

**PEACE IS NOT THE ABSENCE OF CONFLICT:<sup>1</sup>  
A RESPONSE TO PROFESSOR ROGERS’S ARTICLE  
“FIT AND FUNCTION IN LEGAL ETHICS”**

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**INTRODUCTION**

International arbitration has become the preeminent way in which transnational business disputes are adjudicated.<sup>2</sup> As the field of arbitration expands and diversifies,<sup>3</sup> the question of how the lawyers who represent parties to these disputes can and should best be regulated has come to the forefront.

Suppose a German and an American lawyer represent opposing sides in an arbitration. The German professional ethics rule prohibits the lawyer from speaking with witnesses before the hearing because such communications would constitute “witness tampering.”<sup>4</sup> The American rule not only permits pre-testimonial communications but arguably

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<sup>1</sup> “Peace is not the absence of conflict but the presence of creative alternatives for responding to conflict.” Dorothy Thompson.

\* J.D., Stanford Law School, 2007. The author would like to thank Professors David J. Luban and Deborah L. Rhode for their invaluable mentorship, guidance and support.

<sup>2</sup> Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT’L L. 9, 12 (1986); Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What’s Happening and What’s Not*, 56 U. MIAMI L. REV. 949, 949 (2002); see also Susan L. Karamanian, *Overstating the “Americanization” of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5, 33 (2003); Detlev Vagts, *The International Legal Profession: A Need For More Governance?*, 90 AM. J. INT’L L. 250, 261 (1996) [hereinafter Vagts, *Legal Profession*].

<sup>3</sup> Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715 (1995) (noting the expansion of multijurisdictional practice); Richard Abel, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 738-50 (1994) (describing trends in the globalization of legal practice).

<sup>4</sup> Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341, 359 n.84 (2002) (using the terms “witness tampering” and “witness preparation”); Detlev Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 688 (2000).

requires that the lawyer engage in such “witness preparation.”<sup>5</sup> Which ethical rule should apply to these lawyers?

Professor Catherine A. Rogers sets out to answer this question in her article “Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration.”<sup>6</sup> Rogers proposes a novel methodology, which she calls the “functional approach,” that is designed to develop the substantive content of the rules of professional conduct to govern in the context of international arbitration.<sup>7</sup> In a companion article, Rogers proposes that these rules should be promulgated and enforced by the arbitral tribunals themselves.<sup>8</sup>

This Article evaluates the functional approach and concludes that it is not necessary to derive a wholly new set of rules of professional conduct for lawyers practicing international arbitration. This Article argues, instead, that extant professional rules and disciplinary institutions are sufficient to regulate attorneys practicing international arbitration, and that a conflict of laws approach is the best approach to reconciling inconsistent national professional ethical rules.

Part I outlines Rogers’s functional approach and describes the way in which it derives the content of the ethical rules governing lawyers from their “functional role” in a particular context. In laying the foundation for her novel theory, Rogers rejects several alternative methods for ascertaining ethical rules for lawyers in international arbitration, including the conflict of laws approach. Part I ends with a review of Rogers’s critique of the choice of law approach. Part II argues that the conflict of laws approach is not only a feasible solution but also the best answer to the question of which rules should govern lawyers practicing international arbitration. First, it describes the differences between national legal ethics regimes in a manner that does not require the conclusion that lawyers play fundamentally different roles in these regimes. Then Part II argues that national ethical regulation already provides for application of conflict of laws principles in the context of international arbitration. Finally, the section analyzes the conceptual reasons, including the independence of the legal profession and co-equal sovereignty of nations under international law, that support the

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<sup>5</sup> Rogers, *supra* note 4, at 360.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 341.

<sup>8</sup> Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT’L L. 1, 4 (2003) [hereinafter Rogers, *Context and Institutional Structure*].

application of conflict of laws doctrine. Part III applies the conflict of laws approach to a few of Rogers's examples as well as those of other scholars who have addressed these issues in order to demonstrate the practicability of the approach.

### **I. ROGERS CLAIMS THE FUNCTIONAL APPROACH PROVIDES THE ONLY VIABLE METHODOLOGY FOR DEVELOPING THE CONTENT OF ETHICAL RULES IN INTERNATIONAL ARBITRATION**

Rogers provides two different formulations of the problem of lawyer regulation in international regulation: either international arbitration is an “ethical no man’s land” where lawyers are not subject to any regulation at all or lawyers practicing international arbitration are subject to multiple regulatory regimes so that it is unclear which ethical rules they should follow.<sup>9</sup> Furthermore, even if there is not an obvious conflict, such as the witness preparation/tampering example, there is always an implicit conflict among lawyers from different jurisdictions simply because they have different “professional habits” that structure the ways in which they practice.<sup>10</sup> Compliance with ethical rules can have significant effects on the substantive outcome of the arbitration—if the American lawyer prepares her witnesses, but the German lawyer does not, the American client may well fare better. In order for a proceeding to be fair, all attorneys involved must be “playing by the same rules.”<sup>11</sup> Under Rogers’s theory, either formulation of the problem requires the same solution, namely, an independent code of ethics for lawyers engaged in international arbitration.<sup>12</sup>

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<sup>9</sup> Rogers, *supra* note 4, at 342; Rogers, *Context and Institutional Structure*, *supra* note 8, at 2-3 (“[A]ttorneys in an international arbitration are either each abiding by different and often conflicting national ethical rules or are engaging in a completely unregulated ethical free-for-all.”).

<sup>10</sup> Rogers, *supra* note 4, at 357; *see also* Sheila Block, *Ethics in International Proceedings*, INT’L LITIG. NEWS (Int’l Bar Ass’n), Oct. 2004, at 15, 18 (noting that “it may be hard for lawyers in some jurisdictions to get used to” regulations that differ from the rules to which they are accustomed, clear regulations are preferable).

<sup>11</sup> Rogers, *supra* note 4, at 346. *Cf.* Daly, *supra* note 3, at 757.

<sup>12</sup> Rogers, *supra* note 4, at 346.

**A. THE FUNCTIONAL APPROACH DERIVES LEGAL ETHICS  
FROM THE LAWYER'S ROLE**

Rogers's theory describes ethics as inextricably dependent on the lawyer's role.<sup>13</sup> Rogers insists that this is a "conceptual analysis" of ethical rules and not an account of their historical origins.<sup>14</sup> The first part of the functional approach describes the "universal" structure of the lawyer's role. The second situates that role in the context of the procedural and the ethical rules of a justice system.

**1. THE ETHICAL OBLIGATIONS OF A LAWYER ARE DERIVED FROM  
HER ROLE, WHICH IS DETERMINED BY THE PROCEDURAL  
FRAMEWORK OF HER LEGAL SYSTEM**

Rogers argues that the ethical obligations of any particular person under a particular circumstance are inherently bound up with that person's "role" and can only be determined in the context of that role.<sup>15</sup> She illustrates with the example of the obligation to take care of a child—the child's mother has an ethical obligation to feed the child whereas an unrelated person in a far away place may not.<sup>16</sup> However, while a role guides conduct, it does not fully determine the corresponding ethical obligations. To extend the example, while the mother's role creates an affirmative duty to feed the child, that role does not specify when, what, or how she should feed it. Since the lawyer's role is more complex and nuanced than can be fully captured within any set of ethical rules, no matter how comprehensive, professional codes of conduct are best viewed as "mak[ing] certain choices impermissible and fram[ing] the inquiry for other choices."<sup>17</sup>

Legal ethics is complex because the lawyer's role "rests on an inherent contradiction," in that it encompasses obligations both to the public as well as the client.<sup>18</sup> Legal ethics is situated on the continuum between law and ethics, professional and moral responsibility. Given the

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<sup>13</sup> *Id.* at 387 ("The thesis of the *functional approach* is that ethical regimes are tied to the inter-relational roles performed by actors . . . in different systems.").

<sup>14</sup> *Id.* at 380 n.188.

<sup>15</sup> *Id.* at 382.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 383; *see also* Vagts, *supra* note 4, at 686 ("The tension between keeping clients' confidences and assuring honesty and legality is resolved in different ways if one sees lawyers as court officers or as client caretakers.").

premise that ethics are inextricably connected to role, Rogers identifies several “universal features” and “core principles” that, in varying proportions, define the contours of the lawyer’s role in any judicial system.<sup>19</sup> These values include “truthfulness, fairness, independence, loyalty, and confidentiality.”<sup>20</sup> The essence of any advocate’s role is the particular balance it strikes between the advocate’s obligations to the client (as manifested in loyalty and confidentiality) and her obligations to the public, the profession, and the courts (truthfulness and fairness). The lawyer’s role in any given society rests somewhere along the continuum between “officer of the court” and “zealous advocate.”<sup>21</sup>

The second part of the functional approach situates this “generic” role structure in the context of the cultural values of the society and the procedural, evidentiary, and ethical rules of that society’s justice system.<sup>22</sup> Rogers argues that a code of legal ethics represents the culmination of a developmental progression that begins with the cultural values of a society.<sup>23</sup> The cultural values of a society give rise to the procedural and evidentiary rules of the justice system.<sup>24</sup> The procedural and evidentiary rules in turn determine the lawyer’s role by “dictat[ing] the specific activities through which the lawyer will perform [her advocacy obligations].”<sup>25</sup> Finally, that role is expressed in the ethical code. Rogers strongly emphasizes that the lawyer’s role in the justice system precedes the ethical code even as it may be “defin[ed]” by that code.<sup>26</sup> In comparing legal ethics across national boundaries, Rogers suggests that we should think about “national ethical regimes . . . as reflecting procedurally-determined and culturally-bound differences” in the lawyer’s role in those various countries.<sup>27</sup>

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<sup>19</sup> Rogers, *supra* note 4, at 384-85.

<sup>20</sup> *Id.* at 357-58.

<sup>21</sup> *Cf. Vagts, supra* note 4, at 686 (discussing the differences between cultures that emphasize the lawyer’s function as an “officer of the court” as opposed to those which emphasize the lawyer’s obligation to the client).

<sup>22</sup> Rogers, *supra* note 4, at 385.

<sup>23</sup> *Id.* at 386.

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

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

<sup>26</sup> *Id.* at 383.

<sup>27</sup> *Id.* at 387.

2. THE RELATIONSHIP BETWEEN ROLE AND RULES DESCRIBED  
BY THE FUNCTIONAL APPROACH EXPLAINS THE  
DIFFERENCES BETWEEN CIVIL AND COMMON LAW SYSTEMS

Rogers moves on to illustrate her theory by using it to describe differences between the U.S. and German legal systems.<sup>28</sup> She characterizes the U.S. judicial system as founded on values of “individualism” and “due process.”<sup>29</sup> These values lead to a framework of procedural and evidentiary rules that allow each party to present her case to a neutral judge whose decisions ultimately make law.<sup>30</sup> In this context, the lawyer is a “strategist” who presents the facts of the case and the supporting precedent in the light most favorable to her client and a “lobbyist” who persuades the judge on how to interpret the law. The lawyer’s role is weighted toward the zealous advocacy side of the continuum. This role determines that the ethical rules will encourage conduct that furthers client-based strategy and advocacy, including, for example, witness preparation.

The German culture, on the other hand, is characterized by a “greater acceptance of authority and less tolerance for uncertainty.”<sup>31</sup> Those values lead to a set of procedural and evidentiary rules that places the judge at the helm where he actively runs the fact-finding process, including interrogating the parties’ witnesses, and then applies the civil code to these facts. In this system, the lawyer is not a strategist, and certainly not a lobbyist, but rather a “guide” to the court, a person who collaborates with the judge in a mutual quest for resolution of the issue.<sup>32</sup> This role requires an ethical rule that prohibits lawyers from tampering with witnesses because such conduct would undermine the judge’s access to unadulterated evidence.

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<sup>28</sup> *Id.* at 387-94; *see also* Vagts, *supra* note 4, at 687 (noting that “[w]hile comparisons between Anglo-American and Continental legal systems as being adversarial as opposed to inquisitorial are regarded as oversimplified by the experts, they still provide a useful contrast for comparative purposes”).

<sup>29</sup> Rogers, *supra* note 4, at 394.

<sup>30</sup> *Id.* at 390 (describing the U.S. system as “a model of party contest before a ‘judicial *tabula rasa*’”).

<sup>31</sup> *Id.* at 394.

<sup>32</sup> *Id.* at 389.

### 3. THE FUNCTIONAL APPROACH CAN PRESCRIBE THE CONTENT OF THE RULES FOR INTERNATIONAL ARBITRATION

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

In order to derive the content of the ethical rules from the role of the lawyer in the international arbitration system, Rogers looks first to the underlying cultural values of international arbitration. While she concedes that international arbitration is “a system of dispute resolution without geographic borders or a discernible citizenry” such that it doesn’t have cultural values per se, she nevertheless maintains that international arbitration has “distinctive normative goals” that provide the basis for the procedural and, ultimately, ethical rules of that system.<sup>33</sup> These normative goals include neutrality, effective resolution of disputes, and party autonomy.<sup>34</sup> Because international arbitration has these qualities, businesses often select it as the mandatory form of dispute resolution in their initial contracts. Arbitration provides a more neutral venue than the national court of any of the parties.<sup>35</sup> Arbitral awards are not appealable but are enforceable in nearly any jurisdiction under international treaties, such as the New York Convention.<sup>36</sup> Arbitrators typically have particularized knowledge of the industry or terms of the dispute so that they have a unique ability to adjudicate the fine subtleties of the dispute in the most equitable manner (and not necessarily one dictated by precedent).<sup>37</sup> As a private regime, the parties control which issues are addressed as well as the procedures followed by the tribunal.<sup>38</sup>

Although parties are entitled to determine the procedures used in their arbitral proceedings,<sup>39</sup> default procedures have been adopted by the International Bar Association.<sup>40</sup> Rogers makes much of these “hybridized” procedures and claims that they flow from the normative goals of the international arbitration system.<sup>41</sup> The more ready

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<sup>33</sup> *Id.* at 407-08.

<sup>34</sup> *Id.* at 408-11.

<sup>35</sup> Smit, *supra* note 2, at 10.

<sup>36</sup> *Id.*

<sup>37</sup> Rogers, *supra* note 4, at 417.

<sup>38</sup> Smit, *supra* note 2, at 11-12, 21.

<sup>39</sup> *Id.* at 12 n.11.

<sup>40</sup> Rogers, *supra* note 4, at 414.

<sup>41</sup> *Id.* at 412.

explanation is that the hybrid procedures represent a compromise between the civil and common law procedural frameworks to which the lawyers practicing international arbitration are accustomed.<sup>42</sup> According to Rogers, however, the fact that the hybrid procedures allow for a fair amount of U.S.-style lawyer advocacy, including direct and cross-examination of witnesses, represents the expression of arbitration's normative goal of party autonomy.<sup>43</sup>

The final step in the functional approach is, of course, to derive ethical rules from the lawyer's role as it is shaped by procedure. The hybrid arbitral procedures create a role for the lawyer in which "the attorney's sphere or obligation to the client must be expanded over that of the classic civil law system, but not nearly to the dimensions of the U.S. system."<sup>44</sup> Specifically, Rogers notes that the procedural rules allow for introduction of prepared witness statements and a certain amount of cross-examination.<sup>45</sup> She infers that the ethical rules "must therefore accommodate some [pre-testimonial] communication" with witnesses.<sup>46</sup> The functional approach requires that ethical rules agree with the procedural framework and that they account for and flow from the lawyer's role in the particular justice system.

**B. CONFLICT OF LAWS DOCTRINE CANNOT PROVIDE ETHICS RULES FOR INTERNATIONAL ARBITRATION BECAUSE IT DOES NOT ACCOUNT FOR THE LAWYER'S UNIQUE ROLE IN THAT SETTING**

Rogers addresses several alternative ways of coming up with rules of professional responsibility for international arbitration and declares them all "implausible."<sup>47</sup> Only her brief critique of conflict of laws is addressed here.

The conflict of laws discussion is only relevant to international arbitration in the event that national ethics regimes apply in that context. If it is truly the case that international arbitration is devoid of professional regulation, conflict of laws doctrine will not get us anywhere. Rogers insists that national regulation does not apply based on a prior formulation of ABA Model Rule 8.5 that "expressly

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<sup>42</sup> *Id.* at 416 n.362; *see also infra* notes 86-95 and accompanying text.

<sup>43</sup> Rogers, *supra* note 4, at 390.

<sup>44</sup> *Id.* at 418.

<sup>45</sup> *Id.*; *see also* Rogers, *Context and Institutional Structure*, *supra* note 8, at 27.

<sup>46</sup> Rogers, *supra* note 4, at 418.

<sup>47</sup> *Id.* at 395.



disavow[ed] any application in the international context.”<sup>48</sup> As discussed below, the rule has been changed and now expressly does apply to international practice. This change nullifies Rogers’s initial argument that there is no conflict between national laws to resolve because they do not apply in the first instance.

In the case national ethics rules do apply to lawyers representing clients in international arbitration, Rogers gives several reasons why conflict of laws does not provide a satisfactory solution. Her primary critique is that international arbitration and the role of its lawyers have “unique features” and differ “at an organic level” from national courts and their lawyers.<sup>49</sup> These differences render ethics rules devised to fit the function of lawyers in national courts inapplicable to international arbitration. Essentially, she argues that the unique role of the international arbitration lawyer requires unique ethics rules. To expose the “untenab[ility]” of conflict of laws in this arena, Rogers describes a situation in which the procedures chosen for the arbitration allowed for American-style discovery but the ethics rule selected by choice of law did not privilege attorney-client communications.<sup>50</sup> The untenable result is that attorney-client communications would be discoverable. As illustrated in Part III of this Article, proper application of the conflict of laws doctrine should not produce such results.

Rogers further points out that national ethics rules do not provide guidance for all of the circumstances found in international arbitration, including selection of the arbitrator. She claims the “time-cost” of filling these gaps on an ad hoc basis is “prohibitive.”<sup>51</sup> Finally, she notes that conflict of laws is “unsettled . . . in many legal systems” so that there is a danger that it would be hard to agree upon and its application would be “unpredictable” and “potentially detrimental.”<sup>52</sup> This is not a criticism of the fundamentals of conflict of laws but rather a suspicion that it will not be applied properly. Rogers’s fundamental criticisms of conflict of laws rest firmly on the assumption that international arbitration is unique and as such requires a “specially tailored” ethics code. The next part of this Article provides an alternate explanation of national ethical codes and the procedural framework of international arbitration that renders the

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<sup>48</sup> *Id.* at 355 n.65, 403 n.296; MODEL RULES OF PROF’L CONDUCT 8.5 (1996).

<sup>49</sup> Rogers, *supra* note 4, at 402, 403 n.303.

<sup>50</sup> *Id.* at 402.

<sup>51</sup> *Id.* at 404.

<sup>52</sup> *Id.* at 405 n.305.

application of conflict of laws to ethics rules not only plausible but necessary.

## II. REGULATORY INTERESTS ARE BETTER SERVED BY THE CONFLICT OF LAWS APPROACH THAN BY ROGERS'S FUNCTIONAL APPROACH

Rogers's theory, as described above, depends on the factual assessment that international arbitration takes place in "an a-national space."<sup>53</sup> She argues that nationally based professional regulation does not reach lawyers' conduct in international arbitration.<sup>54</sup> Both of these premises are false, as evidenced by the new version of the ABA Model Rule 8.5<sup>55</sup> and the European Community Professional Ethics Code (CCBE Code)<sup>56</sup> and as supported by the principles of the co-equal sovereignty of nations and the independence of the legal profession. Conflict of laws provides a more sound solution than Rogers's institution-specific ethics rules since it applies extant ethical regimes and disciplinary systems to international arbitration.

To begin, the problem can be reformulated as one of notice rather than conflicting rules. For example, examine the pre-testimonial communications rules discussed above.<sup>57</sup> Instead of focusing on the difference between the rules the two sides are accustomed to following, it should be noted that an unfair result only occurs in the situation in which the American lawyer prepares her witnesses and the German lawyer does not. If both sides knew about the discrepancy, this would never come to pass. In that case, the German lawyer would protest against the inequity, and the American lawyer would insist on her right and duty to go forward with her preparation. The parties and the tribunal would be forced to resolve the disagreement in some manner. Again, the problem is one of notice: both the American and German lawyers must know about and adhere to the same standard in order to ensure that the proceeding is equitable. Furthermore, lawyers in international arbitration

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<sup>53</sup> *Id.* at 356.

<sup>54</sup> *Id.* at 404.

<sup>55</sup> MODEL RULES OF PROF'L CONDUCT 8.5 (2002), *reprinted in* ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 623 (5th ed. 2003).

<sup>56</sup> CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION [hereinafter CCBE CODE OF CONDUCT] (2006), *available at* [http://www.ccbe.org/doc/En/2006\\_code\\_en.pdf](http://www.ccbe.org/doc/En/2006_code_en.pdf).

<sup>57</sup> *See supra* Introduction; Part I.A.3.

need to know which ethics rules will be applied to their conduct in the event of potential disciplinary action.<sup>58</sup>

Though Rogers states that “[a]ttorneys remain subject to often conflicting professional obligations,”<sup>59</sup> attorneys are actually subject to only one set of professional obligations. The problem is that it may not be clear to them which obligations apply. Rogers concludes that “[a] code is needed to get all the participants playing by the same rules.”<sup>60</sup> However, a level playing field can also be achieved by notifying all counsel of the applicable ethics rules. The playing field will be just as level if the American lawyer is told that the German rule on pre-testimonial communications governs in a particular case. Rogers concedes this point with respect to cross-border practice when she states that “[f]or regulation of cross-border practice, conflict-of-law rules may in fact be appropriate, as long as they are clear in their application.”<sup>61</sup> But she does not explain why arbitration should be treated differently than other cross-border practice. As long as practitioners are provided with notice as to which ethics rules apply to them, the playing field will be level and the dilemmas faced by lawyers in international arbitration will be resolved. Conflict of laws doctrine provides the necessary notice.

#### **A. THE DIFFERENCES AMONG NATIONAL ETHICS RULES ARE BEST EXPLAINED HISTORICALLY**

Rogers’s conceptual analysis of legal ethics can be replaced with a comparative, historical analysis. Ethical rules are best understood, not in terms of the lawyer’s role, but rather as a historical contingency that operates in tandem with the procedural and other features of a legal system to express the lawyer’s role within it. The development of detailed ethics rules in the United States took place over the course of nearly one hundred years, instigated and propelled by various forces that changed the way in which legal services were provided.<sup>62</sup> Similarly,

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<sup>58</sup> See Block, *supra* note 10 (emphasizing the practical problem lawyers face in deciding what ethical rules to follow in international proceedings). As Professor Detlev Vagts notes, questions of lawyer behavior in international situations may have to be determined in the context of professional disciplinary proceedings. Vagts, *supra* note 4, at 688.

<sup>59</sup> Rogers, *supra* note 4, at 346.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 398 n.276.

<sup>62</sup> Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463 (2005) (surveying the development of legal ethics from 1904 through the present).

legal ethics in European countries and the EU have developed over the past few decades, including the notable promulgation of a Code of Conduct for European Lawyers engaged in cross-border practice, the CCBE Code.<sup>63</sup> Whereas Rogers suggests we should analyze international arbitration as if it were a society with a culture that promoted the values of its justice system by implementing certain procedures within its tribunals, international arbitration can instead be viewed as a commingling of the historically rooted legal systems of co-equal sovereigns.

The following subsections first argue that differences in national ethics rules do not necessarily reflect profound differences in the lawyer's role. Then they argue that the variation in national ethics codes can be largely credited to the different stages of historical development of the legal profession across jurisdictions. The final subsection argues that the procedural rules of international arbitration reflect a compromise between these systems.

#### 1. THE CULTURAL DIVIDE BETWEEN CIVIL AND COMMON LAW JUDICIAL SYSTEMS DOES NOT NECESSARILY REFLECT A PROFOUND DIFFERENCE IN THE UNDERSTANDING OF THE LAWYER'S ROLE

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

Even though the dichotomy between adversarial and inquisitorial systems has been widely used to characterize the procedural differences

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<sup>63</sup> The Council of the Bars and Law Societies of the European Community [CCBE] originally published the CCBE Code in 1988 and subsequently amended it in 1998, 2002, and 2006. CCBE CODE OF CONDUCT, *supra* note 56; see Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993) [hereinafter Terry Part I]; Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 345 (1993) [hereinafter Terry Part II]; John Toulmin Q.C., *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L. J. 673 (1992) (discussing the CCBE code in connection with the possibility for an international code of professional ethics).

between the legal systems,<sup>64</sup> lawyers' roles are not necessarily distinguishable along adversarial and inquisitorial lines. For example, one scholar notes that the rift between the lawyer's role in the "adversarial" and "inquisitorial" systems is not as wide as one might think.<sup>65</sup> In fact, a report prepared by Austrian lawyers "suggests a completely reversed perspective with respect to these gross generalizations concerning the role of the American lawyer and Austrian lawyer," namely, that "the Austrian lawyer . . . is [the] vigorous advocate of the client's interests . . . whereas the lawyer from the Anglo-American tradition puts the duty to find the truth at least as high, if not higher, than the duty of loyalty to a client."<sup>66</sup>

Furthermore, lawyers' roles are fluid and changeable even within one system. U.S. lawyers serve a variety of roles, including "civil advocate, adviser, prosecutor and lawyer for governmental organizations."<sup>67</sup> Rogers does not explain why her functional approach describes and prescribes the differences in ethical rules in the international arena yet does not explain the sometimes vast differences between states' ethical rules within the U.S. domestic context, where, one would assume, the same cultural values would result in the same role for lawyers.<sup>68</sup> In many European countries the roles played by the members of the legal profession differ widely enough from one another that there are actually a variety of names for legal professionals.<sup>69</sup>

There is, in any case, a diversity of viewpoints about the nature of the lawyer's role—among systems as well as under a given unitary procedural framework. The best characterization of the lawyer's role in international arbitration is as manifesting a combination of traits from different national systems. Indeed, international arbitration has become increasingly more American or adversarial<sup>70</sup> as it has expanded and

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<sup>64</sup> Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in *ETHICS IN PRACTICE* 125 (Deborah L. Rhode ed., 2000).

<sup>65</sup> Terry Part I, *supra* note 63, at 49 n.194 (citing Professor Luban for the conclusion that "German lawyers [a]re really operating on an adversary basis, notwithstanding the traditional comments about 'inquisitorial systems'").

<sup>66</sup> Terry Part II, *supra* note 63, at 389-90.

<sup>67</sup> Menkel-Meadow, *supra* note 64, at 126.

<sup>68</sup> Vagts, *supra* note 4, at 677-78 (noting the tenacity of divergence among state ethical rules, despite long-standing model rules)

<sup>69</sup> Terry Part I, *supra* note 63, at 10-11 (describing the variety of names for legal professionals used in European countries).

<sup>70</sup> Karamanian, *supra* note 2; see also Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 *VAND. J. TRANSNAT'L L.* 1117, 1142 (1999) (noting that the

developed from its origins as a private dispute mechanism among the “grand old men” of Europe.<sup>71</sup> Rogers’s imposition of the binary divide in her characterization of adversarial and inquisitorial systems belies an adversarial way of thinking, and her goal of promulgating an original ethical code for arbitration could itself be viewed as a reflection of this process of Americanization.<sup>72</sup>

## 2. THE DIFFERENCES IN FORMS OF NATIONAL CODES OF PROFESSIONAL CONDUCT ARE RELEVANT TO EVALUATING PROFESSIONAL ETHICS IN THE INTERNATIONAL SPHERE

One of the assumptions Rogers makes in her proposal for a code of ethics specific to international arbitration is that lawyers hailing from different jurisdictions will share an understanding of the form of professional ethics and that disagreement will only arise as to the appropriate content of those rules.<sup>73</sup> Codes of professional responsibility take different forms across jurisdictions. For example, there are vast gaps in the specificity of professional rules governing conflicts of interest. The U.S. rules “are among the strictest in the world”<sup>74</sup> whereas other nations’ rules mention conflicts only in the most general of terms on the theory that “conflicts are a matter of [personal] ethics, not law.”<sup>75</sup> In France, for example, “[t]he Code of Conduct governing the notarial attorneys has no specific provisions on conflicts of interest. The notarial attorney simply has to put the interest of his client before his own interest.”<sup>76</sup>

The cultural divide goes deeper than this, however. The legal professions in jurisdictions around the globe are at different stages of development with respect to the rules and standards of ethical conduct. Some European countries have only general ethics guidelines, if they

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“‘judicialization’ of professional responsibility is a distinctive feature of the U.S. legal system”) (emphasis added).

<sup>71</sup> Menkel-Meadow, *supra* note 2, at 958.

<sup>72</sup> Menkel-Meadow, *supra* note 64, at 125 (“[T]he juxtaposition of adversarial to inquisitorial frameworks itself illustrates a primary deficiency of adversarial thinking—an assumption of two presumed opposites.”).

<sup>73</sup> Rogers, *supra* note 4, at 347-78.

<sup>74</sup> Toulmin, *supra* note 63, at 681 (citing MODEL RULES OF PROF’L CONDUCT (Discussion Draft 1983)).

<sup>75</sup> Daly, *supra* note 70, at 1150 (quoting Justin Castillo, *International Law Practice in the 1990s: Issues of Law, Policy, and Professional Ethics*, 86 AM. SOC’Y INT’L L. PROC. 272, 283 (1992)).

<sup>76</sup> *Id.* at 1149 n.165 (quoting Olivier d’Ormesson, *French Perspectives on the Duty of Loyalty: Comparisons with the American View*, in RIGHTS, LIABILITY AND ETHICS 29 (1995)).

have any codified ethics rules at all.<sup>77</sup> The ever increasing transnational practice and the growth of international arbitration may well contribute to the development of more specific and codified ethical rules in jurisdictions where those rules are currently uncodified.

The ABA Model Rules and the CCBE Code each represent the current status of the historical development of professional ethics in the United States and the EU, respectively. One scholar describes the progression of ethical rules over time as one from standards to rules of conduct.<sup>78</sup> The U.S. rules have developed further toward the rules end of the spectrum, as evidenced by a level of specificity that European regulations have not yet achieved. The generality of the European regulations is, however, not perceived as a deficiency.<sup>79</sup> Indeed, Europeans do not want or need more specific professional rules and regulations. Professor Geoffrey C. Hazard has reported that “[t]he English barristers [think] it quaint that American lawyers [feel] in need of legal rules for their governance, but they recalled that Americans seemed to need rules for everything.”<sup>80</sup>

Professor Mary C. Daly describes the historical development of the American legal profession’s self-regulation as a steady movement away from its early reliance on the interconnectedness within “mini-communities” of lawyers for regulation.<sup>81</sup> Each of these subsections of the profession “had its own shared understandings of the ethical standards governing its members” and functioned as a self-contained, largely informal regulatory system.<sup>82</sup> As the American legal profession expanded and diversified, and the disciplinary mechanisms became more

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<sup>77</sup> See *id.* at 1150 (noting that some countries rely on oral tradition for rules of professional conduct, that the codes in France and Italy are much less specific than the U.S. code of conduct, and that Mexico has no code of ethics at all); Terry Part II, *supra* note 63, at 384.

<sup>78</sup> Daly, *supra* note 70, at 1124 (“Understanding the standards/rules dichotomy is an important first step in the creation of a cross-border code of lawyer conduct.”).

<sup>79</sup> Commentators have identified the benefits of general standards over specific rules with respect to the current EU regulations as well as historical U.S. regulations. Compare Terry Part I, *supra* note 63, at 16 (regarding current EU regulation, quoting the CCBE Compendium: “Codes . . . have limitations. They have more often more often a dissuasive effect than a positive impetus. . . . They are attempts to capture on paper an approved pattern of behavior, a desired moral climate, an answer to all questions of conduct—which cannot be adequately captured on paper.”), with Daly, *supra* note 70, at 1126 (describing the reasoning behind the “vague” standards of the 1908 Canons of Ethics, quoting the Preamble: “No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life.”).

<sup>80</sup> Daly, *supra* note 70, at 1122; Terry Part I, *supra* note 63, at 16.

<sup>81</sup> Daly, *supra* note 70, at 1126.

<sup>82</sup> *Id.*

“regularized,” “professionalized,” and institutionalized,<sup>83</sup> the demand grew for “clearer, more sharply framed directives”<sup>84</sup> on professional conduct for lawyers. The 1908 Canons of Ethics was surpassed by the 1969 Model Code of Professional Responsibility, which gave way to the 1983 Model Rules of Professional Conduct.<sup>85</sup>

The development of the CCBE Code provides an interesting historical parallel to the development of U.S. domestic legal ethics. Professor Laurel S. Terry notes the ready comparison between the 1977 Declaration of Perugia and the 1908 Canons of Legal Ethics,<sup>86</sup> and the correlation between the 1988 CCBE Code and the 1969 Model Code of Professional Responsibility.<sup>87</sup> The developments on both sides were motivated by similar changes in circumstances, including greater diversification of the legal community and movement within it. A comment Justice Harlan F. Stone made on the state of the American legal profession in 1934 could just as easily be applied to the European legal profession in the period before the promulgation of the CCBE Code: “Our canons of ethics for the most part are generalizations designed for an earlier era.”<sup>88</sup> The drafters of the CCBE Code remarked that “[in the past] rudimentary rules met simpler circumstances, [while] more refined and detailed rules now meet more complex circumstances.”<sup>89</sup> Despite the strides made by the EU toward a rules-based as opposed to standards-based framework for professional conduct, the legal profession in Europe remains less institutionalized than that in the United States,<sup>90</sup> and regulation remains less regularized and professionalized.<sup>91</sup>

The state of affairs of ethical regulation in the practice of international arbitration stands essentially at the same crossroads where the American legal profession found itself in the early part of the century

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<sup>83</sup> *Id.* at 1127.

<sup>84</sup> *Id.* at 1128.

<sup>85</sup> *Id.* at 1125-31 (emphasis added) (describing the progression from canons to codes to rules).

<sup>86</sup> Terry Part I, *supra* note 63, at 9.

<sup>87</sup> Terry Part I, *supra* note 63, at 15-16 (“The concerns . . . about the nature and shape of the CCBE Code mirror many of the same concerns that appeared in the United States revolving around whether the approach of the *Model Rules* should be used in place of the established *Model Code* approach,” but that while the CCBE provides “black letter rules” it is “leaner’ than the *Model Rules*”).

<sup>88</sup> Daly, *supra* note 70, at 1127 (quoting Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934)).

<sup>89</sup> Terry Part I, *supra* note 63, at 16 n.54.

<sup>90</sup> *Id.* at 11 (referring to the “incomplete institutionalization of the legal profession in Europe”).

<sup>91</sup> Daly, *supra* note 70, at 1160-61 (noting that the CCBE Code could be seen as a shift toward rules, but that the shift is in no way wholehearted).



and which motivated the adoption by the European nations of the CCBE Code in the early 1990s.<sup>92</sup> International arbitration is no longer the gentlemen's club, run by a cadre of "grand old men," that it used to be.<sup>93</sup> Whereas "differences [among the ethical obligations binding attorneys] were mute when international arbitration was run by a small group of insiders," the growth and diversification of the practice has rendered these differences disruptive.<sup>94</sup>

Rogers's theory simply does not account for the current divergence of the form of professional rules across jurisdictions. In order to truly level the playing field of ethical regulation in international arbitration, we must account for differences in both the form and content of national ethical regulation. It might be just as difficult for the British barrister to adjust to myriad detailed ethical rules as it is for the German lawyer to adjust to a rule that permitted him to prepare his witnesses for their testimony. The project of ascertaining which ethics rules should apply to lawyers in the context of international arbitration must be informed by the background of historical development of ethical rules in other contexts and the continued divergence in the form of national professional ethics rules.

### 3. HYBRID PROCEDURES IN INTERNATIONAL ARBITRATION REFLECT COMPROMISES BETWEEN INTERNATIONAL LEGAL SYSTEMS

Whereas Rogers argues that we should understand the hybrid procedures found in international arbitration as a manifestation of the normative goals of that system, including neutrality, effective resolution of disputes, and party autonomy, hybrid procedures are better understood as compromises between international systems. Professor Andreas Lowenfeld argues that procedures developed for use in international arbitration represent the best of both the civil and common law worlds.<sup>95</sup> He remarks that "many of the techniques and approaches developed in

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<sup>92</sup> Cf. Abel, *supra* note 3, at 750 ("Transnational lawyers are significantly deprofessionalized. In this they increasingly resemble their competitors in offices of house counsel and accounting firms, as well as their predecessors—lawyers before the emergence of strong professional associations.").

<sup>93</sup> Menkel-Meadow, *supra* note 2, at 958-59.

<sup>94</sup> Rogers, *supra* note 4, at 357.

<sup>95</sup> Andreas F. Lowenfeld, *Introduction: The Elements of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 654 (1997) ("Altogether, I think international arbitrators have gotten it about right—better than civil litigation in New York or Paris or Rome—*without any treaty or universal rules or other act of creation.*") (emphasis added).

one context are indeed portable, that is they are capable of being adapted to use in different contexts and different fora from those for which they were originally planned.”<sup>96</sup> He further observes that the exchange of procedural ideas between arbitration and litigation is a two-way street: arbitration borrows procedure from litigation, but litigation can also be influenced by procedures that have proved effective in arbitration.<sup>97</sup> According to Lowenfeld, therefore, procedures don’t necessarily represent the underlying normative goals of the international arbitration system but rather flow from an interactive dialogue between the lawyers who each bring knowledge of their own procedural frameworks. Ultimately, international arbitration and international domestic legal systems reflect a certain amount of convergence, generally in the direction of Americanization.<sup>98</sup> That the International Bar Association’s Rules of Evidence for Arbitration provide for cross-examination, some discovery by the parties,<sup>99</sup> and testimony by party witnesses, reflects a “mild” form of Americanization.<sup>100</sup>

By Rogers’s own estimation, international arbitration has become more “formal,” “judicialized,” and “sophisticated.”<sup>101</sup> Given this evolution in conjunction with the evidence that arbitral procedures reflect measured compromises between national regimes, it is no stretch to claim that arbitration has become tantamount to “offshore litigation.”<sup>102</sup> Why, then, shouldn’t the conflict of laws approach we take to professional ethics in other cross-border practices seamlessly carry over to the international arbitration context? The more similar international arbitration and litigation become, the less need there is for a wholesale new professional ethics code. In light of Lowenfeld’s description of the procedural rules in international arbitration as a compromise in progress, Rogers’s theory that the procedures of international arbitration embody a fundamentally different role for the lawyer seems incorrect.

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<sup>96</sup> *Id.* at 655.

<sup>97</sup> *Id.* at 654 (noting that the arbitration practice of distributing witness statements in advance of testimony has been “adopted in American civil trials”).

<sup>98</sup> Vagts, *supra* note 4, at 680 (“Internationally, one sees signs of a certain amount of convergence between systems as other countries adjust their rules in the direction of the American norm.”). *But see* Karamanian, *supra* note 2 (discussing the “Americanization” of international arbitration).

<sup>99</sup> Although, Lowenfeld insists that discovery in arbitration is much more limited, reflecting yet another compromise between the civil and common law procedural systems. Lowenfeld, *supra* note 95, at 654.

<sup>100</sup> Karamanian, *supra* note 2, at 10.

<sup>101</sup> Rogers, *supra* note 4, at 353–54.

<sup>102</sup> *Id.* at 352–53.

Under Rogers's functional approach, the role of the lawyer is hard and fast, and the differences between the civil and common law legal systems are discernible and definitive. In the context of the individual countries' national legal professions, such narrowly defined roles are hard to pin down, however. The ethics rules that Rogers claims express the lawyer's role seem to be more readily described in terms of the institutionalization and historical development of the profession. The procedures that she argues provide the foundation for the lawyer's role in international arbitration represent a set of strategic compromises made between lawyers familiar with different legal systems in an effort to facilitate adjudication. Describing international arbitration in terms of its procedural development and exposing the historical contingency of the form of ethics codes undermines Rogers's premise that the lawyer's role in international arbitration is unique and fundamentally different from her role in national legal systems. If that premise does not hold, and if the lawyer's role in international arbitration is an amalgam of adversarial and inquisitorial-style procedures that govern the proceeding,<sup>103</sup> there is no need to fabricate an ethics code for international arbitration out of whole cloth. If the lawyer practicing international arbitration is simply a lawyer in a novel venue,<sup>104</sup> there is no reason that conflict of laws principles, which have historically been used to ascertain the ethics rules applicable to lawyers in novel venues, should not apply.

The following section argues that U.S. and EU ethics codes currently affirmatively apply conflict of laws to international arbitration. The subsequent section argues that conflict of laws should be used to determine the applicable ethics rules in international arbitration.

#### **B. NATIONAL DISCIPLINARY AUTHORITIES HAVE EXPLICITLY INVOKED CONFLICT OF LAWS TO ADDRESS ISSUES ARISING IN CONNECTION WITH INTERNATIONAL ARBITRATION**

National regulatory authorities have several bases of prescriptive jurisdiction which permit them to regulate attorney conduct in

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<sup>103</sup> Vagts, *Legal Profession*, *supra* note 2, at 260 ("The way in which a case is tried before an international tribunal . . . depends greatly on the composition of the panel. It may come close to an Anglo-American adversarial model or may tend toward a civil law pattern.").

<sup>104</sup> Block, *supra* note 10, at 21 ("[T]he international arbitration bar is a glaring misnomer as the practitioners in the field are a random collection of lawyers from around the world."); Smit, *supra* note 2, at 11 ("In international arbitration, parties frequently use the lawyers they customarily use in their principal place of business, even if the arbitration takes place in another country.").

international fora.<sup>105</sup> The problem arises “[w]hen multiple states have legitimate power to, and an interest in, regulating the same conduct.”<sup>106</sup> Rogers identifies the problem as “a risk that an attorney will be subject to conflicting obligations.”<sup>107</sup> As noted above, the problem can be re-characterized as a lack of notice to the lawyers as to which obligations they are subjected. Conflict of laws doctrine provides a method to “identify and evaluate the competing policies behind different rules in order to determine which should prevail.”<sup>108</sup> This approach shares Rogers’s goal of leveling the playing field and ensuring that all lawyers in a proceeding are subject to the same rules.<sup>109</sup> The 2002 version of the ABA Model Rule 8.5 and the CCBE Code both provide conflict of laws rules that apply in cases of cross-border or international practice, including international arbitration.

#### 1. ABA MODEL RULE 8.5 APPLIES A CONFLICT OF LAWS APPROACH TO PROFESSIONAL ETHICS IN THE CONTEXT OF INTERNATIONAL ARBITRATION

As discussed above, the question a practitioner in international arbitration must ask herself is this: by which ethical rules must she abide? The implied question is if a lawyer’s conduct were to become subject to a disciplinary proceeding, under which rules would it be evaluated? The new version of ABA Model Rule 8.5 answers this question for lawyers engaged in international arbitration by providing “relatively simple, bright-line rules”<sup>110</sup> designed to “facilitate international law practice.”<sup>111</sup> And, as long as it is clear to practitioners

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<sup>105</sup> Vagts, *supra* note 4, at 689-90 (citing territoriality (“state[s] can regulate the conduct of persons who appear in [their] courts, maintain offices, or conduct other transactions within [their] territory”), nationality (states can regulate conduct of lawyers who are their citizens), and effects (states can regulate conduct of lawyers who cause effects in their territory)).

<sup>106</sup> Rogers, *Context and Institutional Structure*, *supra* note 8, at 23.

<sup>107</sup> *Id.* at 23-24.

<sup>108</sup> Vagts, *supra* note 4, at 678, 696 (discussing the application of common law conflicts of laws doctrine, including the Second Restatement test and governmental interest analysis as these approaches have been applied by courts in the context of malpractice suits).

<sup>109</sup> *Id.* at 690, 692.

<sup>110</sup> Daly, *supra* note 3, at 757 (citing ABA Comm. on Ethics and Professional Responsibility, *Recommendation and Report to the House of Delegates* 4, 6-8 (1993)).

<sup>111</sup> *Id.*; MODEL RULES OF PROF’L CONDUCT 8.5 cmt. 7 (noting that the choice of law provision applies to “transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise”); VAGTS ET AL., TRANSNATIONAL BUSINESS PROBLEMS 19 (3d ed. 2003) (commenting on the application of the 2002 version of Model Rule 8.5 to international practice).

what rules they will be held accountable for at the end of the day, they will know what rules to follow initially.<sup>112</sup>

The 2002 version of Model Rule 8.5 embodies an interest analysis approach to conflict of laws. Interest analysis holds that a particular law is applicable to a given factual situation only if that factual situation implicates the purpose of the law.<sup>113</sup> This purposive approach would dictate, therefore, that a German rule prohibiting pre-testimonial communications does not govern an arbitration proceeding in which procedural rules provide for counsel to conduct direct and cross-examination of their witnesses. This is because the purpose of the prohibition (maintenance of unadulterated evidence for the judge) is not promoted in a proceeding where the lawyers are each required to present their versions of the facts by way of witness examination.<sup>114</sup> This example is discussed more fully below.

Each provision of Rule 8.5 reflects this purposive approach. The express purpose of the Model Rules is to define the relationship between lawyers and the legal system as part of the self-governance of the autonomous legal profession.<sup>115</sup> The provision of Rule 8.5 governing lawyer conduct (other than in the context of a proceeding before a tribunal) manifests an intent to apply the rules of a jurisdiction only to conduct which implicates the relationship between lawyers and the legal system in that jurisdiction.<sup>116</sup> It premises application of a jurisdiction's ethics rules on contacts that are relevant to this relationship, namely, the place of the lawyer's conduct or the "predominant effect" of the conduct.<sup>117</sup>

Professor Daly has criticized the predominant effect standard in previous versions of this rule as vague and difficult to apply.<sup>118</sup> The force of that critique is lessened by the addition in the 2002 version of a safety catch for lawyer's conduct that "conforms to the rules of a jurisdiction in

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<sup>112</sup> Cf. Daly, *supra* note 3, at 790 ("[I]t is not very useful for lawyers seeking guidance about future conduct.").

<sup>113</sup> Larry Kramer, *The Myth of the "Unprovided-for" Case*, 75 VA. L. REV. 1045, 1045 (1989); see also *Indus. Indemnity Co. v. Chapman & Culter*, 22 F.3d 1346, 1350 (5th Cir. 1994) (describing California's governmental interest approach).

<sup>114</sup> Thus, Rogers' concern that conflicts of law might result in the application of an ethical rule that would not agree with the procedural rules of an arbitration is unwarranted.

<sup>115</sup> MODEL RULES OF PROF'L CONDUCT Preamble, ¶¶ 10, 12, 13.

<sup>116</sup> See *id.*

<sup>117</sup> MODEL RULES OF PROF'L CONDUCT 8.5(b)(2) ("for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct").

<sup>118</sup> Daly, *supra* note 3, at 760.

which the lawyer reasonably believes the predominant effect [of the lawyer's conduct] will occur," which is designed to protect "lawyers who act reasonably in the face of uncertainty."<sup>119</sup> Despite the fact that the drafters of the 2002 rule do not provide a "method" whereby lawyers could ascertain the jurisdiction of predominant effect, as Daly would have liked,<sup>120</sup> they seem to indicate that a lawyer's reasonable determination will be accepted. Indeed, Daly herself suggested the inclusion of a "reasonableness requirement," noting that "[t]he reasonableness requirement . . . prevent[s] a multiple licensed lawyer from taking unfair advantage of a state's more liberal rule."<sup>121</sup> Because the current version of Rule 8.5 relies on the place of conduct along with the reasonableness requirement, it is likely to lead to the application of the rules of a state that has an interest in regulating that conduct. The place where conduct occurs or takes predominant effect has a greater interest in having its rules of ethics apply than does the jurisdiction in which the lawyer happened to be licensed, for example, as under the previous version of the rule.

Lawyer conduct in international arbitrations will fall under the provision governing conduct in connection with matters before tribunals.<sup>122</sup> The historical choice of law rule of the situs would apply the ethical rules of the jurisdiction in which the tribunal is located. This is articulated in Rule 8.5, which provides that "the rules of the jurisdiction in which a tribunal sits" shall apply.<sup>123</sup> As Rogers points out, it may not make sense for the ethics rules of a state to apply merely because it is hosting the arbitration.<sup>124</sup> The Model Rules account for this concern by further providing that the tribunals have preeminent authority to designate which ethics rules apply.<sup>125</sup> However, it is not necessary for arbitral tribunals to go so far as to promulgate full-fledged codes of ethics to regulate the lawyers who appear before them, as Rogers suggests. In order to regulate the attorneys, arbitral tribunals need only provide a choice of law rule that invokes extant regulatory systems where the purposes of those regulations are implicated.

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<sup>119</sup> MODEL RULES OF PROF'L CONDUCT 8.5 cmts. 3, 5.

<sup>120</sup> Daly, *supra* note 3, at 760-61.

<sup>121</sup> *Id.* at 797.

<sup>122</sup> MODEL RULES OF PROF'L CONDUCT 8.5(b)(1).

<sup>123</sup> *Id.*

<sup>124</sup> See Rogers, *Context and Institutional Structure*, *supra* note 8, at 2-3.

<sup>125</sup> MODEL RULES OF PROF'L CONDUCT 8.5(b)(1) (" . . . the rules of the jurisdiction in which a tribunal sits, unless the rules of the tribunal provide otherwise").

Rogers's critique of the choice of law approach centers on her allegation that this approach falsely views "ethical norms as freestanding precepts, which are independently modifiable and interchangeable."<sup>126</sup> However, the approach taken by the Model Rules does not view "ethical norms as . . . independently modifiable" but rather recognizes the fact that rules of ethics have specific purposes and should only be applied to lawyers' conduct when those purposes are implicated.<sup>127</sup> Model Rule 8.5 explicitly applies a conflict of laws approach informed by interest analysis to international arbitrations.

## 2. THE CCBE CODE APPLIES A CONFLICT OF LAWS APPROACH TO CROSS-BORDER PRACTICE INCLUDING INTERNATIONAL ARBITRATION

The CCBE Code operates slightly differently than the ABA Model Rules. Like Model Rule 8.5, the CCBE Code applies to international arbitrations.<sup>128</sup> Whereas the ABA rules apply primarily to domestic practice and have few provisions that address multi-jurisdictional practice (including international arbitration), the CCBE Code was designed solely to address issues surrounding cross-border practice in Europe.<sup>129</sup> Further, when the ABA rules are adopted in whole or in part by the individual states, they become the substantive content of that state's disciplinary system.<sup>130</sup> On the other hand, a European state's adoption of the CCBE Code merely supplements the ethics rules and disciplinary system already in place in the adoptive state by providing rules for cross-border practice.<sup>131</sup> In this way, the whole of the CCBE Code can be loosely analogized to Model Rule 8.5.

Professor Terry characterizes the code as one which provides a series of conflict of laws rules indicating which national ethics rules should apply rather than setting forth a "universally acceptable 'legal ethics' code."<sup>132</sup> The code was intended to prevent the simultaneous

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<sup>126</sup> Rogers, *supra* note 4, at 379.

<sup>127</sup> MODEL RULES OF PROF'L CONDUCT 8.5(b)(1).

<sup>128</sup> See CODE OF CONDUCT FOR EUROPEAN LAWYERS 4.5 (2006) ("The rules governing a lawyer's relations with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.").

<sup>129</sup> See *supra* notes 78-83 and accompanying text.

<sup>130</sup> MODEL RULES OF PROF'L CONDUCT 8.5 cmt. 1.

<sup>131</sup> See CODE OF CONDUCT FOR EUROPEAN LAWYERS 4.5.

<sup>132</sup> Terry Part I, *supra* note 63, at 18; see also Vagts, *supra* note 4, at 678 (noting that the CCBE Code "turns out to contain many instances in which it in effect resorts to conflict of laws solutions rather than providing uniform rules"). Professors Terry and Vagts based their analysis

application of conflicting ethical rules (“double deontology”), without necessarily “adopting a particular substantive position” (“single deontology”).<sup>133</sup> The CCBE Code provisions on “incompatible occupations,” and “personal publicity,” provide such conflict of laws guidance that directs lawyers to follow a given state’s rule under specified circumstances instead of dictating a new rule.<sup>134</sup> Other provisions, for example the provision on “fee sharing with non-lawyers”, combine a substantive component with a choice of law rule. This rule forbids fee sharing with non-lawyers “except where an association between the lawyer and the other person is permitted by the laws and the professional rules to which the lawyer is subject.”<sup>135</sup> In a manner similar to that of the Rule 8.5 provision that defers to the rules of the tribunal, the CCBE Code incorporates the principles underlying interest analysis by recognizing that a tribunal before which a lawyer appears or a particular state in which a lawyer practices has a greater interest in regulating the conduct of that lawyer than does the Council of Bars and Law Societies of Europe, the organization that promulgates the CCBE code.<sup>136</sup>

The CCBE Code likewise applies its conflict of laws approach to the determination of which rules of professional conduct should apply to international arbitration.<sup>137</sup> A hint of interest analysis is apparent in certain rules of the code that seek to level the playing field between lawyers from jurisdictions that may have more specific and restrictive rules and those from jurisdictions with less restrictive rules. For example, the CCBE Code rule governing conflict of interest is surprisingly strict, given the vagueness or non-existence of conflict of

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on the 1989 version of the CCBE Code, which is different in certain respects from the current 2006 version. Where possible, the current version of the CCBE Code is quoted here.

<sup>133</sup> Terry Part I, *supra* note 63, at 18.

<sup>134</sup> *Id.* at 25-27. See also CODE OF CONDUCT FOR EUROPEAN LAWYERS Art. 2.5 (“Incompatible Occupations”); Art. 2.6 (2006) (“Personal Publicity”). The latter article on “personal publicity” explains that “there is no overriding objection to personal publicity in cross-border practice. However, lawyers are nevertheless subject to prohibitions or restrictions laid down by their home professional rules, and a lawyer will still be subject to prohibitions or restrictions laid down by Host State rules when these are binding on the lawyer.” CODE OF CONDUCT FOR EUROPEAN LAWYERS Art. 2.6 (2006).

<sup>135</sup> CODE OF CONDUCT FOR EUROPEAN LAWYERS 3.6 (2006).

<sup>136</sup> See CODE OF CONDUCT FOR EUROPEAN LAWYERS 4.1 (2006) (“A lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal.”).

<sup>137</sup> See CODE OF CONDUCT FOR EUROPEAN LAWYERS 4.5 (Rule 4.5 extends the application of all provisions referring to “courts” to arbitrators and other “judicial or quasi-judicial” institutions.).



interest rules in many of the CCBE member states.<sup>138</sup> In a cross-border arbitration in which the parties were represented by a lawyer from a jurisdiction with a specific conflict of interest rule and a lawyer from a jurisdiction with a vague conflict of interest rule, the CCBE rule would govern so that these lawyers could be prevented from representing their clients in the event of a conflict even if their national rule would not have prevented the representation. In terms of interest analysis, the CCBE prioritizes states' interest in preventing conflicts over the interest in promoting freedom of representation. The restrictive rule guarantees that in all cases, the state interest in preventing conflicts is upheld.<sup>139</sup> In sum, the CCBE Code applies a conflict of laws approach that incorporates the competing regulatory interests of European nations to cross-border practice, including international arbitration.

### 3. CONFLICT OF LAWS RULES FOR PROFESSIONAL ETHICS IN INTERNATIONAL ARBITRATION SHOULD BE DECIDED BY THE TRIBUNALS

Given that national regulation, including the ABA Model Rules<sup>140</sup> and the CCBE Code, apply choice of law rules to lawyer conduct in the context of international arbitration, the next question is which choice of law rules should be followed. For example, in an international arbitration proceeding between German and American parties held in Geneva, which choice of law rules determine the ethics rules that will apply—the CCBE Code or Model Rule 8.5? The companion inquiry is: who should best decide?

Private international adjudication, due to the fact that it implicates the regulatory interests of multiple sovereigns, will inevitably encounter conflicting regulations.<sup>141</sup> The real problem with conflict of laws is not resolving these conflicts but rather the potential for diversity

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<sup>138</sup> CODE OF CONDUCT FOR EUROPEAN LAWYERS 3.2; Terry Part I, *supra* note 63, at 31, 31 n.118.

<sup>139</sup> CODE OF CONDUCT FOR EUROPEAN LAWYERS 3.2

<sup>140</sup> The practical matter of application of the Model Rules depends, of course, on whether the individual states have adopted those rules. The adoption of the current Model Rule 8.5 in New York is still pending, and the rule currently in force in that state corresponds to the prior version of the rule. *See* Am. Bar Ass'n, State Implementation of Model Rule 8.5 (Oct. 20, 2006), [http://www.abanet.org/cpr/jclr/8\\_5\\_quick\\_guide.pdf](http://www.abanet.org/cpr/jclr/8_5_quick_guide.pdf); New York County Lawyers' Ass'n, Report by the Ad Hoc Committee on Multi-Jurisdictional Practice (Jan. 29, 2001), [http://www.nycla.org/siteFiles/Publications/Publications88\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications88_0.pdf); N.Y. Rules on Prof'l Responsibility § 1200.5-a, *in* MORGAN & ROTUNDA, MODEL RULES OF PROFESSIONAL CONDUCT AND OTHER SELECTED STANDARDS 487-88 (2006).

<sup>141</sup> *See* Rogers, *Context and Institutional Structure*, *supra* note 8, at 2.

in the approaches to the rules for resolving them. In order to obtain certainty, uniformity, and predictability and to provide lawyers with notice as to the applicable ethical rules, arbitral tribunals must be clear in their application of choice of law rules. In the same way that the CCBE Code has “harmonize[d] the ‘conflicts of law’ choices facing a lawyer” engaged in cross-border practice in Europe, international arbitration needs to harmonize and clarify the application of conflict of laws rules so that all lawyers involved in the same arbitral proceeding will be governed by the same ethical regulations.<sup>142</sup>

As to the question of which conflict of laws rules should be applied, there are a variety of possible answers. As discussed above, the Model Rules and the CCBE Code each provide approaches to this question.<sup>143</sup> Arbitrators have the authority to develop and apply conflict of laws rules. This authority comports fully with their adjudicatory role. Furthermore, consistent with the deference of national ethics rules to rules of specific tribunals, arbitrator authority to determine conflict of laws rules does not undermine the regulatory interests of the nations whose lawyers practice before those tribunals. The comment to Model Rule 8.5 supports placing the authority to determine choice of law rules with the tribunal insofar as it anticipates and defers to the tribunal’s choice of law rule: “the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise.”<sup>144</sup> Also, a choice of law determination by the arbitral tribunal would indicate to the relevant nationally based disciplinary authority the standards against which the lawyer’s conduct should be measured in the event of a disciplinary proceeding.

There is precedent for allowing an arbitral tribunal to develop a conflict of laws rule in the context of the application of substantive law. A tribunal’s choice of law determination can either be invoked on an ad hoc basis or it can be built into the rules of the tribunal. Certain tribunals exemplify the ad hoc approach by allowing the arbitrator to determine which law will govern in the event the party’s agreement does not specify the governing law.<sup>145</sup> International Center for Settlement of

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<sup>142</sup> Terry Part I, *supra* note 63, at 45.

<sup>143</sup> *Supra* Parts II.B.1, II.B.2.

<sup>144</sup> MODEL RULES OF PROF’L CONDUCT 8.5 cmt. 4 (emphasis added).

<sup>145</sup> Rogers, *supra* note 4, at 421, 423 n.382 (quoting W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS, AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 258 (1997)).

Investment Disputes (ICSID) provides an example where the rules of the arbitral tribunal stipulate the choice of law rule: “article 42(1) of the ICSID rules mandates that, in the absence of party agreement, the arbitrators apply the ‘law of the Contracting State party to the dispute (including its conflict-of-laws) and such rules of international law as may be applicable.’”<sup>146</sup>

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

### **C. THE CONFLICT OF LAWS APPROACH TO ETHICAL REGULATION IN INTERNATIONAL ARBITRATION RESPECTS BOTH THE COEQUAL SOVEREIGNTY OF NATIONAL DISCIPLINARY AUTHORITIES AND THE INDEPENDENCE OF THE LEGAL PROFESSION**

It is important to remember that the tribunals of the international arbitration system are not international or supranational courts.<sup>147</sup> They are privately administered bodies that provide private dispute resolution to, in large part, private parties. One of the reasons that arbitration is such a highly prized form of dispute settlement is that national sovereigns respect the private nature of these tribunals by enforcing awards made by them largely without question.<sup>148</sup> Despite this, national sovereigns nevertheless maintain an interest in regulating the professional conduct of their lawyers representing clients in private international adjudication.<sup>149</sup> Ethical regulation in the context of

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<sup>146</sup> *Id.* at 423 n.382.

<sup>147</sup> *See id.* at 342.

<sup>148</sup> *See* United Nations Conference on International Commercial Arbitration, June 10, 1958, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. V, [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf).

<sup>149</sup> Rogers, *Context and Institutional Structure*, *supra* note 8, at 4 (“[N]ation-states retain an interest in the regulation of the behavior of lawyers who are licensed in their jurisdictions and whose work affects the rights and obligations of their citizens.”).

international arbitration must account for the coequal sovereignty of the nations implicated in the arbitration as well as the independence of the legal professions of those nations.

The principle of coequal sovereignty of nations is critical to the international legal sphere, including arbitration. Rogers asserts that “the goals of ethical regulation are to guide, punish, and deter attorney conduct in an effort to protect clients and third parties, and to ensure the proper functioning of the state adjudicatory apparatus.”<sup>150</sup> These goals are equally important and equally well-served by the application of state rules of ethics to lawyer conduct, regardless of whether the conduct is in the context of a domestic court, a domestic arbitration, or an international arbitration. The very nature of our federalist system at the domestic level and the system of Westphalian sovereignty at the international level allow for varied, conflicting, and from time to time completely incompatible ethical rules. The coexistence of national regulatory systems is simply part and parcel of the relations among nations on the international plane. If international arbitration is viewed as an example of the interaction of sovereign nations, there is no way—either feasible or desirable—to avoid conflicts between ethical rules. Even as the ABA Multijurisdictional Practice Commission prepared the new version of Model Rule 8.5 in an attempt to facilitate the ever-growing interstate practice, it “affirm[ed] its support for the principle of state judicial regulation of lawyers.”<sup>151</sup> Both the ABA and the CCBE have provided tools to resolve inconsistencies in the interstate and inter-European context that deliberately allow accommodation of various interests of the disciplinary authorities.

International tribunals do not have an interest in regulating attorney conduct;<sup>152</sup> rather, they merely have an interest in the equity of their proceedings. That interest can be satisfactorily fulfilled by invoking extant national rules and mechanisms through application of

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<sup>150</sup> *Id.* at 20 n.93 (quoting JOINT COMM. ON PROF'L DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1978)) (“The purpose of lawyer discipline . . . is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are likely to be unable to properly discharge their professional duties.”).

<sup>151</sup> ABA Comm. on Multijurisdictional Practice, Report of the Commission on Multijurisdictional Practice 6 (2002), <http://www.acca.com/advocacy/mjp/finalmjp.pdf>.

<sup>152</sup> This is not to say that an arbitral tribunal does not have an interest in having regulated attorneys appear before it, but simply that the tribunal’s interest does not extend to providing that regulation itself.

conflict of laws principles.<sup>153</sup> While Rogers's observation that the tribunal is in the best position to discipline the lawyers before it because it is best acquainted with their conduct makes intuitive sense, Professor Vagts notes that the apparent practical convenience is illusory in that "[e]xercising that power [to discipline] might . . . be diversionary and counterproductive."<sup>154</sup>

The way in which Rogers's functional approach contravenes the coequal sovereignty of nations is best illustrated in terms of her proposed enforcement mechanism. In a second article Rogers argues that the functional approach should lead to ethical rules that are promulgated and enforced by the arbitral tribunals themselves.<sup>155</sup> That enforcement should take the form of disciplinary sanctions and published reprimands.<sup>156</sup> Under this regime, the arbitral tribunal, an organization with no international personality or sovereign authority, would effectively govern conduct that is already regulated by professional organizations.<sup>157</sup> As argued above, there is nothing fundamentally different about a lawyer's international arbitration practice to warrant its exemption from the usual professional regulation. Rogers's recommendation would displace sovereign regulation of lawyers' conduct with a private regime under the sole authority of the arbitral tribunals. On the other hand, application of conflict of laws rules to ethics in arbitral proceedings incorporates the sovereign authority of the nation of each lawyer's citizenship by maintaining nationally based lawyer regulation. Conflict of laws seeks to ensure that national regulations are invoked when the sovereign's regulatory interest is implicated.

A conflict of laws approach likewise respects the independence of the legal profession—a long-held and essential value of bar associations around the world.<sup>158</sup> Organized bars promulgate rules of professional conduct for the very purpose of maintaining their

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<sup>153</sup> See Rogers, *Context and Institutional Structure*, *supra* note 8, at 2. As discussed above, in contrast to Rogers' repeated assertion that "international arbitration is intentionally disassociated from sovereigns, [so that] there is no obvious source for regulating participating attorneys," the current national rules expose a clear intention on the part of national regulatory authorities to extend the application of their rule to international arbitration. *Id.*

<sup>154</sup> Vagts, *Legal Profession*, *supra* note 2, at 253. Contrast with Rogers' assertion that "[t]he fact that international arbitration is a private system does nothing to diminish [its] inherent need" to have the "tools" and "power" to regulate the attorneys before them. Rogers, *Context and Institutional Structure*, *supra* note 8, at 24.

<sup>155</sup> Rogers, *Context and Institutional Structure*, *supra* note 8, at 4.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See Rogers, *supra* note 4, at 365-67.

independence.<sup>159</sup> The very fact of the bar's professionalism is intimately connected with its capacity of self-regulation.<sup>160</sup> Professor Daly invoked these principles in an unequivocal argument against a proposal for a unitary national bar association in place of the current state bar system:

As a matter of policy, the proposal for a national bar threatens the independence of the legal profession and should be rejected on this basis alone. State-based regulation preserves liberty . . . . The creation of a national bar would . . . lessen[] the protection of individual liberty.<sup>161</sup>

The independence of the legal profession must likewise be maintained in the context of private international adjudication. Application of conflict of laws to ethics rules in international arbitration supports and furthers the independence of the national bars by maintaining nationally based lawyer regulation. By contrast, Rogers's recommendation that international arbitrators should double as disciplinary authorities and sanction attorney conduct that does not comply with the ethics rules promulgated by that tribunal completely contravenes this principle of independence.<sup>162</sup> Involving an adjudicator as a ground floor disciplinarian threatens both the sovereign regulatory authority of the lawyers' respective nations and also the independence of the legal profession.

In summary, the role of the lawyer in international arbitration is not fundamentally different from her role in other contexts, as Rogers claims. National rules explicitly apply to international arbitration and call for a conflict of laws approach in that context. Furthermore, conflict of laws incorporates the essential principles of coequal sovereignty of nations and the independence of the legal profession whereas Rogers's approach contravenes these principles. National ethical regulations should therefore apply to international arbitration.

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<sup>159</sup> See Daly, *supra* note 3, at 749.

<sup>160</sup> Vagts, *supra* note 4, at 679-80.

<sup>161</sup> Daly, *supra* note 3, at 784 (emphasis added).

<sup>162</sup> Rogers, *Context and Institutional Structure*, *supra* note 8, at 3-4.

### III. THE CONFLICT OF LAWS APPROACH TO RULES OF PROFESSIONAL CONDUCT IS PRACTICABLE

This final section attempts to apply the conflict of laws principles delineated above to a few different factual scenarios discussed by Professors Rogers, Daly, and Vagts.<sup>163</sup> These hypothetical examples illustrate the ways in which a conflict of laws approach furthers the interests of national regulatory authorities, the arbitral tribunals, and the lawyers themselves. The examples should expose not only the complexity of conflict of laws but also the ultimate workability of the approach.<sup>164</sup>

#### A. INTERSTATE CONFLICTS OF RULES OF ETHICS PROVIDE A FAMILIAR STARTING POINT FOR CONFLICT OF LAWS ANALYSIS

We begin with an example<sup>165</sup> of an interstate conflict to juxtapose against the international examples in an attempt to expose the fundamental similarity in the application of conflict of laws regardless of whether the conflict is between states or nations.<sup>166</sup>

A law firm, S & H, is based in New York and has a branch office in New Jersey for the sole purpose of providing services to a principal client, DX, a Delaware corporation that has its principal place of operations in New Jersey. S & H has one partner, who is licensed both in New York and New Jersey, and three associates based at the New Jersey branch. Two of the associates are admitted to both the New York and New Jersey bars, and one is admitted only in New York. S & H transfers a second partner, licensed in California, to the office. DX reveals a fraud it has committed to the partner in charge of its account.

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<sup>163</sup> Daly, *supra* note 3, at 717; Rogers, *supra* note 4, at 392; Detlev Vagts, *International Legal Ethics and Professional Responsibility*, 92 AM. SOC'Y INT'L L. PROC. 378, 379 (1998) [hereinafter Vagts, *International Legal Ethics*].

<sup>164</sup> Cf. Gene R. Shreve, *Conflicts of Law—State or Federal?*, 68 IND. L.J. 907, 911 (1993) (“Those of us who study conflicts must regret that it is law frequently unpopular with lawyers, judges, law students, and even law professors . . . . [C]hief among the reasons must be the daunting nature of the subject: difficulties in framing issues, in deciding between complex and, at times, contradictory approaches to a solution, and in applying the approach selected to the facts of the case.”).

<sup>165</sup> This example is borrowed from Professor Daly, though the author has abbreviated the facts. Daly, *supra* note 3.

<sup>166</sup> *Id.* at 717, 718 n.1 (crediting Professors Hazard, Koniak, and Cramton with the hypothetical; citing GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 316 n.56 (2d ed. 1994)).

The California rule would prohibit disclosure, the New Jersey rule would require disclosure under certain circumstances, and the New York rule would either prohibit disclosure or leave it to the lawyer's discretion under certain circumstances. The question is, of course, which jurisdiction's ethical rules govern the lawyers' conduct.<sup>167</sup>

Daly's analysis and conclusion that the previous version of Model Rule 8.5 is wholly unworkable is based in large part on the centrality of the lawyer's place of admission and principal place of practice to the section of the rule governing conduct not related to a court proceeding.<sup>168</sup> These criticisms are no longer applicable under the new formation of the rule, which bases jurisdiction on the place of conduct.<sup>169</sup> Her further contention that the lawyer attempting to ascertain the place of the predominant effect of his conduct "has no assurance that either formula will be ultimately acceptable to the disciplinary authorities"<sup>170</sup> has also been remedied under the new formula through the reasonableness safeguard provision, as discussed above in Part II(B)(1).

The S & H lawyers' evaluation of whether they must disclose DX's fraud is undoubtedly a difficult task but not an impossible one. The first step of the application of Model Rule 8.5 is to determine whether the conduct is in connection with a matter before a tribunal.<sup>171</sup> For simplicity's sake, we will assume the fraud is not connected with any court proceeding.

Therefore, the second step falls under section 8.5(b)(2) governing conduct not related to a court proceeding. That section requires that the lawyers pinpoint the place of conduct.<sup>172</sup> The partner to whom the fraud was revealed must evaluate where the relevant conduct—in this case disclosure of the fraud—would occur. Probably the answer is New York or New Jersey, given that those are the jurisdictions in which this partner practices.

The next step is to determine whether the disclosure would have predominant effect in a jurisdiction other than New York or New Jersey. As Daly reasons, the disclosure would likely have effects in all the states in which DX did business, and so it is impossible to ascertain a place of

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<sup>167</sup> *Id.* at 776.

<sup>168</sup> *Id.* at 777.

<sup>169</sup> MODEL RULES OF PROF'L CONDUCT 8.5(b)(1-2).

<sup>170</sup> Daly, *supra* note 3, at 777.

<sup>171</sup> MODEL RULES OF PROF'L CONDUCT 8.5(b)(1).

<sup>172</sup> Daly, *supra* note 3, at 776-77.



predominant effect.<sup>173</sup> However, given the partner's intimate knowledge of DX's operations, as well as the details of the fraud, that partner is probably in a position to make a reasonable determination as to the place where his disclosure of the company fraud would have its predominant effect. The answer might be New Jersey (DX's primary place of operations) or it might be New York (the primary place of business of the third parties affected by the fraud).

Ultimately, the question of whether the lawyer gets the answer right is made eminently less critical by the reasonable basis provision of the new Model Rule. Provided that the S & H attorneys approach the inquiry in good faith and formulate a reasonable basis for their ultimate decision, any disciplinary authority that might eventually be confronted with their situation would apply the rules of the state where S & H attorneys reasonably placed the fraud's predominant effect.<sup>174</sup>

This example further illustrates the way in which the new Rule 8.5 captures a conflict of laws approach founded in interest analysis. Although multiple states will be affected by the disclosure, or lack thereof, and therefore have an interest in applying their rule, the predominant effect standard seeks out the state with the greatest interest.<sup>175</sup> The lawyer is the person in the best position to make this determination because she can assess the consequences of disclosing the fraud in the context of everything she knows about the client's matter. It is therefore advantageous to assign the lawyer the task of making this determination.

### **B. INTERNATIONAL CONFLICTS ARE STRIKINGLY SIMILAR TO INTERSTATE CONFLICTS**

Interestingly, Professor Vagts proposes nearly the same hypothetical in an international context.<sup>176</sup> In his scenario, an American lawyer working in the German office of an American firm discovers a client's plan to commit fraud. The German rule would require disclosure, and, as we saw in the preceding example, the American rules on the subject differ wildly. Elsewhere, Vagts notes "that the German lawyer's duty to report is contained within a provision that relates to

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<sup>173</sup> *Id.* at 777.

<sup>174</sup> *Id.* at 777-78.

<sup>175</sup> *Id.* at 777.

<sup>176</sup> Vagts, *International Legal Ethics*, *supra* note 163, at 379.

obligations of all Germans to assist in the forestalling of crime.”<sup>177</sup> Under interest analysis, then, the German rule would not apply to this American lawyer. The conduct of an American lawyer working for an American law firm does not implicate the purpose of the rule, which is to govern the conduct of German citizens within the German political community. If the disclosure of the client’s fraud can be characterized as a matter of cross-border EU practice, the CCBE Code might apply. In this case Rule 2.3 on “confidentiality” unambiguously militates against disclosure of the fraud, as it would against disclosure of any other client confidence.<sup>178</sup>

As one commentator observed, “[t]he discussion of which rules to apply becomes somewhat academic when one considers that the jurisdiction best able—and most likely—to pursue disciplinary action is the lawyer’s home jurisdiction.”<sup>179</sup> It is certainly possible to imagine that if the lawyer did make the disclosure, a disciplinary action might well be brought in the United States before a state disciplinary committee that had adopted Model Rule 8.5. In this case, the lawyer could argue that the rules of the jurisdiction where he made the disclosure, Germany, required that he do so, rendering the conduct permissible under the “place of conduct” provision of Rule 8.5. In the alternative, he could argue that he reasonably believed the predominant effect of the disclosure would occur in a jurisdiction that required the disclosure (whether that jurisdiction was New York or another state). Again, as long as the lawyer considered the factors and structured his conduct to comply with the regulations that he reasonably determined applicable, the lawyer should be able to rest assured that he is immune from disciplinary action.

### C. CONFLICTS IN INTERNATIONAL ARBITRATION: PRE-TRIAL COMMUNICATION WITH WITNESSES

The two preceding examples were intended to lay the groundwork for the application of conflict of laws doctrine to ethics rules; now we will address a few examples specific to international arbitration. The first, Rogers’s “paradigmatic” conflict introduced above, can be summarized neatly as the witness preparation/tampering

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<sup>177</sup> Vagts, *supra* note 4, at 687.

<sup>178</sup> CODE OF CONDUCT FOR EUROPEAN LAWYERS 2.3 (2006).

<sup>179</sup> Jay L. Krystinik, Comment, *The Complex Web of Conflicting Disciplinary Standards in Litigation*, 38 TEX. INT’L L.J. 815, 827 (2003).

issue.<sup>180</sup> Significantly, this issue has been addressed by the International Bar Association as part of its “Rules on the Taking of Evidence in International Commercial Arbitration.”<sup>181</sup> Specifically, Rule 4.3 provides: “It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.”<sup>182</sup> This example sheds some light on a common sense solution to the purported problem of conflict between ethics and procedural rules. Clearly, if the rules of the tribunal provide for preparation of witnesses by attorneys, it should not contravene the ethics rules of any relevant jurisdiction for attorneys before that tribunal to do so. The combined effect of either the CCBE Code<sup>183</sup> or Model Rule 8.5 and the IBA evidence rules will allow both the civil law and the common law lawyer to engage in strategic pre-testimonial communication with their respective witnesses in a fully ethical manner. By standardizing this evidence rule in international arbitration, the IBA has effectively harmonized the ethics rules regarding pre-testimonial communication with witnesses as well.

The principles underlying conflict of laws interest analysis provide a ready justification for resolving conflicts of ethics rules through the back door of procedural or evidentiary rules. The two regulatory bodies allegedly competing for prescriptive jurisdiction are the state<sup>184</sup> (which promulgated the ethical rule) and the arbitral tribunal (which promulgated the evidentiary rule). Let’s assume that the arbitration takes place in a civil law jurisdiction where pre-testimonial communications are prohibited but that the rules of the tribunal permit these communications. Can a lawyer, hailing from a civil law jurisdiction that likewise prohibits pre-testimonial communications, ethically take depositions and interview witnesses prior to the hearing?

The first step in interest analysis is to look to the purposes of the laws of each regulatory entity. The purpose of the state’s law prohibiting pre-testimonial communications is to maintain an untainted base of

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<sup>180</sup> Rogers, *supra* note 4, at 359-60.

<sup>181</sup> Block, *supra* note 10, at 18.

<sup>182</sup> INT’L BAR ASS’N [IBA], IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION, art. 4(3) (adopted June 1, 1999), *available at* [http://www.ibanet.org/publications/IBA\\_Guides\\_Practical\\_Checklists\\_Precedents\\_and\\_Free\\_Materials.cfm](http://www.ibanet.org/publications/IBA_Guides_Practical_Checklists_Precedents_and_Free_Materials.cfm).

<sup>183</sup> CODE OF CONDUCT FOR EUROPEAN LAWYERS 4.1.

<sup>184</sup> Either the lawyer’s home state or the location of the tribunal.

evidence to facilitate fact-finding by the inquisitorial judge.<sup>185</sup> The state's interest, therefore, extends only to attorneys who participate in the type of inquisitorial proceeding implicated by the rule. The arbitration proceeding, by its own definition, is not such an inquisitorial setting. Therefore, the state has no interest in preventing lawyers appearing before that tribunal from interviewing their witnesses before the fact. This situation presents the classic "false conflict," an instance in which only one regulatory entity—in this case the arbitral tribunal—has an interest in having its rule apply to the case.<sup>186</sup>

The only remaining issue is the practical question of whether lawyers from different backgrounds and training will prepare their witnesses equally well or in the same qualitative way.<sup>187</sup> Rogers also recognizes this but claims that a "controlling rule" will bring different lawyers' practice styles into alignment.<sup>188</sup> Her conclusion that a uniform ethics code will create such alignment seems to underestimate the pervasive cultural differences among lawyers internationally. As one practitioner stated, "Although it may be hard for lawyers in some jurisdictions to get used to this, at least the rule is clear."<sup>189</sup> This comment expresses the important idea that homogenizing the differences in practice styles among lawyers of vastly different education and experience takes much more than a rule of conduct. One of the essential features of international arbitration is that it is international. Lawyers from different traditions represent opposing parties and have different ways of thinking about litigation. This does not mean the problem of conflicting ethical obligations is insoluble but merely emphasizes that a conflict of laws approach incorporates this reality by respecting the regulatory authority of the implicated states while still allowing the tribunals to shape the conduct of lawyers in their proceedings.

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<sup>185</sup> Rogers, *supra* note 4, at 391. The prohibition on pre-testimonial communications reflects the lawyer's role, not a tolerance for perjury. *See id.* at 399.

<sup>186</sup> Kramer, *supra* note 113, at 1045.

<sup>187</sup> *See* Block, *supra* note 10, at 18-19.

<sup>188</sup> Rogers, *supra* note 4, at 360 n.85.

<sup>189</sup> Block, *supra* note 10, at 18.

**D. CONFLICTS IN INTERNATIONAL ARBITRATION:  
EX PARTE COMMUNICATIONS**

Rogers's description of ex parte communications with arbitrators is the final illustration of the conflict of laws approach in action.<sup>190</sup> An American and a European represent opposing sides before an arbitral panel composed of two party-appointed and one neutral arbitrator in a proceeding under Swiss law.<sup>191</sup> The question is "whether it is permissible for the lawyer for one of the parties to the arbitration to communicate ex parte with the arbitrator whom that party appointed."<sup>192</sup>

A conflict of laws rule which applies the ethics rules of the situs of the tribunal would require the application of the civil law rule allowing ex parte communications. Interest analysis would look to the purpose of the American rule prohibiting ex parte communications: to prevent one side from gaining an unfair advantage.<sup>193</sup> If the structure of the proceeding is intended to equip each side with an advocate on the arbitral panel and maintain the neutrality of the third panelist, then the purpose of the U.S. rule is only implicated with respect to ex parte communications with the neutral arbitrator.<sup>194</sup> The U.S. rule would not bar communications with the party-appointed arbitrators.<sup>195</sup> Furthermore, under the situs rule, the U.S. lawyer would be fully justified in engaging in such ex parte communications under ABA Model Rule 8.5 as she would be complying with the rules of the jurisdiction where the tribunal sits.<sup>196</sup>

The practice has developed in the opposite direction, however. Ex parte communications are "not the norm in international arbitration."<sup>197</sup> Several organizations that issue arbitration rules and guidelines have come down on the side prohibiting ex parte communications and, therefore, encouraging the neutrality of all arbitrators.<sup>198</sup> The 1989 version of the CCBE Code resolved this conflict

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<sup>190</sup> The author borrowed the hypothetical from Professor Vagts. Vagts, *International Legal Ethics*, *supra* note 163, at 379.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Rogers, *supra* note 4, at 392.

<sup>194</sup> *Id.* at 392 n.247.

<sup>195</sup> *Id.* at 292-93.

<sup>196</sup> MODEL RULES OF PROF'L CONDUCT 8.5(b)(1).

<sup>197</sup> Menkel-Meadow, *supra* note 2, at 957-58.

<sup>198</sup> *Id.* at 958, 958 nn.42-43. *Cf.* Vagts, *supra* note 4, at 259 (calling for "uniform standards" in this area).

in favor of prohibiting *ex parte* communications except where they are permitted “under the relevant rules of procedure.”<sup>199</sup> The new 2006 version of the CCBE Code avoids the issue entirely.<sup>200</sup>

Professor Carrie Menkel-Meadow refers to this situation as a “conflict of role.”<sup>201</sup> Whereas Rogers’s functional approach emphasizes the derivation of the ethics rule from the role of the lawyer in a given procedural framework, this example of *ex parte* communications betrays the fact that the rub might actually be in ascertaining the role in the first place. The debate about *ex parte* communications with party-appointed arbitrators exposes differing views about whether arbitrators should properly serve a partisan or a neutral role. The counterpart to this debate regards the lawyer’s role and the extent to which the lawyer should advocate before a neutral panel or work with a member of that panel as a team—a conflict of role, indeed. As international arbitration grows and develops, the roles lawyers play before its tribunals will surely develop and change as well. As procedural and evidentiary rules are drafted and revised, they will reflect these developments in the framing of the lawyer’s role. The conflicts among ethical rules can be best resolved by weighing the interests of the relevant regulatory authorities in the context of the particular procedural and evidentiary rules of an international proceeding.

## CONCLUSION

Catherine Rogers’s article “Fit and Function” provides a novel approach to the analysis of conflicting rules of professional conduct in the context of international arbitration. Her analysis of the interconnectedness of procedural rules, ethics, and the lawyer’s role falls short, however, of compelling her recommendation that a code of ethics be developed especially for international arbitration. Differing ethical rules across jurisdictions do not necessarily indicate fundamentally different roles of the lawyers in those jurisdictions. Ethical rules are partly a function of the development of the legal profession over time. Further, lawyers practicing in international arbitration do not take on a

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<sup>199</sup> Terry Part I, *supra* note 63, at 387; CODE OF CONDUCT FOR EUROPEAN LAWYERS 4.2 (1989) (language omitted when amended 2006).

<sup>200</sup> The 2006 version provides a rule barring “communication with opposing parties,” but does not address *ex parte* communications. CODE OF CONDUCT FOR EUROPEAN LAWYERS 5.5 (2006).

<sup>201</sup> Menkel-Meadow, *supra* note 2, at 957.

profoundly different role in that context. They bring their culturally specific professional outlook with them, and the conflicts among ethical standards that arise in this setting are a necessary part of the continued development and professionalization of international arbitration.

A conflict of laws approach to ethical dilemmas in international arbitration incorporates these complexities and accounts for the coequal sovereignty of the regulating states and the independence of the legal profession. Application of conflict of laws principles to resolve the ethical dilemmas that arise in the context of international arbitration will ensure that the standards for professional conduct in this venue support its reputation as a neutral and efficient method of adjudication that furthers both party and state interests.