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REGULATING CONFLICTS OF INTEREST IN GLOBAL LAW FIRMS: PEACE IN OUR TIME?

Janine Griffiths-Baker & Nancy J. Moore***

INTRODUCTION

The phenomenal rise of the global law firm, which began in the 1980s, has transformed the face of international legal practice.[1] Closer economic and political ties between countries, global advertising, and improved transport and communication systems have allowed goods, capital, and personnel to be transferred worldwide. As a result, there are now more cross-border transactions between governments, individuals, and businesses. To this end, the practice of law has also become "global," as lawyers play their part in the growing international market for corporate and commercial services.

While globalization has no doubt brought positive developments for some, it has created significant challenges for others. As clients increasingly seek specialist advice at competitive prices, traditional professional values are more and more at odds with lawyers' commercial interests and with the commercial interests of a highly privileged client group. Some have questioned whether the emergence of a commercially driven professional paradigm is the best way forward.[2] Others have described globalization as a "slippery concept" that fundamentally challenges the jurisdiction and authority of regulators.[3]

The global expansion of legal practice has prompted several jurisdictions to consider how their own legal services markets should be regulated in an ever-increasing global economy.[4] Yet, although significant attention has

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1. *See* John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, 3 INT'L J. LEGAL PROF. 169 (1996); John Flood, *Megalaw in the UK: Professionalism or Corporatism? A Preliminary Report*, 64 IND. L.J. 569 (1989); Marc Galanter, *Mega-law and Mega-lawyering in the Contemporary United States*, *in* THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS, AND OTHERS 152 (Robert Dingwall & Philip Lewis eds., 1983).

2. *See* Harry McVea, *Predators and the Public Interest—The 'Big Four' and Multi-Disciplinary Practices*, 65 MOD. L. REV. 811 (2002).

3. Carole Silver, *What We Don't Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009, 1014 (2010).

4. *See, e.g.*, ABA REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE, 29–33 (Aug. 2002), http://www.abanet.org/cpr/mjp/final_mjp_rpt_6-5.pdf. More recently, in 2009, the ABA Ethics 20/20 Commission was created. Current efforts include proposals concerning the admission of foreign lawyers, outsourcing of legal services, and choice of

been paid to factors that drive cross-border legal work, only limited scholarly consideration has been given to the practicalities of regulating the day-to-day practice of law on an international scale.[5]

A universal framework for governing international legal work has yet to be established, and while some jurisdictions have adopted choice-of-law principles to determine which rules apply across borders,[6] many others have conflicting and incompatible rules. While it can be argued that uniformity in cross-border transactions is desirable on a number of levels, in practice, several important questions need to be addressed if this is to be achieved. If a common set of rules is to be adopted, can a consensus be reached as to which should be used? Would it be possible to reconcile the differences among many jurisdictions to create a single framework? If not, which country's rules should be accepted? Would it be better to devise an entirely new structure for regulating global legal practice?

Carole Silver has argued that before any such rules are considered, global regulation should be based upon sound empirical evidence.[7] She urges empirical scholars to work with law schools and legal professions "to generate a comprehensive understanding of the activities and actors comprising the legal profession as it exists in the context of globalization."[8] By acting in a collaborative way, she hopes that more effective regulation will result and that light will be shed on the activities of the legal profession in a global context.[9]

This Article attempts to "shed light" on methods of regulating the conduct of lawyers in the context of a reasonably well-defined area of difficulty for the global law firm—namely, conflicts of interest. By focusing on just one area of cross-border practice and by describing the particular difficulties experienced by lawyers, regulators, and clients, we hope to inform the debate on how best to regulate lawyers in a global environment.

Conflicts of interest provide a useful study in this respect. Unlike some areas of practice, it is a generally accepted principle that lawyers should not act for two or more clients whose interests may potentially conflict.[10] In

law regarding both alternative law practice structures and conflicts of interest. *See id.* In this Article, we consider and comment on the proposal concerning choice of law regarding conflicts of interest.

5. *See, e.g.*, James R. Faulconbridge et al., *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. J. INT'L L. & BUS. 455 (2008); Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT'L L. 1035 (2009); Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677 (2000).

6. *See* INT'L BAR ASS'N, IBA INTERNATIONAL PRINCIPLES FOR THE LEGAL PROFESSION cmt. 3.3 (May 28, 2011), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C.

7. *See* Silver, *supra* note 3, at 1014.

8. *See id.* at 1015.

9. *See id.*

10. *See generally* CONFLICTS OF INTEREST: A GUIDE FOR BANKS, AUDITORS AND LAW FIRMS (Keith Clark ed., 2011) (discussing conflicts rules in Europe); JANINE GRIFFITHS-BAKER, SERVING TWO MASTERS: CONFLICTS OF INTEREST IN THE MODERN LAW FIRM (2002) (focusing on conflicts rules in the United Kingdom); SUSAN P. SHAPIRO, TANGLED

recent times, however, this proscription has come under increasing pressure for four reasons: (1) a significantly increased demand for specialist legal services, (2) the globalization of commerce, (3) a dramatic growth in the size of law firms, and (4) much greater mobility within the profession.[11]

For the purposes of this Article, we have confined our examination to two jurisdictions, the United Kingdom (excluding Scotland and Northern Ireland) and the United States. The reasons for the selection are threefold.

First, London and New York play an important role in cross-border legal practice. As James Faulconbridge and his co-authors have observed: "In global lawyering London and New York stand out as the prime centers of the service . . . the dominance of U.S. and U.K. (English in particular) firms . . . [is] significant: they signal a new era where Anglo-American transnational lawyering is central to the global economy."[12] The two jurisdictions should, therefore, provide a fruitful comparison.

Second, the United Kingdom has recently adopted a new approach to regulating professional conduct following extensive consultation.[13] Similar debates are currently taking place in the United States.[14] Both jurisdictions have considered the rules on conflicts of interest in depth and thus provide useful analyses of many of the underlying concerns with allowing firms to act in such situations.

Finally, there is limited value in making normative statements in the absence of a full understanding of the practice environment. As Silver suggests,[15] before embarking on a review of regulation, it is necessary to have a reliable account of the problems that confront lawyers in their daily work, the way in which those difficulties manifest themselves, and the way in which they are addressed and resolved. Empirical investigations are, therefore, an important tool to gain such understanding. Without some attempt to examine the way in which rules are applied in practice, a discussion of regulation will be limited by inadequate contextualization. There have been several valuable studies conducted on conflicts of interest in both the United States and the United Kingdom;[16] we thus have a good understanding of the practice environment operating in these two jurisdictions.

LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE (2002) (United States). For reviews of the latter two books, see Nancy J. Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the 'Mega Firm,'* 18 GEO. J. LEGAL ETHICS 521 (2005).

11. *See generally* GRIFFITHS-BAKER, *supra* note 10.

12. *See* Faulconbridge et al., *supra* note 5, at 458–60*; see also* D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study*, 14 IND. J. GLOBAL LEGAL STUD. 5 (2007).

13. *See Outcomes-Focused Regulation–Transforming the SRA's Regulation of Legal Services*, SOLIC. REG. AUTH., http://www.sra.org.uk/sra/consultations/OFR-consultation.page (last updated July 28, 2010).

14. *See Commission on Ethics 20/20*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Apr. 21, 2012).

15. *See* Silver, *supra* note 3, at 1014–15.

16. *See generally* SHAPIRO, *supra* note 10; *see also* GRIFFITHS-BAKER, *supra* note 10.

Before we turn to examine these jurisdictions in greater depth, in Part I we explore the current rules on conflicts of interest for lawyers conducting cross-border activities, and the problems with these rules.

I. THE CURRENT CROSS-BORDER POSITION

It has been suggested that there are essentially two ways in which conflicts of interest can be regulated: first, lawyers can be prevented from acting where conflicts arise, or second, conflicts can be controlled by appropriate measures.[17] Presently, there are substantial differences between the approaches of various countries. Some have strict rules prohibiting lawyers from acting in all conflict situations; others allow conflicts to be "managed" and "controlled" in certain situations.[18] Indeed, the definition of what a conflict of interest is also varies from jurisdiction to jurisdiction.[19] While the International Bar Association (IBA) maintains that a conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, a third person or by a personal interest of the lawyer,"[20] many countries have a different understanding of the term.[21]

So where does that leave lawyers, firms, and clients working in a global environment? It seems that the differences in national rules on conflicts of interest have to be taken into account in each individual case of cross-border practice. Thus, lawyers have to be aware of, and comply with, the different rules in every country, while global law firms have to ensure that their entire organization complies with the rules in each jurisdiction. The IBA specifically recognizes these difficulties in its Code of Conduct for the Global Legal Profession:

> The differences in national rules on conflicts of interest will have to be taken into account in any case of cross-border practice. Every lawyer is called upon to observe the relevant rules of conflicts of interest when engaging in the practice of law outside the jurisdiction in which the lawyer is admitted to practice. Every international law firm will have to examine whether its entire organisation complies with such rules in every jurisdiction.[22]

The result is that while one jurisdiction may allow conflicts to be managed by lawyers with the use of information barriers or "Chinese walls," another country may prohibit firms from acting in such situations. Moreover, this prohibition may cross national boundaries—for example, the regulation of conflicts of interest in England and Wales purports to extend

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17. HARRY MCVEA, FINANCIAL CONGLOMERATES AND THE CHINESE WALL: REGULATING CONFLICTS OF INTEREST 122 (1993).

18. For a discussion of the regimes governing conflicts of interest in the United States, United Kingdom, Canada, Australia, New Zealand, and Europe, see GRIFFITHS-BAKER, *supra* note 10, at 75–94.

19. *See* INT'L BAR ASS'N, *supra* note 6, cmt. 3.3.

20. *See id.*

21. *See infra* Part II.B.

22. *See* INT'L BAR ASS'N, *supra* note 6, cmt. 3.3.

to other jurisdictions, with the rule stating that "the provisions [on conflicts] apply to your overseas practice as well."[23] The overall picture is therefore confusing not only for individual lawyers, global firms, and clients, but also for the regulation of international practice. Difficulties can be demonstrated by the following hypothetical example:

A new highway is to be constructed across several countries. U.K. Firm XYZ is retained by the bank financing the project, by the bondholders putting up the bonds to create the security documents, and by the main contractor. All wish to use the same law firm to complete the necessary documentation because of its global expertise in the field.

An assessment of all the relevant considerations is not easy for firm XYZ in this situation. Although the U.K. rules of conduct would allow the firm to act, several countries in which the road is to be built may prohibit such representation.[24] The position would be further complicated if the firm had local offices in these countries or one of the parties to the transaction were based in a country that also excluded lawyers from acting in such a situation.

As the IBA acknowledges: "A universally accepted framework for determining proper conduct in the event of conflicting or incompatible rules has yet to be developed, although certain jurisdictions have adopted conflict of law principles to determine which rules of professional conduct apply in cross-border practice."[25] By comparing the most notable differences in the regulatory approach to conflicts adopted in the United Kingdom with that of the United States, we hope to provide a possible way forward.

II. TRANSATLANTIC CONFLICT

A. The Regulatory Regime

The first, and perhaps most notable, difference between the United Kingdom and United States regimes lies in their contrasting approaches to regulation. All lawyers[26] in England and Wales are subject to the Solicitors' Regulation Authority's (SRA) Code of Conduct. In the United States, although the American Bar Association (ABA) has devised a set of model rules,[27] the rules have not been adopted uniformly across the nation and there are significant variations between states.[28]

Another significant difference can be found in the format of the rules themselves. As of October 2011, the SRA in England and Wales moved

23. *Solicitors' Code of Conduct 2011: Rule 3: Conflict of Interests*, SOLIC. REG. AUTH., http://sra.org.uk/solicitors/handbook/code/part2/rule3/content.page (last visited Apr. 21, 2012).

24. *See infra* Part II.

25. *See* INT'L BAR ASS'N, *supra* note 6, cmt. 1.3.

26. For the purpose of this Article, "lawyer" in this context is defined as a Solicitor of the Supreme Court of England and Wales.

27. MODEL RULES OF PROF'L CONDUCT (2011).

28. *See, e.g.*, 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 1.16 (Supp. 2012).

away from a rule-based approach to regulating lawyers, to one that focuses on "high-level outcomes governing practice and the quality of outcomes for clients."[29] These "outcomes" have not changed the United Kingdom's position on conflicts of interest, but the "rules" are now written in a new "outcome-focused" way. This means that "rules" are very brief—the bare minimum—with much less information, guidance, and commentary than before. The idea behind such an approach is that law firms and individual lawyers can "innovate and find new ways by which they might satisfactorily achieve the necessary outcomes in the SRA Code."[30]

The new regime includes a change in the SRA's approach to its authorization and supervision of lawyers, and also to the enforcement of the Code of Conduct. This change gives lawyers and firms much more responsibility for their own supervision:

> This will be risk based, proportionate and targeted and will involve a more open and constructive relationship between the SRA and those we regulate. Firms that are already well-managed and providing a good service to their clients should have nothing to fear from this approach. . . . Our approach to supervision will encourage you to identify, manage and mitigate risks to your ability to meet the requirements of the [Code of Conduct]. . . . We expect you to be straightforward in your dealings with us.[31]

All firms now need to appoint compliance officers for legal practice and for finance and administration. These officers are responsible for ensuring that the firm complies with all obligations and for reporting any material failures. In particular, they are obliged to ensure that the firm has controls and systems in place to enable compliance with the Code of Conduct. Individual lawyers still have responsibility for their own compliance, however.

The move to "outcome-focused" regulation represents a major shift in the approach of law firm regulation in the United Kingdom. Some, however, regard this move as a considerably risky one. Concerns have been expressed that such a change in approach will require "serious cultural, practical and philosophical adjustments,"[32] and that such rules will be too vague to provide adequate guidance to practitioners or appropriate protection for clients.[33] The "rules" might also be undermined by the creation of another set of norms with a lower standard. Nicolson and Webb, both strong advocates for an outcome-focused approach,

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29. LAW SOC'Y, PRACTICE NOTES: CONFLICTS OF INTEREST 1.2, *available at* http://www.lawsociety.org.uk/productsandservices/practicenotes/conflictofinterests/4978.article.

30. *Outcomes-Focused Regulation at a Glance*, SOLIC. REG. AUTH., http://www.sra.org.uk/solicitors/freedom-in-practice/OFR/ofr-quick-guide.page (last updated Oct. 10, 2011).

31. *Id.*

32. Tony Guise, *Outcomes-Focused Regulation Will Require Cultural Changes by Solicitors*, LAW SOC'Y GAZETTE (Apr. 7, 2011), http://www.lawgazette.co.uk/opinion/comment/outcomes-focused-regulation-will-require-cultural-changes-solicitors.

33. *See* GRIFFITHS-BAKER, *supra* note 10, at 184.

acknowledge that a change in lawyer attitudes will not occur simply through changes in the content and form of regulations.[34] They suggest that the new regime would have to be coupled with: (1) changes in legal education; (2) greater participation by consumers on regulatory bodies; (3) appointment of in-house compliance officers; (4) engagement of firms in more pro-bono work; (5) recruitment of solicitors from different ethnic and social backgrounds; and (6) a move away from the present adversarial system.[35]

While the SRA is working on addressing some of these points, there is a feeling that the timetable for bringing in outcome-focused regulation is too tight.[36] A major concern is that the rush to implement change does not allow for full consideration about the potential consequences of change, and that the SRA risks a breakdown in its relationship with the profession and its stakeholders.[37]

The ABA, on the other hand, adopts a far more prescriptive approach to its regulation of lawyers. The ABA's Model Rules contain much greater detail and, unlike the SRA guidelines, contain little flexibility for individual lawyers to "innovate" in their interpretation. Lawyers are required to follow the rules and are subject to disciplinary sanction if they fail to comply.[38] This approach has also been criticized, with some arguing that, as lawyers have a trained capacity to find ways around rules, the more detailed regulation becomes, the less lawyers will exercise their ethical judgment appropriately.[39]

Whatever the merits or otherwise of the relevant approaches, it is clear that the regulatory regimes differ considerably between the two jurisdictions. This in itself raises questions about whether harmonization of conflict rules would be possible.

Even though the basic approach is different, it may be that the fundamental principles for managing conflicts of interest are the same, and thus, a way forward can be found. We shall examine this possibility in the remainder of this part.

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34. DONALD NICOLSON & JULIAN WEBB, PROFESSIONAL LEGAL ETHICS: CRITICAL INTERROGATIONS 286–92 (1999).

35. *Id.*

36. *Timetable for Outcomes-Focused Regulation Is Too Tight and Too Risky, Law Society Warns*, LEGAL FUTURES BLOG (Jan. 23, 2011), http://www.legalfutures.co.uk/regulation/solicitors/timetable-for-outcomes-focused-regulation-is-too-tight-and-too-risky-law-society-warns.

37. Rachel Rothwell, *Warning over 'Regulatory Ambush,'* LAW SOC'Y GAZETTE (Jan. 20, 2011), http://www.lawgazette.co.uk/news/warning-over-039regulatory-ambush039.

38. *See* MODEL RULES OF PROF'L CONDUCT pmbl. & scope, ¶ 19 (2011). Although not intended for use outside the disciplinary process, the Model Rules acknowledge that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." *Id.* ¶ 20.

39. *See, e.g.*, ROGER COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 194–200 (2d ed. 1992); SUSAN SHAPIRO, CONFLICTING RESPONSIBILITIES: MANEUVERING THROUGH THE MINEFIELD OF FIDUCIARY OBLIGATIONS 46 (1995).

B. Defining Conflicts

As previously indicated, the term "conflict of interest" covers many different circumstances. Thus, defining what amounts to a conflict is not straightforward. The SRA divides conflicts into two categories: (1) lawyers acting where their own interests are involved (personal or own interest conflicts); and (2) lawyers acting where a conflict arises between two or more current clients (client conflicts).[40]

The ABA, on the other hand, classifies conflicts as follows: (1) lawyers acting where a conflict arises between two or more existing clients (concurrent conflicts); (2) lawyers acting where their own interests are involved (personal interest conflicts); (3) lawyers acting against former clients (former client conflicts); and (4) lawyers practicing in a firm acting when another member of the firm would be prevented in (1) to (3) above (imputation conflicts).[41]

Others have analyzed the topic by reference to the subject matter of the conflict, for example: (1) same-matter conflicts; (2) former-client conflicts; (3) separate-matter conflicts; and (4) fair-dealing conflicts.[42]

Alternatively, conflicts can be classified on a temporal basis, that is to say, according to when the duties of the lawyer arise. One duty may precede the other—for example, where a lawyer represents one client and then takes on another with conflicting interests, in which case the conflict is "successive." On the other hand, the duties may arise concurrently—for example, acting for more than one party in the same transaction, in which case the conflict is "simultaneous."[43]

Some lawyers, especially those in the United Kingdom, have classified conflicts by reference to the subject matter.[44] While this method is commendable, we will adopt a slightly different approach and divide conflicts as follows: (1) current-client conflicts; (2) former-client conflicts; and (3) imputation conflicts.

We believe this distinction offers the best route into the subject, providing as it does a convenient framework for reviewing the U.K. and U.S. responses to conflict situations.

C. Current-Client Conflicts

The U.K. rule is brief and simply states: "You can never act where there is a conflict, or a significant risk of conflict, between you and your *client*."[45] There are two exceptions, however: (1) where there is a client

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40. *See* SOLIC. REG. AUTH., *supra* note 23.

41. Conflicts between current clients and between lawyer and client are generally covered under Rule 1.7; former-client conflicts are addressed in Rule 1.9; and imputation conflicts under both these rules are addressed in Rule 1.10. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, R. 1.9 & R. 1.10.

42. Paul Finn, *Fiduciary Law and the Modern Commercial World*, *in* COMMERCIAL ASPECTS OF TRUSTS AND FIDUCIARY OBLIGATIONS 7, 23–39 (Ewan McKendrick ed., 1992).

43. *See* JOHN GLOVER, COMMERCIAL EQUITY-FIDUCIARY RELATIONSHIPS 201–02 (1995).

44. *See* GRIFFITHS-BAKER, *supra* note 10, at 110.

45. SOLIC. REG. AUTH., *supra* note 23.

conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it; and (2) where there is a client conflict and clients are competing for the same objective (or asset).[46]

Where a lawyer is proposing to act under these exceptions, the following must also apply: the lawyer must explain the relevant issues to the clients; he must have a reasonable belief that the clients understand those issues and risks; all clients must give informed consent in writing to the lawyer acting; the lawyer must be satisfied that it is reasonable to act for all the clients and in their best interests so to do; and the lawyer must be satisfied that the benefits to the clients of acting outweigh the risks.[47]

It is expected that the clients will be "sophisticated users of legal services" if they are competing for the same objective.[48] In such circumstances, no individual lawyer should act, or be responsible for the supervision of work done, for more than one client.[49] The rule makes it abundantly clear that lawyers in England and Wales must never act if there is an "own interest" conflict.

The ABA model rule, at first glance, seems stricter in stating that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[50] The rule goes on to define a concurrent conflict as existing if: "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[51]

The rule then sets out an exception, namely that even where there is a concurrent conflict,

> a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceedings before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.[52]

Interestingly, therefore, in spite of what at first appears to be a much stricter approach in the United States than in the United Kingdom—including the initial prohibition of representation "directly adverse" to a current client, even in unrelated matters—the situation is reversed in one key area. Namely, the ABA has a more liberal approach to allowing clients

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46. *Id.*
47. *Id.* at O(3.6).
48. *Id.* at IB(3.6).
49. *Id.* at O(3.7).
50. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2011). In addition to the general rule governing concurrent conflicts, Rule 1.8 addresses a number of commonly recurring current conflict situations, such as business transactions between lawyers and clients, and provides more specific guidance as to how these conflicts should be resolved. *Id.* at R. 1.8.
51. *Id.* at R. 1.7(a).
52. *Id.* at R. 1.7(b).

to consent to the lawyer acting in a "current conflict" situation. In the United Kingdom, clients must have a substantially common interest or be competing for the same objective (and usually be a sophisticated user of legal services) before they can consent to the same lawyer acting for them. In the United States, however, the position is not so limited, and provided that the lawyer reasonably believes he will be able to provide competent and diligent representation and is not prohibited by law from acting, clients can consent to a much wider range of conflict situations (including where the lawyer himself has a personal conflict).

D. Former-Client Conflicts

Lawyers in the United Kingdom are under a duty to keep the affairs of their clients confidential, but may still act against former clients provided that they are able to obtain informed consent or, if that is not feasible, that effective safeguards (including information barriers) are put in place.[53] In theory, the rule, and its exception, apply equally to both individual lawyers and firms:

> [Y]ou do not act for A in a matter where A has an interest adverse to B, and B is a *client* for whom you hold confidential information which is material to A in that matter, unless the confidential information can be protected by the use of safeguards, and:
>
> (a) you reasonably believe that A is aware of, and understands, the relevant issues and gives informed consent;
>
> (b) either:
>
> (i) B gives informed consent and you agree with B the safeguards to protect B's information; or
>
> (ii) where this is not possible, you put in place effective safeguards including information barriers which comply with the common law; and
>
> (c) it is reasonable in all the circumstances to act for A with such safeguards in place.[54]

It is difficult to imagine, however, a way in which an individual lawyer could ensure "effective safeguards" were in place to allow him to act against a former client. In fact, the notes accompanying this rule indicate that confidential information should be considered at particular risk when two or more firms merge, or when a lawyer leaves one firm and joins another that is acting against one of his former clients.[55] The notes also state:

> The following circumstances may make it difficult to implement effective safeguards and information barriers:
>
> (a) you are a small *firm*;

53. *Solicitors' Code of Conduct 2011, Rule 4: Confidentiality and Disclosure*, SOLIC. REG. AUTH., http://sra.org.uk/solicitors/handbook/code/part2/rule4/content.page (last visited Apr. 21, 2012).

54. *Id.* at O(4.4).

55. *Id.* at Notes (i)(a)–(b).

> (b) the physical structure or layout of the *firm* means that it will be difficult to preserve confidentiality; or
>
> (c) the *clients* are not sophisticated users of legal services.[56]

The size of the firm and the nature of its client base will thus be decisive in determining whether instructions should be accepted against former clients. If the firm is able to erect effective safeguards, and its clients are "sophisticated users" of legal services, it is possible for lawyers to act against former clients without obtaining consent.

In the United States, Model Rule 1.9 states that a "lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."[57] Similarly, a

> lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person;
>
> (2) and about whom the lawyer had acquired information protected by [the rules] that is material to the matter; unless the former client gives informed consent, confirmed in writing.[58]

Obtaining informed consent is essential, therefore, if an individual lawyer wishes to act against a former client in a substantially related matter.

E. Imputation Conflicts

It is when we look at the rules on imputation of current- and former-client conflicts that much greater differences appear. In the United States, virtually all conflicts under Model Rule 1.7 (namely, current-client conflicts) are imputed to other lawyers in the firm regardless of whether the conflict involves confidential information or merely loyalty. Model Rule 1.10 states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the [model rules on conflicts]."[59] Although there are some exceptions for former clients, as we shall see below, there are no exceptions for current clients unless the prohibition is based on a "personal interest" conflict.[60] This is clearly a major problem for global practice in that what is known by one lawyer in the firm is deemed to be known by the whole firm, irrespective of whether what the lawyer knows is truly confidential or whether it would merely assist another client

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56. *Id.* at Notes (ii)(a)–(b).
57. MODEL RULES OF PROF'L CONDUCT R. 1.9(a).
58. *Id.* at R. 1.19(b).
59. *Id.* at R. 1.10(a).
60. *Id.* at R. 1.10(a)(1) (representation prohibited "unless . . . the prohibition is based upon a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm").

somewhere in the firm. No account is taken of the likelihood of such information being passed. For example, in a law firm with offices worldwide and over 2,000 lawyers, how likely is it that an associate in the New York office will have any contact with a lawyer in a different practice area on the other side of the world? In addition, even when confidential information is not at stake, as when one lawyer represents a client on a matter that is directly adverse to another client represented by a different lawyer in the firm on an unrelated matter, the entire firm will be disqualified from the representation unless both clients consent.

The Model Rules are more flexible with respect to the imputation of former-client conflicts, which can be avoided if the disqualified lawyer is timely screened and certain other precautions are taken.[61] Even here, however, Model Rule 1.10 permits the use of non-consensual screening only with respect to those former-client conflicts that arise because of the disqualified lawyer's association with a prior firm.[62] Moreover, not all states have adopted this controversial screening provision.[63]

The United Kingdom's approach to imputation conflicts is far more flexible, regardless of whether the conflict involves current or former conflicts. The fee-earner must personally hold confidential information, so there is no imputation within the firm, and the lawyer is required to disclose only information that is "material," so he may himself proceed with the representation if the information is not expected to be material.[64] Moreover, even if a fee-earner is in possession of "material" information, he or his firm may continue to act provided that the information could be protected by the use of appropriate safeguards. This may even extend to acting without an affected client's consent if it would not be possible to obtain such agreement.[65]

It appears, therefore, that U.S. lawyers have only one competitive advantage over their U.K. counterparts in relation to conflicts of interest. The ABA permits clients to give informed consent to "current client" conflicts in every area except when there are interests at stake other than those of the clients themselves, such as the requirement of courts to have opposing litigants separately represented.[66] At present, U.K. clients can give informed consent only in limited situations.

In all other respects, U.K. law firms could be said to have several competitive advantages over U.S. law firms. The United Kingdom does not

61. *Id.* at R. 1.10(a)(2) (requiring, in addition to timely screening, that the lawyer be apportioned no part of the fee from the current client, that written notice is promptly given to the former client, and that certification of compliance with these requirements is provided upon the former client's written request).

62. *Id.*

63. *See State Adoption of Lateral Screening Rule*, ABA (Jan. 26, 2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.authcheckdam.pdf.

64. *See* SOLIC. REG. AUTH., *supra* note 53.

65. Again, in such cases, the clients would be expected to be sophisticated users of legal services.

66. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3).

define conflict of interest to include "directly adverse" conflicts when the client as to whom the representation is adverse is not being represented by the lawyer or the law firm in that particular matter.[67] In addition, conflicts are not imputed from one lawyer to another (even with respect to current-client conflicts), and firms may in certain circumstances act against former clients without gaining informed consent.

Such differences may prove decisive in a global environment. Evidence already exists to show that conflicts are often used tactically by clients to disqualify particular U.S. law firms from acting.[68] "Taint-shopping," as it became known, was a growing problem in the United Kingdom before the latest rules on conflicts of interest were introduced.[69] On the other hand, given the cross-jurisdictional nature of global legal practice and the complex rules applying in different countries, it can reasonably be argued that enforcing conflict rules may not be an easy task for regulators or clients.

III. POLICING GLOBAL CONFLICTS

Conflict of interest rules pose real-life problems for global law firms and their lawyers only if there is a realistic threat that the rules will be enforced in one or more of the relevant jurisdictions. Enforcement can be direct, as in disciplinary actions. But it can also be indirect, as in lawsuits seeking to stop a law firm from representing or continuing to represent a client, motions to disqualify a lawyer from representing a client in a pending litigation, or lawsuits to recover monetary damages for a lawyer's breach of fiduciary duty or legal malpractice.[70]

We are unaware of any disciplinary actions against global lawyers based on alleged violations of a jurisdiction's conflict of interest rule, and we believe that any such actions will be extremely rare. This is because large, corporate clients rarely file complaints with disciplinary authorities, relying instead on either their market power or their ability to pursue other, indirect avenues of relief.[71]

As for the potential enforcement of conflicts rules through indirect means, large corporate clients occasionally seek injunctions in the United Kingdom, although not nearly as frequently as U.S. companies seek

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67. *See* SOLIC. REG. AUTH., *supra* note 23.

68. *See* Marcia Chambers, *Conflicts as Weapons*, NAT'L L.J., Sept. 19, 1994, at 14 ("A trend that seems to be emerging . . . is the apparent purposeful manipulation of the conflicts issue in order to keep a law firm from representing a specific client. A large corporation may spread insignificant business to law firms all over the town, knowing that at some point a case will come up that will conflict them all out."); *see also* Kenric Kattner & Keith D. Spickelmier, *Client, Attorney Mobility Creates Growing Conflict of Interest Concerns*, 53 TEX. B.J. 406 (1990); Victoria Slind-Flor, *Client–Conflicts Patrols March On*, NAT'L L.J., Mar. 20, 1992, at 1.

69. GRIFFITHS-BAKER, *supra* note 10, at 99.

70. *E.g.*, Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 54, 54 (1997).

71. *See, e.g.*, Moore, *supra* note 10, at 532, 541; Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 7–8 (1991).

disqualification in U.S. lawsuits.[72] We are unaware of any enforcement action to date in either the United Kingdom or the United States that addresses the differences between U.K. and U.S. conflicts rules,[73] but we believe it is only a matter of time before such an action is brought (probably in the United States, where disqualification motions are quite common). We also anticipate that at some point a large, corporate client will sue a global law firm for damages based on either breach of fiduciary duty or legal malpractice (also most likely in the United States), arising from allegations of impermissible conflicts,[74] and the judge will need to determine which jurisdiction's conflict of interest rules apply.[75]

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72. *S*ee Moore, *supra* note 10, at 532. In the United Kingdom, courts deciding injunction lawsuits typically rely on the common law, rather than on disciplinary rules. *Id.* at 530. In the United States, courts rely more on disciplinary rules, although they are not strictly bound to follow such rules and often depart from them in certain situations, such as when the complaining client has delayed unduly in bringing the matter to the court's attention. *See generally* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71 (1996). Notably, some courts have permitted the use of screening devices to avoid disqualification, even when the jurisdiction's disciplinary rules do not provide for such screening. *See, e.g.*, HAZARD ET AL, *supra* note 28, § 14.9, at 14–34 (2010 Supp.).

73. There are a few U.S. disqualification cases addressing potential differences between conflict of interest rules in the United States and in foreign jurisdictions, and indicating that a U.S. court is likely to apply U.S. rules without regard to the potentially significant differences that may exist in other jurisdictions. *See, e.g.*, Image Technical Servs., Inc. v. Eastman Kodak Co., 820 F. Supp. 1212, 1218 (N.D. Cal. 1993) (disqualifying international law firm from representing client in California based on the conduct of lawyers in the Hong Kong office: applying California rules and finding that lawyers engaged in international practice are held to the same standards as lawyers engaged in domestic practice); *In re* Mortg. & Realty Trust, 195 B.R. 740, 747 (Bankr. C.D. Cal. 1996) (disqualifying all lawyers in U.S. and non-U.S. offices of an international law firm, applying the ethics rules of California, despite recognition of realities of law firms with national and international practices, "including foreign countries, whose standards for professional conduct may vary substantially" from those in U.S. jurisdictions). These two decisions are discussed in Robert M. Jarvis, *Cross-Border Legal Practice and Ethics Rule 4-8.5: Why Greater Guidance Is Needed*, 72 FLA. B.J. 59 (1998). One of the authors of this Article, Professor Nancy J. Moore, also heard Steve Krane, the recently deceased former General Counsel of the Proskauer Rose law firm, discuss a case in which Proskauer was disqualified from representing a client in a U.S. lawsuit due to a conflict arising in Proskauer's Paris office. According to Professor Moore, Mr. Krane said that the conflict went undetected when the French lawyers in the Paris office failed to recognize a "directly adverse" conflict under Rule 1.7 because such conflicts do not exist under French law. We have been unable to find any published reference to this case.

74. *See generally* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE ch. 15 (2011 ed.) (discussing the lawyer's fiduciary obligations as the basis for an action in damages; also referencing other remedies for violation of fiduciary obligations, including conflicts of interest).

75. For purposes of disqualification, courts may apply the law of the forum, regardless of where the alleged violation occurred. *See, e.g.*, *In re Mortg. & Realty Trust*, 195 B.R. at 747; *Image Technical Servs., Inc.*, 820 F. Supp. at 1215. In other contexts, however, courts are more likely to engage in a more complex choice-of-law analysis. *See, e.g.*, Daynard v. Ness, 178 F. Supp. 2d 9 (D. Mass. 2001) (involving law professor licensed in New York and teaching in Massachusetts who brought an action in Massachusetts seeking to enforce an oral fee-splitting agreement entered into in Illinois, by lawyers from Mississippi and South Carolina, with respect to multiple lawsuits filed in different jurisdictions on behalf of certain state governments against tobacco companies); Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at*

In addition to the substantive differences between conflict of interest rules in the United Kingdom and the United States, these jurisdictions may differ in their choice-of-law rules. In civil lawsuits referencing but not directly enforcing disciplinary rules, a court might well apply choice-of-law principles that govern other, similar civil litigation, such as the choice-of-law rules that apply to disputes concerning contracts or torts.[76] This approach has been taken in some U.S. cases,[77] although there are also indications that courts in such actions may rely on professional conduct rules, not only for substantive guidance in determining whether a law firm should be disqualified or whether its lawyers have breached their fiduciary duties to a client or committed legal malpractice, but also for whatever guidance such rules provide on the appropriate choice-of-law rule.[78]

If and when disciplinary authorities or courts look to professional conduct rules for guidance in determining which choice-of-law principles to apply, either in disciplinary or in non-disciplinary proceedings, they will find that the professional conduct choice-of-law rules differ significantly in the United Kingdom and the United States. In the United Kingdom, solicitors are directed to comply with the SRA's conflict of interest rules in their overseas practices as well as in their domestic ones.[79] Given that the SRA drafters were well aware that solicitors practicing outside the United Kingdom may also be subject to a host jurisdiction's conflict of interest rules,[80] the failure to provide an exception for compliance with the host

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All?, 36 S. TEX. L. REV. 715, 771–73 (1995) (discussing choice-of-law analysis in several decisions concerning conflicting contingent fee rules); Nancy J. Moore, *Choice of Law for Professional Responsibility Issues in Aggregate Litigation*, 14 ROGER WILLIAMS U. L. REV. 73, 85, 91–93 (2009) (discussing complex choice-of-law analysis in actions such as *Daynard*).

76. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. e ("In general, traditional choice-of-law principles, such as those set out in the Restatement Second of Conflict of Laws, have governed questions of choice of law in nondisciplinary litigation involving lawyers."); Vagts, *supra* note 5, at 689–96 (discussing application of general choice-of-law principles to legal malpractice actions, based on rules applicable to torts and contracts).

77. *See, e.g.*, Bernick v. Frost, 510 A.2d 56 (N.J. Super. Ct. App. Div. 1986). At the time that *Bernick* was decided, the ABA Model Rules did not contain a specific choice-of-law rule, even for disciplinary proceedings, but rather merely provided in comments that "principles of conflict of laws" and "applicable rules of choice of law" may apply when lawyers are licensed in two or more jurisdictions that impose conflicting obligations. MODEL RULES OF PROF'L CONDUCT R. 8.5 cmts. 2–3 (1983); *see also* Ackerman v. Levine, 788 F.2d 830 (2d Cir. 1986) (refusing to enforce a German lawyer's fee computed on statutory basis, when no work had been done, because it was in violation of U.S. public policy); Daly, *supra* note 75, at 750–51.

78. *See, e.g.*, *Daynard*, 178 F. Supp. 2d at 18–19 (looking to choice-of-law disciplinary rules in five relevant jurisdictions to determine the ethical propriety of a fee-splitting agreement); *see also* Moore, *supra* note 75, at 91–93 (discussing choice-of-law discussion in *Daynard* and arguing that court mistakenly concluded that the choice-of-law rules in the five relevant jurisdictions were the same).

79. *See* SOLIC. REG. AUTH., *supra* note 53.

80. Each chapter within the 2011 SRA Code of Conduct has its own outcomes for outside counsel, in-house practice, and overseas practice. In contrast to the chapter on conflicts of interest, some chapters provide that a solicitor in an overseas practice need not comply with the outcomes governing outside counsel within the United Kingdom,

jurisdiction's rules for conflicts of interest suggests that the SRA drafters were consciously adopting what has been described as the "double deontology" approach.[81] This approach, which may be prevalent in Europe—that is, outside of cross-border activities within Europe—directs lawyers to comply with the rules of *both* the home and the host country.[82] This may be possible when the rules do not directly conflict,[83] although the

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particularly when compliance would violate local rules or customs. *See, e.g.*, *id.* ch. 1 (Client Care) at OP (1.1) ("[Y]ou [must] properly account to your clients for any financial benefit you receive as a result of your instructions unless it is the prevailing custom of your local jurisdiction to deal with financial benefits in a different way."); *see also* SOLICITORS' CODE OF CONDUCT 2007 R. 15.01(2)(c) (providing with regard to "core duties" under Rule 1 that "if compliance with any provision of these rules would result in your breaching local law, you may disregard that provision to the extent necessary to comply with that local law").

81. *See, e.g.*, MAYA GOLDSTEIN BOLOCAN, PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE 93 (2002) ("The term *double deontology* often is used, particularly in Europe, to express the idea that a lawyer engaged in transnational legal practice may be subject to the ethics rules and discipline in both the home jurisdiction and the host jurisdiction. If a lawyer is subject to two different sets of ethics rules and discipline, the possibility exists that the rules may not be identical.").

82. *See, e.g.*, Directive 98/5/EC, of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other than that in Which the Qualification Was Obtained, 1998 O.J. (L 77) 36, art. (6): With respect to the practice "of [a] lawyer on a permanent basis in a Member State other than that in which the qualification was obtained," the Directive provides:

> Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory.

The Directive further provides that the home state should have an opportunity to offer comments before the host state disciplines a lawyer. *Id.*; *see also* INT'L BAR ASS'N, *supra* note 6, cmt. 1.3 ("Every lawyer is called upon to observe applicable rules of professional conduct in both home and host jurisdictions ('Double Deontology') when engaging in the practice of law outside the jurisdiction in which the lawyer is admitted to practice."); INT'L BAR ASS'N, INTERNATIONAL CODE OF ETHICS R. 1 (1988), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=A9AB05AA-8B69-4BF2-B52C-97E1CF774A1B ("A lawyer undertaking professional work in a jurisdiction where he is not a full member shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted. He shall also observe all ethical standards which apply to lawyers where he is working."). The Code of Conduct for European Lawyers represents an attempt "to mitigate the difficulties which result from the application of 'double deontology'" by providing that, with respect to cross-border activities within the European Union and the European Economic Area, the European lawyer will be bound by the provisions of this Code. COUNCIL OF BARS & LAW SOC'YS OF EUR., CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS 1.3.1–1.5 (2010), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf [hereinafter CCBE Code of Conduct]. Individual provisions of the Code, however, often direct the lawyer to apply with the provisions of both the host state and the home state when those provisions are not in direct conflict, thus requiring the lawyer to comply with the stricter of the two rules. *E.g.*, *id.* at 2.8 (to the extent permitted by both the host and home state, the lawyer may limit liabilities toward a client). The CCBE Code of Conduct has been widely adopted within Europe. *See Adoption of the CCBE Code of Conduct 2006*, CCBE (Feb. 17, 2011), http://www.ccbe.org/fileadmin/user_upload/NTCdocument/CoC_adoption_for_web1_1298021202.pdf.

83. *See, e.g.*, CCBE CODE OF CONDUCT, *supra* note 82, at 1.3.2 ("After the rules in this Code have been adopted as enforceable rules in relation to a lawyer's cross-border activities,

results in such a case might not be satisfactory, for reasons we discuss shortly.[84] Of course, it will not be possible to comply with both sets of rules when they are in direct conflict, as when one jurisdiction requires conduct that the other jurisdiction forbids,[85] in which case "double deontology" rules may not provide further guidance. The lack of such guidance for the SRA's conflict of interest rules suggests that the SRA believes that lawyers can typically comply with two sets of conflicts rules by adopting the most conservative approaches under both sets. It is at least theoretically possible that there may be some instances of direct conflict of such rules, but these instances are likely to be rare.

State courts in the United States do not take such a "double deontology" approach. Rather, their choice-of-law rules direct lawyers to comply with the rules of a single state. But individual states have adopted choice-of-law rules that differ significantly in the means of identifying *which* jurisdiction's ethics rules should apply. Some states continue to follow the original Model Rules approach in Rule 8.5, in which a disciplinary authority was directed to follow the rules of the admitting jurisdiction unless the lawyer was either licensed in two jurisdictions, or practiced law outside an admitting jurisdiction, in which case general choice-of-law principles would apply.[86] Other states follow the approach adopted by the ABA in its 1993 amendments to Rule 8.5: for conduct outside of litigation, the rules of the jurisdiction in which the lawyer is licensed apply, unless the lawyer is licensed in more than one jurisdiction, in which case the rules that apply are the "the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant affect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction" are to be applied.[87] Still other jurisdictions have adopted the ABA's 2002 amendments to Rule 8.5. Under this rule, for matters not in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the lawyer's conduct occurred apply, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.[88]

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the lawyer will remain bound to observe the rules of the Bar or Law Society to which he or she belongs to the extent that they are consistent with the rules in this Code.").

84. *See infra* note 94 and accompanying text.

85. *See, e.g.*, BOLOCAN, *supra* note 81, at 35 (discussing the conflict between U.S. rules requiring the lawyer's duty to disclose information to clients and lawyer's duty of confidentiality in most European countries, which requires lawyers to keep confidential communications between lawyers, prohibiting disclosure even to the client); *see also* Catherine Rogers, *Cross-Border Bankruptcy as a Model for the Regulation of International Attorneys*, *in* MAKING TRANSNATIONAL LAW WORK IN A GLOBAL ECONOMY: ESSAYS IN HONOR OF DETLEV VAGTS 635 (2010) (providing additional examples of when a lawyer may be "mandated to perform certain conduct expressly prohibited by the rules of another jurisdiction").

86. MODEL RULES OF PROF'L CONDUCT R. 8.5 cmts. 2–3 (1983). Alabama, Hawaii, and Kansas continue to take this approach.

87. MODEL RULES OF PROF'L CONDUCT R. 8.5(2) (1993). The District of Columbia and New York take this approach.

88. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2) (2002). As of October 21, 2009, thirty-one states had adopted the current version of Rule 8.5(b)(2) without significant

Neither the 1993 rule nor the 2002 rule provide any guidance for determining where the "predominant effect" of a lawyer's conduct will occur; however, the 2002 rule provides 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."[89] Unfortunately, this "safe harbor" approach provides no protection for the lawyer in non-disciplinary actions, in which the court must apply the law of one jurisdiction or another.[90]

Given that the United Kingdom generally takes a "double deontology" approach with respect to conflicts of interest,[91] global lawyers engaged in a representation with significant U.S. and U.K. contacts must comply with *both* sets of conflict of interest rules in order to avoid a possible enforcement action in either jurisdiction. This would require global lawyers and their law firms to decline significantly more engagements than they would need to decline in either jurisdiction alone. For example, they would need to define conflicts as broadly as U.S. jurisdictions typically do, including representations directly adverse to a current client in unrelated matters.[92] At the same time, they would be precluded from proceeding with informed consent in a number of situations permitted by the U.S. (but not the U.K.) rules, including matters in which multiple clients do not have "a substantially common interest" or are not "competing for the same objective," as well as personal interest conflicts.[93]

Even in the absence of an actual conflict between the two sets of rules, relying on "double deontology" fails to provide a satisfactory solution for global firms and global lawyers. As a practical matter, it may be unfairly burdensome to require global law firms to comply with the requirements of two separate regimes when the results exceed the prohibitions of either regime alone. Practicalities aside, it is also conceptually objectionable to always favor the stricter of two rules; such an approach completely ignores, and thus devalues, the legitimate interests of the regime that takes the more permissive approach.[94] This effect is even more problematic when one considers that what lawyers would have to do to avoid liability goes beyond

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modification. *See Variations of the ABA Model Rules of Professional Conduct Rule 8.5 Comment [7]*, ABA (Oct. 21, 2009), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/8_5_cmt_7.authcheckdam.pdf.

89. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2) (2002).

90. *See* Moore, *supra* note 75, at 83–84.

91. *See supra* note 76 and accompanying text.

92. *See supra* notes 37–63 and accompanying text.

93. *See id*.

94. For example, when the District of Columbia adopted a rule permitting non-lawyer partners, most national firms declined to make non-lawyer partners in their D.C. offices because of uncertainty as to how this would affect their practices outside of the District. The result was to give short shrift to the District of Columbia's interest in permitting its lawyers to practice in a manner that the District of Columbia believed would offer significant benefits to D.C. clients, as well as to the lawyers and law firms. *See* Daly, *supra* note 75, at 767 n.208. In other words, lawyers admitted both in the District of Columbia and in other bars could avoid conflict by not taking advantage of the D.C. rule but "their acquiescence would, as a practical matter, infringe on the autonomy of the District of Columbia bar to fashion its rules as it chooses. It would be a captive of the other jurisdictions." *Id.*

the prohibitions enacted by either regime alone—a result that is not only intolerable for global law firms, but also difficult to justify as a client protection measure.

IV. REFORM PROPOSALS

The two competing approaches to addressing the uncertainties faced by global lawyers who are potentially subject to different regulatory regimes have been described as "harmonisation" and "territorialism."[95] Under harmonization, the differences between regulatory regimes disappear (or are minimized), either because a single super-regulator displaces the competing regimes or because the regimes themselves voluntarily eliminate significant differences between their rules.[96] "Territorialism," on the other hand, acknowledges the reality—perhaps even the desirability—of conflicting substantive rules, and focuses instead on developing clear (or clearer) choice-of-law rules.[97]

As for a potential super-regulator, someday a supra-national body may emerge that will establish a single set of "world-wide prescriptions" for lawyers engaged in multinational transactions; however, such a prospect is nowhere in sight today.[98] At least one international tribunal has established professional rules for all lawyers appearing before it, whatever their nationality.[99] Not all tribunals have done so, however,[100] and outside of tribunals, no supra-national authorities presently exist that have the authority or the will to promulgate a single set of rules designed to govern multinational lawyers.

In the short-term, therefore, it is more realistic to focus on voluntary cooperation among different regulatory regimes. Because Anglo-American law firms have dominated the commercial market for global lawyering,[101] it makes sense to look first to the United Kingdom and the United States and ask whether their conflict of interest rules might be harmonized to a greater extent than they are today. We propose two areas for potential reform—one on the part of the U.K. regulators and one on the part of the U.S. regulators.

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95. *See* Rogers, *supra* note 85, at 638–40.

96. The adoption of the CCBE Code of Conduct reflects a blend of these two approaches to harmonization. The CCBE proposed a single code, which was then voluntarily adopted by the individual European states, but only for purposes of cross-border activities within Europe. *See supra* note 83 and accompanying text.

97. *See* Rogers, *supra* note 85, at 639 (territorialism proponents promote "greater reciprocal respect for conflicting national rules and clearer choice-of-law rules").

98. *See* Vagts, *supra* note 5, at 677–78; *see also* Rogers, *supra* note 85, at 638–39 (proponents of territorialism "contend that . . . universalism is impossible").

99. *See* Rogers, *supra* note 5, at 1077–79 (describing adoption of ICTY Code of Professional Conduct).

100. *Id.* at 1057.

101. *See, e.g.*, Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT'L L. 931, 934 (2001). Anglo-American law firms have a competitive advantage as a result of their experience in mergers, acquisitions and complex transnational transactions, as well as the dominance of Anglo-American capital markets and financial institutions, and the dominance of U.S. and English law in regulating international financial transactions. *Id.*

Before turning to these two reforms, however, we first note that, as a practical matter, it may be exceedingly difficult to harmonize U.S. rules with those of other countries so long as U.S. lawyers are governed by different state conflict of interest rules.[102] Fortunately, the conflict of interest rules among the fifty states differ less than some other rules, such as rules governing confidentiality. Nevertheless, there are important differences, such as a law firm's ability to employ screening devices in order to avoid having the conflict of one lawyer imputed to the entire firm.[103] Although we do not propose that U.S. lawyers should be federally regulated,[104] we do suggest that it may be time for Congress to impose national standards in selective areas, such as conflict of interest rules for lawyers engaged in multistate or multinational practice. Any such national legislation should follow the ABA Model Rules, with the proposed change we discuss below.

For the United Kingdom, the most important effort at harmonization would be to relax the rule prohibiting lawyers from proceeding with conflicted representation, even with their clients' informed consent, which is currently permitted only in limited situations.[105] U.K. regulators should instead adopt the U.S. approach, which permits clients to give informed consent to conflicts whenever it is reasonable to expect that the lawyer can provide reasonably competent and diligent representation.[106]

For the United States, the most important effort at harmonization would be to relax the rule requiring the imputation of the conflicts of one lawyer to

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102. *See, e.g.*, Judith L. Maute, *Global Continental Shifts to New Governance Paradigm in Lawyer Regulation and Consumer Protection: Riding the Wave*, *reprinted in* ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION 11 (Francesca Bartlett et al. eds., 2011) (comparing "progressive reforms in the United Kingdom with the balkanized state-based lawyer regulation in the United States"). According to Maute, the "balkanized" regime in the United States disadvantages U.S. lawyers in the international marketplace and "risks criticism as arcane, self-interested and disserving the public interest." *Id.* at 38.

103. For a chart comparing state rules on the screening of lateral lawyers to avoid imputation of conflicts, see *State Adoption of Lateral Screening Rule*, ABA (Jan. 26, 2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.authcheckdam.pdf.

104. For a proposal to nationalize U.S. legal ethics rules through federalization, see Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 345 (1994). For a more recent discussion of the disadvantages of this proposal, see Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489, 493–94 (2011) (rejecting the proposal to federalize U.S. legal ethics rule and proposing instead an "open-border national jurisdiction for purposes of lawyer's authorized law practice").

105. *See supra* notes 40–68 and accompanying text.

106. Of course, conflicts of interest cannot be waived when there are other interests at stake, such as if a tribunal has an interest in having opposing litigants represented by different law firms. *See supra* notes 40–68 and accompanying text. This is similar to the approach taken in the United Kingdom and in other Commonwealth countries, including Canada, New Zealand, and Australia. *See* GRIFFITHS-BAKER, *supra* note 10, at 45–46, 81–108. The United Kingdom's current position is closer to the position of most European countries, as exemplified in the CCBE Code of Conduct, which does not contain any provision for client consent to a conflict. *See* BOLOCAN, *supra* note 81, at 42–44 (describing both the CCBE Code of Conduct and individual approaches of several European countries).

all lawyers in the law firm, which cannot currently be avoided except in very limited situations.[107] It is not necessary that the United States go as far as the United Kingdom, which does not generally impute either current or former client conflicts;[108] rather, it would be sufficient to permit law firms to avoid imputation—for both current and former client conflicts—when the different representations involve lawyers in physically separate offices in separate states or separate countries, so long as the law firms have implemented effective screening devices.[109] This change would not eliminate imputation when lawyers in different offices are personally involved in the conflicted representations, but it would go a long way to reduce the current uncertainty in multinational representations.

We will not attempt to argue in any detail as to why these two rule changes are reasonable. It will be sufficient for our purposes: (1) to suggest that these are the two rule changes that would do the most to harmonize the two sets of conflict of interest rules for global lawyers; and (2) to point out that both the United Kingdom and the United States have legal and regulatory regimes that are advanced and similar enough that, history and custom notwithstanding, it makes sense to say that what is done in either country[110] should constitute a reasonable approach to lawyer regulation. In other words, in the absence of regulatory overlap, each regime might be reasonable in preferring its own current approach over the approach of the other; however, given the difficulties presented by regulatory overlap, it should be reasonable for each regime to take an important step toward harmonization, as long as it does not adversely impact other aspects of that regulatory regime.

Given that we are advocating loosening current restrictions, it will be natural for both sets of regulators to object on the ground that client protection demands a more restrictive approach, particularly when the clients are individuals and cannot be expected to protect themselves against the risks of conflicted representation. This is a reasonable objection, and the solution may be to limit the relaxation of these rules to situations involving either "sophisticated clients" or clients represented by an independent lawyer, including in-house counsel. This is the method we take in our proposal to reform the "territorial" approach via choice-of-law rules, and we discuss the details and the merits of that proposal in that part of the Article.[111] For now, we note simply that this approach fits easily

107. *See supra* notes 59–63 and accompanying text.

108. *See supra* notes 40–68 and accompanying text.

109. Under the 2011 SRA Code of Conduct, neither current nor former client conflicts are imputed to other lawyers; therefore, no screening is formally required. *See supra* notes 40–56 and accompanying text. However, law firms are required to "have effective systems and controls in place to enable [them] to identify risks to client confidentiality and to mitigate those risks," which may require screens as a practical matter. SOLICITORS' CODE OF CONDUCT 2011 ch.4 at O(4.5).

110. We acknowledge that the screening proposal for the United States goes beyond what is currently in place under the 2011 SRA Code of Conduct; however, it is not inconsistent with common law decisions in the United Kingdom.

111. *See infra* notes 117–39 and accompanying text.

with the proposed reform to the U.K. rules, which focuses on the ability of clients to render informed consent to a conflict:[112] sophisticated clients and clients represented by an independent lawyer are clearly more capable of rendering truly informed consent.[113] This approach does not fit as readily with the proposed reform to the U.S. rules, in which client consent to screening devices is not required. Such a reform could, however, be limited to conflicts involving either sophisticated clients or clients represented by an independent lawyer[114] and, in addition, could require the law firm to advise the clients of the existence of both the conflict and the implementation of screening, which would then give the clients the option of taking their business to a law firm which is not similarly conflicted.[115]

There are a host of reasons why neither the United Kingdom nor the United States is likely to make these complementary efforts toward harmonization. Among them is the practical concern that, if the motivation for reform is to harmonize the two sets of rules, there would need to be some assurance that both regimes will in fact implement the change designed to accommodate the other regime. Given the current "balkanization" of regulatory regimes in the United States,[116] it will be extraordinarily difficult to implement changes that apply to U.S. lawyers as a whole. For that reason, it may be more realistic to focus on "territorial" changes to conflict of interest rules, in which case our reform proposals make sense on their own for either regulator and do not require reciprocal change on the part of the other regulator.

Prompted in part by one of several "Proposals of Law Firm General Counsel for Future Regulation of Relationships Between Law Firms and Sophisticated Clients,"[117] the ABA Commission on Ethics 20/20[118] has

112. Under ABA Model Rule 1.7(b), which is the basis for the U.K. reform proposal, a conflict is not consentable unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and each client renders "informed consent." The capacity of particular clients both to understand the significance of a conflict and to protect himself or herself in light of limitations on the scope of the representation by a common lawyer is critical in determining both whether the conflict is consentable and whether the client has given informed consent. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2011). In determining whether consent to a future conflict is effective, "[t]he effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails": consent given by an "experienced user of legal services," particularly if that client is "independently represented by other counsel in giving consent" is more likely to be effective. *Id.*

113. *See, e.g.*, *supra* note 112 (describing circumstances in which client consent to a future conflict is likely to be upheld).

114. *See, e.g.*, ABA COMM'N ON ETHICS 20/20, PROPOSALS OF LAW FIRM GENERAL COUNSEL FOR FUTURE REGULATION OF RELATIONSHIPS BETWEEN LAW FIRMS AND SOPHISTICATED CLIENTS 31–39 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110707_mjp_comment_compilation.authcheckdam.pdf.

115. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(2)(ii)–(iii) & Comment [9]–[10] (notification and certification requirements for implementation of non-consensual screening of certain former client conflicts).

116. *See, e.g.*, Maute, *supra* note 102.

117. ABA COMM'N ON ETHICS 20/20, *supra* note 114.

published for comment an initial proposal to permit lawyers and clients to "agree that their relationship concerning the matter will be governed by the conflict rules of a specific United States or foreign jurisdiction, which may be other than the jurisdiction whose rules would apply under [the current choice-of-law rule]."[119] The Commission proposes to make this change in a new comment to Rule 1.7, which permits such agreements only under the following conditions:

> The client gives written informed consent to the agreement, confirmed in writing; the lawyer advises the client in writing of the desirability of seeking independent counsel regarding the agreement; the client has a reasonable opportunity to consult with independent counsel regarding the agreement; the selected jurisdiction must be one in which the predominant effect of, or substantial work relating to, the matter is reasonably expected to occur; and the agreement may not result in the application of a conflict rule to which informed client consent is not permitted under the rules of the jurisdiction whose rules would otherwise govern the matter . . . . Client consent under this paragraph is more likely to be effective if the client is an experienced user of legal services.[120]

We agree with the concept of permitting lawyers and clients to agree on which set of conflict of interest rules will govern their relationship, although we have reservations about some of the specific details of the proposal.

Permitting lawyers and clients to agree on which of several jurisdictions' ethics rules will apply cannot work for all or even most aspects of a particular representation. This is because many of the ethics rules are designed for the protection of persons other than the client.[121] The conflict of interest rules, however, are primarily concerned with protecting client interests;[122] therefore, if choice-of-law agreements are to be permitted at all, these would appear to be among the most appropriate rules for inclusion. So long as the jurisdiction chosen has a substantial relationship to the proposed representation,[123] it makes sense to allow the parties to

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118. For information on this Commission, see *ABA Commission on Ethics 20/20*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Apr. 21, 2012).

119. ABA COMM'N ON ETHICS 20/20, INITIAL DRAFT PROPOSAL—CHOICE OF LAW AND CONFLICTS OF INTEREST (Sept. 7, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_1_7_choice_of_law_conflicts_initial_resolution_and_report_for_comment.authcheckdam.pdf.

120. *Id.*

121. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(3) (2011) (permitting disclosures adverse to client to prevent death or serious bodily harm or to prevent, rectify, or mitigate substantial economic harm to a person other than the client).

122. *But see, e.g.*, *id.* at R. 1.7(b)(3) & cmt. 17 (prohibiting consent to a conflict when lawyer or firm represents both sides of a contested proceeding before a tribunal because of "the institutional interest in vigorous development of each client's position").

123. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971) (providing that the chosen state must have a "substantial relationship" to the parties or the transaction or that there is some other "reasonable basis for the parties' choice"). In some situations, it may be reasonable for the parties to choose a jurisdiction that does not have a substantial relationship to the representation. *See, e.g.*, *id.* at cmt. f ("[W]hen contracting in

eliminate or reduce the uncertainty otherwise inherent in multistate or multinational representations.[124]

Substantively, we have several objections to the specific proposal from the Ethics 20/20 Commission.[125] First, we question whether it should apply to all representations, including individual clients who are neither sophisticated nor experienced in using lawyers, so long as they are given the *opportunity* to consult with independent counsel.[126] Although such clients are less likely to be found to have given informed consent, they are also less likely to resist the application of any such agreement, thereby increasing the risk that unscrupulous lawyers will successfully overreach by choosing the law of a jurisdiction that the lawyer knows (but the client does not) is far friendlier to the lawyer than to the client. We would rather have the proposal limited to so-called "sophisticated clients"[127]—or as the Ethics 20/20 proposal describes them, "experienced users of legal services"—or to clients actually represented by an independent lawyer[128] in making the agreement.

Second, we prefer to limit the permissibility of such agreements to those clients who choose to be represented by independent counsel, including in-house counsel,[129] in making the agreement. Defining terms such as "sophisticated clients"[130] or even "experienced users of legal services" will

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countries whose legal systems are strange to them, as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed.").

124. Thus, courts generally enforce choice-of-law clauses in contracts. *See, e.g.*, Michael S. Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1259 (2011).

125. A non-substantive objection we have to the proposal is that the provision permitting certain choice-of-law agreements should be located in the black letter text and not in a comment. That text should appear in Model Rule 8.5(b), which is the general choice-of-law rule for disciplinary purposes. A comment to Model Rule 1.7 could alert lawyers to the possibility of eliminating uncertainty through such a choice-of-law agreement, cross-referencing to the relevant provision in Model Rule 8.5(b).

126. *See supra* note 120 and accompanying text.

127. *See* ABA COMM'N ON ETHICS 20/20, *supra* note 114.

128. *Cf.* Richard W. Painter, *Advance Wavier of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 312–13 (2000) (proposing a bright line rule of "separate representation" with respect to the efficacy of advance conflicts waiver: "Courts thus should generally enforce a waiver if it is unambiguous and the client is independently represented by another lawyer, including in-house counsel, at the time the waiver is given").

129. We use the term "independent lawyer" to indicate that the lawyer representing the client in making the agreement be independent of the lawyer who will be a party to the agreement. *See id.* at 327 ("[A]dvance waivers should be uniformly enforced, but only when the client is independently represented at the time of the waiver by a lawyer, including in-house counsel, who is unaffiliated with the lawyer receiving the consent."). As Painter suggests, representation by a corporate client's in-house counsel is clearly sufficient to satisfy this requirement. *See id.*

130. *See, e.g.*, Lauren N. Morgan, *Finding Their Niche: Advance Conflict Waivers Facilitate Industry-Based Lawyering*, 21 GEO. J. LEGAL ETHICS 963, 985 (2008) (discussing uncertainty concerning the determination of who is a "sophisticated client"). A New York ethics committee defines a "sophisticated client" as "one that readily appreciates the implications of conflicts and waivers. This would include, but not be limited to, clients that regularly engage outside counsel for legal services, or that have access to independent or inside counsel for advice on conflicts." Ass'n of the Bar of the City of New York Comm. on

be difficult; as a result, any definition will inevitably be either under- or over-inclusive. Limiting the proposal to clients actually represented by independent counsel avoids these difficulties; moreover, this is a technique used elsewhere in the ABA Model Rules.[131] Most multinational companies have in-house counsel, and if they do, it will not be burdensome to insist that such counsel participate in making the agreement. Of course, it will also be sufficient for such companies to retain outside counsel, so long as the lawyer involved is independent of the lawyer on the other side of the agreement.

Avoiding the difficulties associated with defining "sophisticated clients" or "experienced users of legal services" is not the only reason to prefer an actual representation requirement. As Richard Painter has argued, clients represented by independent counsel are more likely to be adequately informed in making a choice-of-law agreement.[132] In addition, regardless of whether the client fully understands the implications of the agreement, clients who choose to act through an agent such as a lawyer are legally bound to agreements entered into by the agent, so long as the agent is acting within the scope of his or her actual or apparent authority.[133] This is because other parties who deal with such agents are entitled to rely on their authority.[134] Thus, lawyers entering into agreements with clients represented by an independent lawyer should be entitled to rely on such

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Prof'l & Judicial Ethics, Formal Op. 2006-1, 2006 WL 1662501 at *1 n.1 (2006). Of course, clients that regularly engage outside counsel do not necessarily have experience in granting conflict waivers, particularly if they do not have in-house counsel; moreover, such a definition is far from the bright line test that is preferable from a practical perspective. *See* Painter, *supra* note 128, at 309. The Law Firm General Counsel's proposal concurs that "bright line criteria" are very important and proposes a series of "safe harbor" tests for determining who is a sophisticated client, including: publicly traded companies, frequent users of legal services with a reasonable opportunity to obtain the advice of independent counsel; clients with a balance sheet with assets over $25 million; an annual budget for legal services over $300,000; a client that operates in at least five jurisdictions; or a governmental entity with the ability to give conflicts waivers." *See* ABA COMM'N ON ETHICS 20/20, *supra* note 114, at 2–3.

131. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2011) (the lawyer may not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement"). Prior to 2002, Model Rule 1.8(h) prohibited agreements prospectively limiting the lawyer's malpractice liability unless such agreements were "permitted by law." Given that there was apparently no law that permitted such agreements, the ABA amended the rule in 2002 to permit such representations on the ground that there may sometimes be good reasons to permit the client to do so; it was concluded that clients were adequately protected when represented by independent counsel. *See Reporter's Explanation of Changes, Rule 1.8h(1)*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem.html (last visited Apr. 21, 2012). We believe that the use of this formulation, which is obviously more restrictive than provisions permitting lawyer conduct when the client is given the mere opportunity to consult independent counsel, is justified when the risks of the lawyer conduct are extremely high and the benefits to clients are low. We believe this is the case when clients are unlikely to understand the implications of a choice-of-law provision for conflicts of interest.

132. *See* Painter, *supra* note 128, at 112.

133. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 26–27 (2000).

134. *Id.* § 27 cmt. b.

agreements, and if the independent lawyer is negligent in advising the client to enter into the agreement, then the client's remedy is a malpractice lawsuit against the independent lawyer.[135] Perhaps it is harsh and, at times, unfair to bind unsophisticated clients to the conduct of lawyer-agents; however, unsophisticated clients are unlikely to invest the time and expense to retain independent counsel. As a result, the practical effect of this proposal will be to implement a "sophisticated client" requirement while at the same time avoiding all of the difficulties entailed in the use of that or a similar term.

Finally, we object to the requirement that "the agreement may not result in the application of a conflict rule to which informed client consent is not permitted under the rules of the jurisdiction whose rules would otherwise govern the matter."[136] First, if there is such a non-consentability provision in a jurisdiction whose rules might otherwise govern, then it will be necessary to routinely determine which jurisdiction's rules *would* govern in the absence of the agreement. In such cases, regardless of the outcome, the parties will have been thwarted in their efforts to achieve certainty at the outset of the representation and to avoid the time and expense of making such a determination.[137] Second, and perhaps more important, such a requirement assumes that each and every application of the non-consentability provisions constitutes a "fundamental policy" of the adopting jurisdiction and that the adopting jurisdiction's interests are materially greater than the interest of the chosen state.[138] Such a sweeping assumption ignores the likelihood that jurisdictions will develop a more nuanced approach toward which particular aspects of their non-consentability provisions must be followed, regardless of the particular circumstances (including a choice-of-law agreement),[139] and substantially undermines the provision's purpose of permitting the parties to agree ex ante as to which jurisdiction's conflict of interest rules will govern.

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135. *Id.* at cmt. f.

136. *See* ABA COMM'N ON ETHICS 20/20, *supra* note 119, at 6.

137. Also, this requirement ignores the fact that Model Rule 8.5(a) acknowledges the difficulty of determining which jurisdiction's rules will apply and offers the lawyer a safe haven from discipline so long as the lawyer complies with the rules of a jurisdiction that the lawyer reasonably believes would be chosen under the choice-of-law provisions of that rule. MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2011).

138. *See* RESTATEMENT (SECOND), CONFLICT OF LAWS § 187, cmt. g (1971) ("Application of the chosen law will be refused only (1) to protect a fundamental policy of the state which, under [the general conflicts of laws rule] would be the state of the otherwise applicable law, provided (2) that this state has a materially greater interest than the state of the chosen law in the determination of a particular issue.").

139. For example, the United Kingdom currently prohibits client consent to conflicts in virtually all "same matter" representations. *See supra* Part II.C. Nevertheless, regulators might be willing to permit parties represented by separate counsel to agree to be bound by U.S. rules, which permit such representation with informed client consent, subject to the requirement that the lawyer reasonably believe that the lawyer can competently and diligently represent all the affected clients. *See supra* Part II.C. We should not presume that U.K. regulators would rigidly insist on applying their own non-consentability provisions in such situations.

CONCLUSION

This Article has demonstrated that the current regulatory regimes in both the United Kingdom and the United States are inadequate to serve the needs of international law practice, including both global clients and their increasingly global law firms. Focusing on practical problems that arise in the day-to-day practice of lawyers engaged in cross-border legal work, primarily transactions, we have highlighted the ethical dilemma of lawyers confronting potentially impermissible conflicts of interest. Comparing the ethical rules in the relevant regulatory regimes, we conclude that despite general agreement on the principle that lawyers should not act when the interests of their clients may conflict, the U.K. and U.S. rules differ significantly not only in their definitions of what constitutes a conflict of interest, but also in their articulation of the exceptions in which law firms are permitted to undertake a proposed representation with the informed consent of the affected clients. Also, and just as important, the regulatory regimes differ in their approach to the choice-of-law dilemma facing lawyers and law firms that practice in both countries: the United Kingdom takes a "double deontology" approach, in which lawyers are expected to comply with the rules of both the home and host jurisdiction, whereas in the United States, states have adopted choice-of-law rules that direct lawyers to comply with the rules of a single jurisdiction, although it is often unclear which jurisdiction's rules apply.

As it is unlikely (and perhaps undesirable) that any super-regulator will, in the near future, establish a single set of conflict of interest rules for both U.K. and U.S. lawyers, we have put forth two sets of reform proposals. One set of proposals describes efforts that both the United Kingdom and the United States could take voluntarily to harmonize their conflict rules. The other set of proposals focuses instead on the adoption of an improved choice-of-law rule, along the lines currently proposed by the ABA Commission on Ethics 20/20. While we have criticisms of that particular proposal, we agree with the overall effort to permit sophisticated clients to choose the particular regulatory regime to govern conflicts of interest that arise during the course of the representation.

One of the benefits of the choice-of-law approach is that it is applicable not only to transatlantic legal practice, but also to conflicts of interest that arise in cross-border practice throughout the world. We have chosen to focus on the United Kingdom and the United States because these are the countries whose law firms are currently most heavily invested in cross-border transactions, and because these are the regulatory regimes with which we are most familiar. But most of these law firms are genuinely global, with offices in multiple countries, and their legal practices encompass truly global transactions, involving multiple global actors. We believe that the best way forward in regulating the conflicts of interest of global law firms may be to recognize the right of lawyers and clients to decide for themselves which of multiple potential regulatory regimes should govern these conflicts.