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In Privileged Company: Protecting Attorney-Client Privilege in Corporate Families, M&A Transactions and More

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Program Materials
are available on www.dorsey.com

1. Panel PowerPoint (the answer slides will be available on www.dorsey.com)

2. Excerpts from Minnesota Rules of Professional Conduct
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Trial Run: Which of the following categories best fits you?

(A) Private Company or Firm
(B) Public Company or Firm
(C) Government
(D) Other
Privilege and Former Employees

Zeon Corporation is involved in Minnesota venued litigation with CompuMac. Zeon’s counsel has written opposing counsel indicating (1) that her firm represents Zeon “and all of Zeon’s 1500 employees;” and (2) that “ex parte contact with any Zeon employee about the subject of the litigation is not authorized and would be unethical.”

Zeon’s CEO at the time of events relating to the litigation has since retired and lives in Florida. The CEO made various decisions based upon his discussions with Zeon’s counsel that are now at issue in the CompuMac litigation.
Question No. 1
True or False or …

Zeon’s Counsel is correct in stating that her firm represents all Zeon employees and any ex parte contact would be unethical.

(A) True.

(B) False.

(C) It depends on the subject matter of the litigation.

(D) I don’t know and am afraid to guess which answer is correct. I would prefer to write an essay answer explaining what I know about this subject.
The Correct Answer is:

(B) False – Counsel for Zeon does not represent all Zeon employees.

The comment to Rule 4.2, Rules of Professional Conduct (governing contact with represented persons) limits the representation of an Organization’s counsel to those employees who:

1. supervise, direct or regularly consult with the organization’s lawyer concerning the matter; or
2. have authority to obligate the organization with respect to the matter; or
3. whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.
The Other Answers are Incorrect:

(C) It depends on the subject matter of the litigation. The subject matter of the litigation is relevant in determining which of Zeon’s employees are represented by Zeon’s counsel, but the subject matter is highly unlikely to qualify all of Zeon’s employees as being represented by Zeon’s counsel.

(D) I don’t know and am afraid to guess which answer is correct. I would prefer to write an essay answer explaining what I know about this subject. A lousy choice since this is the only answer which could not be correct and we clearly do not have time for essay answers.
Question No. 2
True or False or …

Question: Counsel for CompuMac can ethically contact Zeon’s former CEO without giving notice to Zeon’s counsel.

(A) True.

(B) False.

(C) It depends upon whether Zeon’s former CEO is being paid a pension by Zeon.

(D) It depends upon what Florida’s ethics rules say about contacting former employees.
The Correct Answer is:

(A) True.

The comment to Minnesota Rule 4.2 (contacting represented persons) states:

Consent of the organization’s lawyer is not required for communication with a former constituent [e.g. officer or employee]. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule.
The Other Answers are Incorrect:

(C) It depends upon whether Zeon’s former CEO is being paid a pension by Zeon. The Ethics Rules focus upon the corporate authority of the person being contacted at the time of the contact, and not when the circumstances giving rise to the dispute occurred. Pension participation would not confer any existing corporate authority.

(D) It depends upon what Florida’s ethics rules say about contacting former employees. Even if Florida’s ethics rule differed from Minnesota, and prohibited contact with former employees, Minnesota Rule 4.2 would take precedence because the litigation is venued in Minnesota. See Rule 8.5(b) Choice of Law.
Question No. 3

Question: When CompuMac’s counsel contacts the former CEO in Florida:

(A) He can ask the CEO anything he wants about any subject related to the litigation.

(B) He must affirmatively disclose to the CEO that he is under no obligation to provide any information to CompuMac.

(C) He has to identify himself as counsel for CompuMac.

(D) He can ask the CEO about discussions with Zeon’s counsel while CEO was in charge at Zeon.
The Correct Answer is:

(C) He has to identify himself as counsel for CompuMac.

Rule 4.3 (Dealing with Unrepresented Person) requires:

(a) a lawyer shall not state or imply that the lawyer is disinterested;
(b) a lawyer shall clearly disclose that the client’s interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse.
The Other Answers are Incorrect:

(A) He can ask the CEO anything he wants about any subject related to the litigation; and (D) He can ask the CEO about discussions with Zeon’s counsel while CEO was in charge at Zeon. Neither is correct. Rule 4.4 prohibits lawyers from using methods of obtaining evidence that violate the legal rights of [a party]. The former CEO lacks the authority to waive Zeon’s attorney-client privilege and therefore asking questions about discussions with counsel is improper.

(B) He must affirmatively disclose to the CEO that he is under no obligation to provide any information to CompuMac. The ethical obligations in *Dealing with Unrepresented Persons* do not require this type of Miranda warning.
Lawyer Participation in Internal Investigations

Zeon Corporation has received a complaint from a competitor that Zeon’s sales staff has been providing kick-back incentives to customers who are reimbursed for the cost of Zeon’s products under a government program.

Zeon’s CEO directs its General Counsel to conduct an investigation and has indicated that General Counsel is to immediately suspend any violators.

After General Counsel has prepared a comprehensive investigative report and suspended two members of the sales staff, the company is served with a Justice Department subpoena seeking the report and all materials related to the report.
(A) Zeon will likely have to provide General Counsel’s notes of the employee interviews, but the report to the CEO with counsel’s analysis will be protected as privileged.

(B) Zeon may very well have to turn everything over in response to the subpoena.

(C) Zeon will have to turn over the report, but the statements taken from employees by the General Counsel during the investigation are protected by the attorney-client privilege.

(D) Because the investigation was conducted by a lawyer, all of the information is protected by the attorney-client privilege.
The Correct Answer is:

(B) Zeon may very well have to turn everything over in response to the subpoena.

When using lawyers to conduct internal investigations, it is important that the lawyer’s role is limited to advisor or counselor. By providing General Counsel with the authority to immediately suspend employees, Zeon increased the likelihood that a court will determine General Counsel’s role in the investigation was business and not legal.
The Other Answers are Incorrect:

(A) Zeon will likely have to provide General Counsel’s notes of the employee interviews, but the report to the CEO with counsel’s analysis will be protected as privileged. **This would ordinarily be correct but for the authority given to General Counsel to immediately suspend.**

(C) Zeon will have to turn over the report, but the statements taken from employees by the General Counsel during the investigation are protected by the attorney-client privilege. **The opposite is usually true. Facts are not protected, whereas analysis and advice are protected.**

(D) Because the investigation was conducted by a lawyer, all of the information is protected by the attorney-client privilege. **Sprinkling “lawyer dust” on an investigation by using a lawyer does not automatically create attorney-client privilege.**
When a lawyer is involved in an internal investigation, only communication about the facts may be protected by privilege. The facts themselves are not privileged.

The lawyer’s analysis of the facts is generally privileged, including analytical tools (graphs, charts, statistical analysis) unless they are the only source of the facts.

The lawyer must be the advisor or counselor and not the decision-maker. Performing both roles risks a determination by the court that the lawyer’s role was business and not legal.
Should a Lawyer Conduct the Internal Investigation?

Is the lawyer’s function to evaluate risk and act as advisor, or is it to investigate to determine what happened and to take appropriate action?

Has a non-lawyer decision-maker been designated and identified in the event litigation arises?

Is the internal investigation and remedial action likely to be asserted as part of the Company’s defense to the claim (e.g., hostile environment sexual harassment)?

What will be the effect of privilege waiver if the court determines the lawyer’s role was business v. legal, or the court finds waiver due to a remedial action defense?
Zeon Corporation has a small House Counsel department with a GC and two Assistant GCs. House Counsel routinely provides advice to Zeon’s wholly-owned subsidiary, Premier, Inc.

As part of a Premier restructuring, Zeon directed Premier to borrow $7 million. When Premier continued to struggle, Zeon ceased its funding of Premier and Premier eventually filed bankruptcy.

The Bankruptcy Trustee brings an adversary action against Zeon and seeks discovery of Zeon’s files relating to the restructuring, including the files of outside counsel hired to provide advice about Premier’s impending bankruptcy.
Question No. 5
Select the Best Answer

(A) The bankruptcy trustee will likely succeed in getting all of the files because Zeon and Premier were jointly advised by Zeon’s House Counsel lawyers regarding Premier’s bankruptcy.

(B) The trustee will likely not get any of the records, because Zeon, as Premier’s parent, controls the attorney-client privilege of its wholly-owned subsidiary.

(C) The trustee can only get access to the files that were maintained for Premier, as a separate subsidiary.

(D) The trustee could get access to outside counsel’s files if the court determines outside counsel advised Zeon and Premier.
The Correct Answer is:

(D) *The trustee could get access to outside counsel’s files if the court determines outside counsel advised Zeon and Premier.*

The law of attorney-client privilege provides that there is no privilege among jointly represented clients. In addition, jointly represented clients are free to use information that is privileged as to outsiders against other jointly represented clients.

A critical issue in the Court’s analysis of this issue might turn on whether counsel and Zeon clearly defined the attorney-client relationship and its scope when Zeon retained outside counsel.
These Answers are Incorrect:

(A) The bankruptcy trustee will likely succeed in getting all of the files because Zeon and Premier were jointly advised by Zeon’s House Counsel lawyers regarding Premier’s bankruptcy. Not necessarily – if Premier was not a client nor advised by outside counsel, then it is unlikely the trustee will gain access to Zeon’s outside counsel’s files. See In re Teleglobe, 493 F.3d 345 (3rd Cir. 2007).

(B) The trustee will likely not get any of the records, because Zeon, as Premier’s parent, controls the attorney-client privilege of its wholly-owned subsidiary. Incorrect, control of the attorney-client privilege of entities in bankruptcy passes to the trustee.

(C) The trustee can only get access to the files that were maintained for Premier, as a separate subsidiary. Not the best answer – if the same House Counsel advised both Premier and Zeon regarding the impending bankruptcy, all of the files relating to this advice are likely discoverable under the joint client rule.
Is the advice of House Counsel, who is employed by the Parent, privileged when provided to a subsidiary?

*Restatement Third, The Law Governing Lawyers* § 73, Cmt. d states that, where a parent corporation owns controlling interest in a subsidiary, the agents of each entity who are responsible for the affairs of the others are within the circle of privilege.

This raises the question of whether advice to a minority-owned subsidiary or affiliate falls within the privilege. The law is unclear.
Parent–Sub Privilege; Joint Client or Common Interest?

Under what basis or analysis is advice by the Parent’s House Counsel protected?

Joint Client Privilege or Common Interest Doctrine? What is the difference?

Joint Privilege protects all attorney-client communications between the lawyer and the joint clients. All joint clients have complete access to all privileged communications, but no privilege exists between the jointly represented clients.

Common Interest Doctrine is an exception to waiver. It permits a party to share privileged information with another party who has a common interest. It does not give other parties to the common interest agreement complete access to all privileged information relating to the subject matter of the common interest agreement.
Tips for Managing House Counsel Advice to Subsidiaries

When the interest of the Parent and Sub begin to diverge, joint representation should end to prevent the Sub from being able to invade the Parent’s privilege, and to protect the Sub.

House Counsel need not cease advising the Sub on all matters, but only those matters where the interests are adverse.

House Counsel can avoid privilege issues by undertaking joint representation only when necessary.

Problems can also be avoided by limiting the scope of joint representations and by separating counsel on matters where Subs are adverse to the Parent.
After Premier’s demise via bankruptcy, Zeon decides to sell its scratch-off lottery supply subsidiary, BetaBunch Inc.

Learning its lesson after the Premier debacle, Zeon retains outside counsel at the inception of the sale negotiations. As part of the sale, Zeon’s counsel advises Zeon and BetaBunch concerning certain reps and warranties demanded by the buyer. The buyer and Zeon also enter into a Non-Disclosure Agreement (NDA).

Several months after the sale, the buyer commences suit alleging breach of the warranties and demands that Zeon produce counsel’s file relating to the sale.
Question No. 6
Select the Best Answer

(A) Buyer will not succeed because the Reps & Warranties legal advice was provided by outside counsel.

(B) Buyer will not succeed because the information is protected by the attorney-client privilege.

(C) Buyer will succeed unless the sale documents include a provision indicating that the seller’s file is confidential and buyer agrees the file does not transfer with the sale of BetaBunch.

(D) Buyer will not succeed as long as the NDA addresses this type of information.
The Correct Answer is:

(C) Buyer will succeed unless the sale documents include a provision indicating that the seller’s file is confidential and buyer agrees the file does not transfer with the sale of BetaBunch.

Control of BetaBunch’s attorney-client privilege would transfer to the buyer if the buyer became BetaBunch’s successor and continued to operate the business and serve its customers. See e.g. Medcom Holding v. Baxter Labs (N.D. Ill. 1988).

In order to override the transfer of privilege control, Zeon could make the buyer agree that attorney-client privilege and files relating to the sale do not transfer to buyer.
The Other Answers are Incorrect:

(A) Buyer will not succeed because the Reps & Warranties legal advice was provided by outside counsel. **Not correct because BetaBunch was a joint client and absent agreement to the contrary, control of the privilege transfers to buyer.**

(B) Buyer will not succeed because the information is protected by the attorney-client privilege. **Not correct for the same reasons as above.**

(D) Buyer will not succeed as long as the NDA addresses this type of information. **Not correct because NDAs only prevent disclosure to and use by third parties.**
Do What You Can to Avoid These Problems.

Incorporating a *privilege control* provision into the sale documents.
Important Elements of a Privilege Control Provision

“Attorney-client privilege relating to negotiations and other communications regarding the sale belong to seller.”

“Seller’s counsel has no obligation to disclose or provide information relating to communications about the sale to buyer or others.”

The scope of the information protected should be limited to those communications relating to the sale transaction and should not try to extend beyond. The danger of a “too broadly worded” clause is that the court may strike the entire clause.
Sample Privilege Control Clause

No Waiver of Privilege.

Seller’s counsel shall have no duty whatsoever to reveal or disclose any such attorney-client communications or files to buyer by reason of any attorney-client relationship between seller’s counsel and buyer entered into in connection with the negotiation and closing of this agreement and the transaction documents.
The End
RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act...
or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. The term "constituent" is defined in Comment [1] to Rule 1.13. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer’s communications are subject to Rule 4.3.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel:

(a) a lawyer shall not state or imply that the lawyer is disinterested;

(b) a lawyer shall clearly disclose that the client’s interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;

(c) when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and

(d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where the lawyer knows or reasonably should know that the interests are adverse, disclose that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer’s client and those in which the person’s interests are not in conflict with the client’s. In the former situation, the possibility that the lawyer will compromise the unrepresented person’s interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents a party whose interests are adverse and is not representing the person, the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement or settle a matter, prepare documents that require
the person’s signature and explain the lawyer’s own view of the meaning of the document or the lawyer’s view of the underlying legal obligations.

**RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

**Comment**

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, “document” includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

**RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW**

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

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

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

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

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction’s disciplinary findings and sanctions will further advance the purposes of this rule. See Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) is subject to service of process in accordance with Rule 12, Rules on Lawyers Professional Responsibility. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer potentially may be subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer’s conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interests of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer’s conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits, or in another jurisdiction.

[5] When a lawyer’s conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer’s conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.