



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

You have been telling us for years that we have to check the version of the Model Rules in effect wherever we are admitted, or where a case or transaction is, where we are proposing to do various things, or where our client is, i.e., that the rules are often different in different states. I've got that.

But how do we know, when the rules are different between two states, which state's law applies? If they are inconsistent in a way that means we can't comply with both, are we simply up the proverbial creek without an ethical paddle? Is there any guidance out there?

A: On March 1, 2023 the ABA issued a formal opinion that provides the best answers we've had on this subject. Don't get too excited—in typical committee fashion, its answers are a bit fuzzy, but it does give some especially useful examples. ABA Formal Op. 504 provides guidance and examples about how to apply the choice of law provisions of Model Rule 8.5. At the outset, it is important to note that a lawyer may be subject to disciplinary authority in any state where the lawyer is licensed and in any state where the lawyer engages in practice, including authorized temporary practice under Rule 5.5 or even unauthorized practice. Formal Opinion 504 addresses the factors that determine which state's rules apply in the exercise of that authority.

Model Rule 8.5(b) in its most current form (not adopted universally) focuses on where the "predominant effect" of the lawyer's conduct occurs. As Op. 504 explains, in litigation matters involving a tribunal, this is almost always the location of the tribunal. In other types of matters, the following factors go into that determination: the client's location, residence and/or principal place of business; where the transaction may occur; which jurisdiction's substantive law applies to the transaction; the location of the lawyer's principal office; where the lawyer is admitted; the location of the opposing party and any other relevant parties; and the jurisdiction with the greatest interest in the lawyer's conduct.

Weighing these various factors appears daunting at first, but the ABA opinion provides specific guidance with examples in several areas where state-adopted versions of the Model Rules frequently vary: fee agreements, law firm ownership, reporting of professional misconduct, confidentiality duties, and screening of lateral lawyers for conflicts. In addition, there is a "safe harbor" built into this version of Rule 8.5 (where adopted): if the lawyer conforms their conduct to the rules of a jurisdiction where the lawyer reasonably believe the predominant effect of

the lawyer's conduct is to occur, even if ultimately that determination turns out to be incorrect, the lawyer shall not be subject to discipline.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 132 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.