportunities the host or operator of the site has to obtain information from the user about the user’s physical location.”<sup>240</sup> Similarly, people using electronic mail or communicating in a chat room will have the opportunity to communicate their physical location to one another. Once an Internet user discovers another party’s physical location, the user can then either continue the communication concerned or cut it off if the user knows that the jurisdiction in which the other party is located prohibits the activity. Without knowledge of the physical location of the other party, though, users have to comply with the most stringent state regulation that exists whether individuals located in that state are involved in the communication or not. Therefore, the level of interactivity of the Internet communications concerned affect how burdensome compliance with different state Internet regulations can be.

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<sup>238</sup> See *id.* See also *Zippo Mfg. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (describing a “passive Web site” as a site “that does little more than make information available to those who are interested in it”).

<sup>239</sup> Loudenslager, *supra* note 7, at 205-06.

Additionally, when a Web site sells tangible goods, the operator will likely need to know the physical location of the site user in order to ship those goods to the user. *Id.* at 206. While this assumes that the shipping address corresponds to the physical location of the user, “the buyer [in most instances will have] every incentive to provide the host with accurate shipping information in order to receive the goods purchased.” *Id.* However, this factor is less relevant to the current analysis because this article involves the provision of a service, specifically the giving of legal advice, over the Internet and not a tangible good.

<sup>240</sup> *Id.*

Consequently, the interactivity of the Internet communications governed by a particular state regulation is a key factor in reconciling the cases that have analyzed state regulation of Internet activity under the dormant commerce clause.<sup>241</sup> The state Internet regulations that courts have invalidated under the dormant commerce clause potentially affected passive Internet activity.<sup>242</sup> These statutes prohibited Web site operators from posting material on the Internet that would be “harmful to minors” and would have covered passive Web sites where operators or hosts just made information available to site users and had no additional contact with site users.<sup>243</sup>

On the other hand, the state Internet regulations that courts have held past muster under the dormant Commerce Clause regulated more interactive Internet activity.<sup>244</sup> These statutes largely have prohibited the use of the Internet by adults to lure known minors into engaging in sexual activity with the adult.<sup>245</sup> The activity affected by these statutes often involved the adult engaging in multiple communications over the Internet with the person believed to be a minor.<sup>246</sup> In order to violate the statute, the adult had to discover from the other party that they were a minor.<sup>247</sup> Moreover, due to the interactive nature of the activity involved, the potential defendant had the opportunity to discover the physical location of the target and also had an incentive to discover the physical location of the target in order to facilitate a face to face meeting.<sup>248</sup> Thus, the dormant commerce clause case law to date has tended to invalidate state Internet regulations that affected

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<sup>241</sup> *Id.* at 251-52, 254-55 (reconciling the *Hatch* and *American Libraries Ass’n* cases according to the interactivity of the Internet conduct affected by the statutes at issue in each case).

<sup>242</sup> *Id.* at 254 (analyzing the statute at issue in the *American Libraries Ass’n* case).

<sup>243</sup> *Id.* (analyzing the statute at issue in the *American Libraries Ass’n* case); *supra* notes – and accompanying text..

<sup>244</sup> *See id.* (analyzing the statute at issue in the *Hatch* case).

<sup>245</sup> *See supra* notes 205 and accompanying text.

<sup>246</sup> *See supra* note 206 and accompanying text.

<sup>247</sup> Loudenslager, *supra* note 7, at 251.

<sup>248</sup> *See id.* at 252; *supra* note 207 and accompanying text.

passive Internet activity and to uphold regulations that dealt with more interactive Internet communications.

## VII. DORMANT COMMERCE CLAUSE ANALYSIS OF CURRENT ABA CHOICE OF ETHICS LAW RULE, MODEL RULE 8.5(b)(2), WHEN APPLIED TO E-LAWYERING

Despite different descriptions in some of the case law, the dormant Commerce Clause test boils down to whether the burden placed on interstate commerce by the state regulation concerned outweighs the benefit to the state interest that the regulation promotes, unless the state regulation at issue discriminates against out-of-state actors on its face or a court can discern this was the purpose of the regulation.<sup>249</sup> The current version of Model Rule 8.5(b)(2) would apply a state's ethics law to all attorney conduct, by attorneys with offices located inside as well as outside of the state, that "occurred" or had its "predominant effect" within a state.<sup>250</sup> Therefore, because this rule treats both resident and non-resident attorneys in the same manner, it is appropriate to apply the dormant commerce clause balancing test from *Pike v. Bruce Church* to examine the constitutionality of Model Rule 8.5(b)(2) in the context of attorney representations of clients over the Internet.<sup>251</sup>

The following hypothetical is included in order to provide a concrete example of a potential Internet representation of a client and to facilitate a more clear understanding of the interests, or lack thereof, of the various states that potentially could regulate and apply

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<sup>249</sup> See *supra* notes 192–196 and accompanying text (explaining the basic dormant commerce clause test from *Pike v. Bruce Church*).

<sup>250</sup> Model Rules of Prof'l Conduct R. 8.5(b)(2) (2002).

<sup>251</sup> Cf. *On Pet. for Review of Op. 475 of Advisory Comm. Prof'l Ethic & DR 2-102(c)*, 444 A.2d 1092, 1100 (N.J. 1982) (holding that New Jersey restriction on use in firm names of names of attorneys not licensed to practice in New Jersey did not discriminate against interstate commerce because the restriction applied to both residents and non-residents who were not licensed to practice in New Jersey and applying the *Pike v. Bruce Church* balancing test to examine whether the regulation violated the dormant commerce clause).

their laws to an attorney's electronic representation of a client. An attorney with an office located in Cincinnati, Ohio has a practice that, among other areas, focuses on landlord-tenant and fair housing law. The attorney is licensed to practice only in Ohio. In order to attract new clients, the attorney from time to time participates in Internet bulletin boards where people with questions about landlord-tenant and fair housing law post questions.

A mother with three young children residing in Roanoke, Virginia recently was turned down after applying for a two bedroom apartment in a local apartment complex. The reason given by the manager of the apartment complex was that the mother would have exceeded the three person occupancy limit for that apartment. The manager of the apartment complex explained that it has a policy of allowing only one more occupant than the number of bedrooms in each apartment.<sup>252</sup> The mother posts a question setting out her situation on an Internet bulletin board dealing with landlord tenant law, asking whether the complex's occupancy policy violates any laws, and asking whether there are any government offices that can help her.

The Ohio attorney posts a reply to the mother's initial post on the landlord-tenant Internet bulletin board and explains the process of lodging a complaint with the United States Department of Housing and Urban Development ("HUD") as well as how complaints are lodged with most state agencies that deal with fair housing matters. He also explain the process that HUD generally uses in processing such complaints. He further states that it is possible that the apartment complex's occupancy policy violates federal fair housing laws due to a disparate impact on families. However, he explains

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<sup>252</sup> Thus, a maximum of two occupants are allowed in one bedroom apartments, and three occupants are allowed in two bedroom apartments.

that he would need more information from the mother and would have to do some legal research in order to form a more definitive opinion. The attorney includes the Web address of his firm Web site in his reply post in case the mother would like to discuss this matter further with him.

The mother goes ahead and submits a housing discrimination complaint to HUD, but also decides to contact the attorney about potentially filing a lawsuit against the apartment complex. The mother goes to the attorney's Web site. The attorney's Web site describes his practice and qualifications. The home page of the Web site also contains a link entitled, "What are my rights?"<sup>253</sup> When a visitor to the Web site clicks on that link, he or she is then taken to another Web page entitled, "Wondering about a legal problem that you have?" This page presents a client intake form to the visitor that asks for the visitor's name, contact information (including e-mail address), a brief statement of the facts involved in the visitor's legal problem, a listing of other parties or actors involved with the visitor's legal problem, and any questions that the visitor has for the attorney about his or her legal problem. The mother fills out the client intake form and clicks on the "Submit" button at the end of the intake form which sends her information to the attorney's computer in Ohio.

After receiving the potential client's information through his Web site, the attorney runs a conflicts check, and then sends an e-mail to the mother, stating the terms of the representation, again stating his belief that the occupancy policy of the apartment complex probably violates fair housing laws and including an information packet for the client to fill out. Upon receipt of the attorney's e-mail, the mother located in Virginia

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<sup>253</sup> Several characteristics of this Web site are based on a hypothetical presented in a California ethics opinion. Cal. Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2005-168 (2005).

fills out the information packet provided to her and then sends the packet back to the Ohio attorney as an attachment to an e-mail. The attorney follows up on the information provided in the information packet by sending e-mail messages to the client, engaging in some legal research and eventually communicating the client's position to HUD through a letter and several telephone calls before HUD reaches a resolution with the apartment complex.

A. The Burden on E-Lawyering of Complying with Different State Ethical Regimes

Electronic representations of clients involve interactive Internet communications that would decrease anonymity among the parties involved and decrease the burden of complying with differing state ethical rules with regard to such conduct. As explained above, the anonymous nature of communications over the Internet is one of the major factors that burden Internet actors in complying with differing state regulations.<sup>254</sup> However, when Internet communications are more interactive, the ability to decrease anonymity among actors exists.<sup>255</sup> Electronic representations of clients involve interactive communications between the attorney and client that allow the attorney to discover the client's physical location and then comport his or her conduct to the ethical rules of that jurisdiction. This is especially true when e-mail communications are involved as well as communications on Internet bulletin boards. Some Internet bulletin boards even require that a user seeking legal advice indicate the jurisdiction in which they are located.<sup>256</sup> Furthermore, an attorney providing a form on a Web site to facilitate client communication can adapt the form to require the client to indicate the jurisdiction

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<sup>254</sup> See *supra* notes 232–237 and accompanying text.

<sup>255</sup> See *supra* notes 238–248 and accompanying text.

<sup>256</sup> See *supra* note 34 and accompanying text.

where he or she physically is located. For example, in the hypothetical presented above, the attorney first had an opportunity to learn of the jurisdiction in which the mother lived, if he did not get this information from her initial post, when he posted a reply on the Internet bulletin board. The attorney had a second opportunity to discover where the mother resided through the client intake form included on his firm Web site.

While the example above did not involve contact between the attorney and client in a real-time Internet chat room, even in this context an attorney would have an opportunity to ask about the physical location of an individual who has asked a legal question. Admittedly, an attorney in a real-time situation would have less time to discern the ethical requirements of the applicable jurisdiction in order to comply with them. However, an attorney that engages in chat room discussions on a regular basis could familiarize him or herself in advance with the jurisdictions that prohibit certain activity and cut off communications with individuals from those jurisdictions. Moreover, an attorney involved in an electronic representation of a client in any context will need to know the client's physical location in order to provide competent legal advice. If the attorney does not have this information, he or she should not be providing legal advice. Consequently, anonymity is not a characteristic of electronic representations of clients, and therefore, one of the largest factors that create a burden on Internet actors complying with the regulatory regime of different states is not an issue in this context.

Nevertheless, in electronic representations of clients, there is some burden placed on the attorney when the attorney has to ascertain and then comport his or activity with the ethical regulations of different jurisdictions, especially if some jurisdictions prohibit the attorney's activity. For example, in the hypothetical above, the attorney located in



Ohio would have to familiarize himself with both Ohio and Virginia's legal ethics rules, ascertain whether or not either state prohibits electronic representations, and if not, whether either state imposes any special duties on attorneys that engage in such representations. The attorney would also have to determine if Virginia's ethics rules conflict with Ohio's rules in any relevant aspect, and if so, then determine which state's ethics laws should apply to his conduct.

However, the burden faced by attorneys in such situations are much less significant than the heavy burdens faced, and noted by much of the case law dealing with state Internet regulation, by individuals operating passive web sites. The interactivity of the Internet communications involved in e-lawyering prevents the attorney from having to comply with the regulations of the most restrictive states even when the representation has no relationship with those states. For example, the Ohio attorney would only have to consider the duties and restrictions imposed by Ohio and Virginia's ethic rules, not the ethics rules of every state. As long as Ohio and Virginia allowed this type of representation, the attorney could engage in this electronic representation despite other jurisdictions prohibiting electronic representation. In this manner, one jurisdiction would not control the conduct of actors in electronic representations bearing no relationship at all to that jurisdiction, and thus, any concerns about the extraterritorial application of states' ethics laws similar to those expressed in the line of cases invalidating state regulation of the Internet under the dormant commerce clause are not relevant in this context.

## B. The Benefits to Potential Jurisdictions of Applying Their Ethical Regimes to E-Lawyering

Having analyzed the burden placed on attorneys in ascertaining which jurisdictions' ethical rules will apply when engaging in electronic representations, it is necessary to examine the benefit to the potential states whose ethical regimes could apply to any given representation. In an electronic representation involving an attorney and client physically located in different jurisdictions, the ethics laws of both the client's home jurisdiction and the attorney's home jurisdiction are potentially applicable to the attorney's conduct. The current version of Model Rule 8.5(b)(2) applies the ethics laws "of the jurisdiction in which the lawyer's conduct occurred" to an attorney unless "the predominant effect of the conduct is in a different jurisdiction."<sup>257</sup> A court would most likely find that the lawyer's conduct occurred or the predominant effect of the conduct in an electronic representation was felt in either the client's home jurisdiction, where the attorney concerned presumably is not licensed, or the attorney's home jurisdiction, where the attorney presumably is licensed. In the hypothetical being used, the ethics rules of Ohio, where the attorney's office is located, and the ethics rules of Virginia, where the client resides, are potentially applicable to the electronic representation concerned.

A dormant commerce clause analysis requires measuring the benefit to each of these jurisdictions of applying its ethics law to electronic legal representations to determine whether the benefit exceeds the burden placed on interstate commerce. However, to determine the benefit to each jurisdiction, the actual interest of each jurisdiction in regulating electronic representations first must be examined.

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<sup>257</sup> Model Rules of Professional Conduct R. 8.5(b)(2) (2002).

1. Interest of Jurisdiction Where Client Resides in Regulating Electronic Representations

In an attorney's electronic representation of a client, the jurisdiction where the client is located, or the client's home jurisdiction, has a legitimate consumer protection interest in applying its ethics rules to this activity in most situations. Therefore, in the hypothetical presented above, Virginia has a legitimate interest in regulating this situation because the consequences of the representation ultimately was felt in Virginia. Virginia was where the client acted upon the attorney's legal advice provided and experienced the end result of that advice.

The first ethical question in the electronic representation concerned would be whether the Ohio attorney has engaged in the unauthorized practice of law. The purpose of unauthorized practice regulations is consumer protection, more specifically to protect state residents from representation in legal matters by people who have not satisfied the various licensing requirements ensuring that a person will provide competent and ethical legal representation to individuals.<sup>258</sup> In other words, Virginia's unauthorized practice

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<sup>258</sup> See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (“We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.”); Model Rules of Prof'l Conduct R. 5.5 cmt. 2 (2002) (“[L]imiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”); Restatement (Third) of the Law Governing Lawyers § 4, cmt. b (2000) (“The primary justification given for unauthorized practice limitations was that of consumer protection—to protect consumers of unauthorized practitioner services against the significant risk of harm believed to be threatened by the nonlawyer practitioner's incompetence or lack of ethical constraints.”); Ritts, *supra* note 108, at 24 (“[W]hen foreign lawyers act in a state, outside of court, the state clearly has an interest in regulating their conduct, in order to protect such residents of the state as might come into contact with them.”). *But see* Restatement (Third) of the Law Governing Lawyers § 4, cmt. c (2000) (stating that “[s]everal jurisdictions recognize that many [out-of-court legal] services can be provided by nonlawyers without significant risk of incompetent service” and “that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services”); Richard L. Abel, *United States: The Contradictions of Professionalism*, in 1 *Lawyers in Society: The Common Law World* 186, 188 (Richard L. Abel & Philip S. C. Lewis eds., 1988) (stating that attorneys’ “substantive rules and the disciplinary process have been unresponsive to consumer grievances, especially since neither does anything to ensure continuing technical competence among lawyers”); Rhode, *supra* note 16, at 89 (“Three years in law school and passage of a bar exam are neither necessary nor

laws provide some measure of protection to Virginia residents from incompetent legal representation. Another ethical issue would be whether or not the attorney had violated any rules governing attorneys' solicitation of potential clients. Virginia's legal solicitation rules serve a similar consumer protect function of ensuring that attorneys do not take advantage of Virginia residents through the manner in which they contact potential clients or in the representations that they make to prospective clients.<sup>259</sup>

Whether a jurisdiction determines that an attorney can provide competent and diligent representation to its residents, including whether the attorney can adequately communicate with the client and implement procedures to avoid conflicts of interest, in an electronic context would inform the unauthorized practice decision. For example, it is appropriate for Virginia, where the mother resided, to weigh the benefits of allowing attorneys located outside of, and presumably not licensed in, Virginia to provide legal advice to Virginia residents through Internet bulletin boards or e-mail communications. In the hypothetical presented above, the mother initially came into contact with the attorney when he posted a reply to the mother's initial Internet bulletin board post

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sufficient to ensure expertise in the areas where nonlawyer services flourish; lay specialists may be better able to provide cost-effective services than lawyers who practice in multiple fields.”); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531, 571 (1994) (“The current law of unauthorized practice goes too far in seeking to protect consumers from competitive services provided by nonlawyers. Consumer groups and ratings can guide consumers in choosing services. Malpractice liability is likely to provide greater protection than professional controls applied to lawyers.”).<sup>259</sup> See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 620-21, 624-25 (1995) (recognizing that states “have a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers” while examining Florida regulations that created “a brief 30-day black-out period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business,” ); Model Rules of Prof'l Conduct R. 7.1 (2002) (prohibiting attorneys from making a “false or misleading communication about the lawyer or the lawyer's services”); Model Rules of Prof'l Conduct R. 7.1 cmt. 3 (2002) (noting that “an advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case”); Model Rules of Prof'l Conduct R. 7.3 cmt. 5 (2002) (recognizing that even written forms of solicitation, which are permitted under the Model Rules, “can be abused” and cannot be “false or misleading” or involve “coercion, duress or harassment” as defined under Model Rules 7.1 and 7.3(b)(2)).

about the apartment complex turning down her application due to the size of her family. The mother learned some beneficial information through the attorney's reply post. She learned about the process for initiating a complaint with HUD, and she received a preliminary opinion about whether she had a discrimination claim against the apartment complex. This is information that she would not have had absent the communication from the attorney. However, there are some significant ethical issues concerning the manner in which the mother received this information. The attorney provided a legal opinion on whether the mother had a valid discrimination claim against the apartment complex based on very minimal information from her, with very little opportunity for follow up questions, and without being able to make a complete conflicts check.

States have applied their unauthorized practice laws and solicitation rules to analogous situations, often with little to no choice of law analysis, where attorneys located and licensed in other jurisdictions attempted through normal United States mail communications to procure residents of the regulating state as clients. In a series of recent, related cases, the Indiana Supreme Court applied Indiana's unauthorized practice of law and solicitation rules to attorneys who had sent by United States mail written solicitations to survivors of and relatives of people killed in a military plane crash in Evansville, Indiana.<sup>260</sup> These cases did not analyze explicitly the propriety of applying Indiana ethics law to the conduct of attorneys licensed to practice in outside jurisdictions,

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<sup>260</sup> In re Coale, 775 N.E.2d 1079, 1080-81, 1083-84 (Ind. 2002) ("By their own admission, the respondents sent videotapes, personal letters and folders containing information about their law firm and a firm brochure to seven people who were widows, widowers or surviving parents of the crash victims or to the crash victims themselves."); In re Murgatroyd, 741 N.E.2d 719, 720, 721-22 (Ind. 2001) (noting that the attorneys "caused to be delivered by United States mail written solicitations to prospective clients in connection with the crash"). See also *Sterns v. Lundberg*, 922 F. Supp. 164, 166 (S.D. Ind. 1996) (stating that the attorneys "although not admitted to practice law in Indiana, directed mailings to survivors and the families of deceased crash victims in order to solicit potential clients").

but instead discussed the appropriateness of Indiana asserting disciplinary jurisdiction over such attorneys.<sup>261</sup>

The court, determined that it had disciplinary jurisdiction over the attorneys because “any acts” the attorneys took in Indiana constituting the practice of law were “subject to [the court’s] exclusive jurisdiction to regulate professional legal activity in this state.”<sup>262</sup> Moreover, the court emphasized that the attorneys had directed activity that had affected Indiana residents:

By directing the solicitations to the prospective clients, the respondents communicated to those persons that they were available to act in a representative capacity for them in Indiana courts to address loss or injury associated with the plane crash. As such, they held themselves out to the public as lawyers in this state when [none of them were] admitted to practice here. Those acts constituted professional legal activity in this state subject to our regulatory authority.<sup>263</sup>

The Indiana Supreme Court then went on to apply Indiana ethics law to the conduct of the attorneys concerned without analyzing whether this was appropriate or not.<sup>264</sup>

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<sup>261</sup> See *Coale*, 775 N.E.2d at 1080-81 (holding that Indiana Supreme Court could properly exercise disciplinary jurisdiction over one attorney licensed to practice in the District of Columbia and one attorney licensed to practice in California who directed written solicitations by United States mail to airplane crash victims); *Murgatroyd*, 741 N.E.2d at 720-21 (holding that Indiana Supreme Court could properly exercise disciplinary jurisdiction over two attorneys licensed to practice in California who directed written solicitations by United States mail to airplane crash victims). See also *Sterns*, 922 F. Supp. at 168, 169 (holding that federal court would abstain from interfering in Indiana disciplinary proceeding when, among other things, state court had already ruled on propriety of assertion of disciplinary jurisdiction and subjecting “out-of-state lawyers who solicit Indiana citizens to [Indiana’s] disciplinary rules [was] not foreclosed by existing case law”).

<sup>262</sup> *Murgatroyd*, 741 N.E.2d at 721. See also *Coale*, 775 N.E.2d at 1081 (quoting *Murgatroyd*).

<sup>263</sup> 741 N.E.2d at 721 (citation and footnotes omitted). See also *Coale*, 775 N.E.2d at 1081 (quoting and applying analysis from *Murgatroyd* to other attorneys not licensed in Indiana that directed solicitations to survivors and families of victims of Indiana airplane crash). A federal court also held that the Indiana Disciplinary Commission had a reasonable argument for subjecting the attorneys to Indiana’s disciplinary jurisdiction in deciding to abstain from interfering in one of the Indiana disciplinary actions. *Sterns*, 922 F. Supp. at 169 (“[T]he Court is simply not convinced that the Commission has no chance of subjecting out-of-state lawyers to Indiana’s disciplinary rules . . . [A]t worst, the Commission’s attempt to subject out-of-state lawyers who solicit Indiana citizens to this state’s disciplinary rules is not foreclosed by existing caselaw [sic] and might even constitute an important case of first impression.”). Although never explicitly stated in any of the decisions, the attorneys apparently directed at least some of their solicitations to Indiana residents.

<sup>264</sup> The court explicitly applied Indiana law to *Coale* and *Allen*. *Coale*, 775 N.E.2d at 1083-84. Because *Murgatroyd* and *Sterns* presented the court with a proposed agreed judgment entered into with the state disciplinary commission, the court cited and discussed Indiana ethics law without directly applying it.

Presumably, the court felt that the justification for applying Indiana ethics rules to the attorneys in this situation was so apparent and inherent in its powers as to not require any discussion beyond that provided in deciding whether disciplinary jurisdiction was appropriate.<sup>265</sup> The same policy justification exists for applying the ethics law of the jurisdiction where the client resides whether the attorney communications concerned occur through regular U.S. mail, by telephone or through the Internet. The jurisdiction has an interest in protecting consumers of legal services that reside in that jurisdiction in each of these contexts.

In the hypothetical situation discussed above, should Virginia decide to allow the electronic representation, the next step involves determining if the attorney should use any special precautions or procedures during the representation. It is appropriate for Virginia, where the client resides, to determine how best to protect its residents in such representations. Consumer protection considerations similar to those discussed above would inform this decision. In other words, Virginia should decide what safeguards an attorney should employ to deal with the advertising, solicitation, confidentiality and conflicts issues,<sup>266</sup> among other things, that arise in electronic representations of Virginia residents because the client experiences the benefits of or harm from the representation in Virginia.

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*Murgatroyd*, 741 N.E.2d at 721-22 nn.3-8, 722. See also Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 94-02 (1994) (applying Illinois unauthorized practice of law statute to attorney licensed "only in a state other than Illinois" who mailed "packets of material advertising his law firm's personal injury litigation services, with letters of solicitation, to persons who were injured in major disasters in Illinois").

<sup>265</sup> Such a view effectively would fold the choice of law analysis into the decision on disciplinary jurisdiction. This might have arisen from the fact that at the time of these decisions Indiana had only incorporated the original version of Model Rule 8.5, which did not contain a choice of law provision, into its ethics rules. Ind. Rules of Prof'l Conduct R. 8.5 (West 2005) (Historical & Statutory Notes) (setting out the language of the version of Rule 8.5 effective from Jan. 1, 1987 to Dec. 31, 2004). It also is possible that the Indiana court simply did not think about the appropriateness of applying its law in this situation. <sup>266</sup> See *supra* notes 86-89 and accompanying text (setting out the ethical issues that various jurisdictions have recognized electronic representations raise).

2. Lack of Interest of Attorney's Home Jurisdiction in Applying Its Ethics Law to an Electronic Representation that Affects a Resident of Another State

The attorney's home state does not have a corresponding consumer interest in regulating the electronic representation concerned by applying its ethics law to the representation. Ohio, although it is the attorney's licensing state, has a negligible interest in choosing the best manner of protecting a Virginia resident who the Ohio attorney represents "electronically," whether it be by not allowing such representations or to allow such representations if certain safeguards are use. This is especially the case if Virginia, where the client resides, has decided to protect its citizens in a different manner than Ohio. This results because the consequences of the attorney's actions are experienced by a Virginia resident in Virginia. Virginia is where the mother acted upon the attorney's advice by filing a HUD claim, where the mother is seeking an apartment, and where the mother will experience the benefits or harm that results from the manner in which her legal problem is resolved. Therefore, Ohio has very little to no interest in determining by applying Ohio law whether the attorney is engaging in the unauthorized practice of law by providing legal advice to a person residing in Virginia through the Internet. Ohio also has no interest in determining through its ethics law how Virginia residents are solicited.

Ohio might assert that it has an interest in regulating the conduct of attorneys it licenses no matter where that conduct occurs or is felt in order to protect the purity of its bar.<sup>267</sup> In the past, some courts have asserted that the licensing jurisdiction's interest in "purifying" the attorneys it licenses to practice law justifies the application of that

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<sup>267</sup> The rationale for such extraterritorial application of the licensing jurisdiction's ethics rules is that the licensing state has "an obligation to protect the 'purity' of the state's bar, and that 'purification' [requires] vigilance against questionable conduct of lawyers, no matter where it [occurs]." Ritts, *supra* note 108, at 27.



jurisdiction's ethics laws to the conduct of such attorneys that occurs outside of the borders of the licensing jurisdiction.<sup>268</sup> In many of these cases, the courts used this "purification" interest to apply a jurisdiction's legal ethics regime to extraterritorial attorney conduct in situations "where other contacts or governmental interests [were] entirely absent."<sup>269</sup>

While this purification interest justifies Ohio disciplining an Ohio attorney for conduct occurring in the electronic representation of a resident of Virginia, it does not justify applying Ohio law to determine whether or not the attorney engaged in the unauthorized practice of law in Virginia or violated any ethical duty owed to the Virginia resident if Ohio's ethics rules differ from Virginia's rules in the context concerned.<sup>270</sup>

Ohio can protect its interest in ensuring that the attorneys it licenses to practice law

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<sup>268</sup> See Ritts, *supra* note 108, at 27, 33-40 (discussing cases asserting that purification of a jurisdiction's bar justified that application of its ethics rules to extraterritorial conduct of lawyers licensed by that jurisdiction). See also, e.g., *People ex rel. Colo. Bar Ass'n v. Lindsey*, 283 P. 539, 546 (Colo. 1929) ("The respondent's oath of office as an attorney and counselor at law is not only binding here in Colorado but everywhere. . . It abides with him at all times and places, and he will be held responsible to this court for his misconduct as an attorney so long as his name continues on the roll; nor can he put himself in a position which will place him beyond the inherent power of this court to purify the bar of its unworthy members, and to keep its roster clean."); *Florida Bar v. Wilkes*, 179 So.2d 193, 196, 197 (Fla. 1965) (recognizing that "to ignore acts of professional misconduct merely because they occurred outside this state would be to ignore our duty to protect the people of this state from one who has been held by another state to be unfit" and giving collateral estoppel effect to the factual findings of the other state's judgment but determining that "the discipline to be awarded for such acts by this state shall be determined by this court and its agencies in the same manner as in all other disciplinary proceedings"); *In re Veach*, 287 S.W.2d 753, 759 (Mo. 1956) ("If one has been guilty of conduct inconsistent with the standard expected of lawyers as officers of the court, it should make no difference whether the acts were committed on this side or the other of a theoretical fence. There are no territorial boundaries in cases of such misconduct. The wrong and the guilt is within the person himself, and he carries it with him; he cannot be mentally and professionally pure in Missouri and impure in Illinois.").

<sup>269</sup> Ritts, *supra* note 108, at 55.

<sup>270</sup> See Ritts, *supra* note 108, at 34-35 ("[I]n the interest of bar 'purification,' a court has subject-matter jurisdiction to hear any case involving alleged professional misconduct of its attorneys; the bar purification interest, however, is not so strong, standing alone, as to justify application of the foreign state's rule where they conflict with the forum's rules which are more permissive.").

conduct themselves in an ethical manner by asserting disciplinary jurisdiction over the attorneys and then applying Virginia's ethics rules to the conduct in question.<sup>271</sup>

Moreover, any interest Ohio has in policing or purifying its bar that supports applying Ohio's ethics rules to the electronic representation concerned, assuming this interest exists at all, should give way to the much greater interest of Virginia in protecting its citizens from potentially incompetent legal representation, choosing the best manner in which to balance its citizens' access to legal services against the ethical issues posed by electronic representations, and deciding how to best minimize the ethical concerns of such representations. Therefore, in dormant commerce clause terms, the putative benefit to the attorney's home jurisdiction in applying its ethic laws to electronic representations is negligible at best while the benefit to the client's home jurisdiction is great.

C. The Safe Harbor Language of Model Rule 8.5(b)(2) Invalidates the Choice of Ethics Law Rule Under the Dormant Commerce Clause Because It Allows the Ethics Laws of the Attorney's Home Jurisdiction to Apply to All Electronic Representations

The lack of interest of the attorney's home jurisdiction in applying its ethics laws to an electronic representation is problematic under the dormant commerce clause when the language of the current version of Model Rule 8.5 is examined. Model Rule 8.5(b)(2) initially applies the ethics "rules of the jurisdiction in which the attorney's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the

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<sup>271</sup> See Ritts, *supra* note 108, at 40 (stating that "'purification' alone is not an adequate answer to choice-of-law questions when they arise, since the purification goal was advanced equally well in both sets of cases [where courts asserted disciplinary jurisdiction over attorneys licensed in that state for extraterritorial conduct], regardless of whether forum or foreign law was applied"). See also, e.g., In re Harris-Smith, 871 A.2d 1183, 1184-85 (D.C. 2005) (applying identical reciprocal discipline to attorney disbarred in another jurisdiction for misconduct occurring in the other jurisdiction); In re Barneys, 861 A.2d 1270, 1274-75 (D.C. 2004) (same). Furthermore, if ethics rules are recognized as "only an imperfect representation of the 'moral purity' required for the responsible practice of law, then a state's concern for attorneys' 'moral purity' cannot alone justify application of its ethics rules in an extraterritorial manner, at least not where the other jurisdiction has meaningful standards of professional conduct to apply." Ritts, *supra* note 108, at 55.

rules of that jurisdiction.”<sup>272</sup> It is very unclear where an attorney’s conduct “occurs” in an electronic representation of a client. Assuming the attorney and client are located in different states, the attorney’s conduct effectively occurs in two jurisdictions: in the attorney’s home jurisdiction where the attorney initiates the Internet communication and in the jurisdiction where the client is located and receives the communication. Therefore, equally persuasive arguments can be presented for the attorney’s conduct having “occurred” in the attorney’s home jurisdiction as well as in the client’s home jurisdiction depending on the point of view used. Consequently, comparing the interests of the jurisdictions concerned according to “where the lawyer’s conduct occurred,” as stated in the first part of the test set out in Model Rule 8.5(b)(2), is unhelpful because it is impossible to locate a single, discrete jurisdiction where the activity concerned actually took place.

However, examining where the “predominant effect” of an electronic representation occurs, as used in the second part of the test used in Model Rule 8.5(b)(2), yields a more meaningful comparison of the interests of the potential jurisdictions under a dormant commerce clause analysis. In an attorney’s electronic representation of a client, the jurisdiction where the client is located, or the client’s home jurisdiction, has a legitimate consumer protection interest in applying its ethics rules to this activity. For example in the hypothetical electronic representation set out above, Virginia has a legitimate interest in regulating the representation because the consequences of the representation ultimately were felt in Virginia, where the Virginia resident acted upon the attorney’s advice.

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<sup>272</sup> Model Rules of Prof’l Conduct R. 8.5(b)(2) (2002).

This is why the safe harbor language of the current version of Model Rule 8.5(b)(2) is problematic under the dormant commerce clause. This language would not subject an attorney to discipline if his or her conduct conformed “to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct” occurred.<sup>273</sup> As explained above, the limited authority available on where the “predominant effect” of an attorney’s conduct occurs gives an attorney in almost all situations reasonable grounds to argue that the ethics law of his or her home jurisdiction apply to electronic representations. Some of this authority appears to consider where the attorney physically drafted documents and conducted research for the representation concerned,<sup>274</sup> and in almost any electronic representation, this conduct will occur in the attorney’s home jurisdiction.

Certainly, in the hypothetical situation being used, the Ohio attorney would have conducted in his Ohio office any research regarding whether the apartment complex discriminated against the mother under applicable fair housing laws. Similarly, the Ohio attorney would have drafted in his Ohio office any documents needed in the representation. The case and administrative authority would add to practical arguments that the attorney would have that he reasonably believed that Ohio ethics law governed the electronic representation of the Virginia resident because Ohio is his licensing jurisdiction and the physical location in which he conducted the legal work involved in the representation. Thus, the safe harbor to Model Rule 8.5(b)(2) results in the ethics law of the attorney’s home jurisdiction almost always to apply to electronic representations of clients.

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<sup>273</sup> Model Rules of Prof’l Conduct R. 8.5(b)(2) (2002).

<sup>274</sup> See *supra* notes 166, 169–170, 181 and accompanying text.

Nevertheless, as established above, the attorney's home jurisdiction has little to no interest in applying its ethics laws to electronic representations and thus derives no benefit from regulating this activity in this manner. Therefore, a choice of law rule that results in always applying the ethics law of the attorney's home jurisdiction to an attorney's conduct in electronic representations fails to meet the minimum threshold required under the dormant commerce clause.<sup>275</sup> This is because the benefit to this state of applying its ethics laws to such representations does not outweigh the burden placed on such representations by applying the ethics law of the attorney's home jurisdiction.

In fact, always applying the ethics regime of the attorney's home jurisdiction in the context of electronic attorney representations ignores the legitimate interest of the client's jurisdiction, where the consequences of the representation usually are experienced, in deciding how to best protect its residents. Thus, in the hypothetical situation, the safe harbor language would allow Ohio law to control the type of legal representation that a Virginia resident can use in order to get legal advice regarding an incident that occurred in Virginia and in order to take action in Virginia. This constitutes an impermissible burden on this activity. Consequently, due to the safe harbor language, the current version of Model Rule 8.5(b)(2) violates the dormant commerce clause.

## VIII. CONCLUSION

Accordingly, states should consider adopting the 2002 version of Model Rule 8.5(b)(2) without the final sentence containing the safe harbor language. In this manner, only the jurisdiction where the largest effect from each representation is experienced

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<sup>275</sup> See *supra* note 200 and accompanying text (stating that dormant commerce clause principles determine whether the application of a particular state's laws meets minimum Constitutional thresholds rather than determining the one jurisdiction's law that would be most appropriate to apply in a given situation).

would apply its ethics rules to electronic representations. In many situations, this is going to be the jurisdiction where the client physically is located, especially when the client acts upon the legal advice obtained through the electronic representation in the client's home jurisdiction. Presumably, the safe harbor language is intended to protect attorneys from facing conflicting obligations under the ethics rules of multiple jurisdictions. However, this language, in conjunction with the limited authority on where the "predominant effect" of multijurisdictional representations occurs and practical arguments regarding attorneys' reasonable beliefs about where such effect occurs, results in the application of the ethics laws of the attorney's home jurisdiction to all electronic representations. Because the attorney's home jurisdiction obtains very little benefit from the application of its laws in the vast majority of situations, this outcome violates the dormant commerce clause. Three jurisdictions, Florida, Indiana and New Jersey, have already adopted the 2002 version of Model Rule 8.5 without the final safe harbor sentence.<sup>276</sup>

Alternatively, jurisdictions could adopt a choice of ethics rule that applies the ethics laws of the client's jurisdiction to all electronic representations involving residents of that state. A few states have done this, in effect, for all multijurisdiction representations involving attorneys not licensed by the state that occur within that state's boundaries.<sup>277</sup> This potentially could provide more clarity concerning which jurisdiction's rules would apply to a particular electronic representation.

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<sup>276</sup> Fla. Bar R. 3-4.6 (effective Jan. 1, 2006); Ind. Rules of Prof'l Conduct R. 8.5 (effective Jan. 1, 2005); N.J. Rules of Prof'l Conduct R. 8.5 (effective Jan. 1, 2004).

<sup>277</sup> Cal. Rules of Ct. R. 967 (effective Nov. 15, 2004) (allowing an attorney licensed and in "good standing" in another United States jurisdiction to provide "legal advice in California to a client concerning a transaction or other nonlitigation matter" as long as, among other things, the attorney agrees that the provision of legal services is subject to California's rules of professional conduct); Colo. R. Civ. P. 220 (effective Jan. 1, 2003) (allowing an attorney "licensed to practice law . . . in another jurisdiction in the United States" and "in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice" to "practice law in the state of Colorado . . . subject to the Colorado Rules of Professional

However, as explained above, it is very difficult to determine exactly where an electronic representation “occurs.” Thus, under the current language of the choice of ethics law rules in these jurisdictions, it may still be difficult to determine exactly when the ethics rules of a particular jurisdiction apply to an electronic legal representation, even under such seemingly “bright line” rules. Furthermore, depending on the circumstances of the particular representation, the representation may have a greater relationship with the attorney’s home jurisdiction than the client’s jurisdiction, although a court might be able to determine that components of the representation occurred in the client’s jurisdiction. An example of this would be when a client has communicated with an attorney over the Internet about a matter governed by the law of the attorney’s home jurisdiction and which requires the attorney physically to take some legal action in the attorney’s home jurisdiction, such as submitting documents to a court or office located in that jurisdiction or engaging in a legal transaction with other parties located in the attorney’s home jurisdiction. In these cases, the attorney’s home jurisdiction would have a significant interest in proscribing the ethical limitations of the representation.

Conversely, adopting the 2002 version of Model Rule 8.5(b) without the safe harbor language contained in the last sentence of subsection 2 would still allow some flexibility in applying the ethic rules of the jurisdiction with the most significant relationship to a particular electronic representation. However, this rule would avoid the unconstitutional application of the legal ethics rules of the attorney’s home jurisdiction to

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Conduct”); Nev. Rules of Prof’l Conduct R. 189.1 (effective Sept. 24, 2002) (requiring an attorney “admitted and in good standing in another jurisdiction in the United States, and who provides legal services for a Nevada client in connection with transactional or extra-judicial matters that are pending or substantially related to Nevada” to file and annual report, along with a fee, to the State Bar of Nevada and to “familiarize himself or herself and comply with the standards of professional conduct required of members of the State Bar of Nevada”).

electronic representations in which that jurisdiction has very little interest, which will be the situation more often than not. Instead of applying the home jurisdiction's ethics laws when any remotely plausible connection can be drawn between that jurisdiction and the representation at issue, which always will be possible in an electronic representation, this choice of ethics law rule would allow a court to examine the particular circumstances of each electronic representation and apply the ethics rules of the jurisdiction where the most significant effect of the representation is felt.

A third option would be to retain the current safe harbor language but amend Model Rule 8.5(b)(2) to include definitions for "conduct occurred" and "predominant effect" that focus on the location of the client affected by the legal representation and the jurisdiction where the legal advice provided in the representation is acted upon and has effect. These definitions would eliminate any basis for an attorney to argue that the "predominant effect" of a legal representation occurred in the jurisdiction where the attorney simply drafted legal documents or conducted legal research. Therefore, by either eliminating the safe harbor language currently contained in Model Rule 8.5(b)(2) or by precisely defining the key terms "conduct occurred" and "predominant effect," a jurisdiction can align the choice of ethics law determination more closely to the actual interests the potential jurisdictions have in and the benefits they receive from applying their legal ethics regimes to electronic representations.