How Legislative Bans on Foreign and International Law Obstruct the Practice and Regulation of American Lawyers

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ABSTRACT

Thirty-two state legislatures have introduced (and five have enacted) “blocking” initiatives that prohibit foreign or international law in state judicial decisions. Some states, such as Oklahoma, extend this ban to religious tenets, notably Sharia law. Scholarly discourse to date has focused principally upon how such legislation discriminates against minority religious groups. The academic community has yet to consider the serious collateral (and apparently unintended) impact of such laws on American lawyers, which is the subject of this article.

Blocking laws make it all but impossible for practicing lawyers to fulfill their ethical obligations in legal matters abroad, which forces them either to decline legal work overseas or to risk violating foreign laws. Blocking initiatives also create uncertainty about ethical duties at home whenever domestic legal work includes a transnational dimension. Such laws resurrect the “double deontology” problem (where inconsistent ethical duties apply simultaneously) that the revised ABA Model Rules intended to solve. They also eviscerate the Rules’ safe harbor protection on difficult choice of law questions.

Blocking measures also interfere with wider regulatory structures. They infringe unconstitutionally on the power of state judiciaries to prescribe substantive ethical rules and to regulate lawyer conduct abroad. They also disrupt reciprocal discipline between American states and relationships between state judiciaries and federal courts. Yet this confluence of negative outcomes is completely unnecessary because judges have sufficient tools already to guard against potential abuses in the application of foreign or international law.

Apart from invalidating existing laws as unconstitutional, there should be a concerted effort by American lawyers, state judiciaries, and bar organizations to oppose such initiatives becoming law in the first place. There certainly is room for spirited disagreement over the proper role of foreign and international law in American courts. But this requires a genuine debate, not legislative ultimatums that foreclose all further consideration. Blocking laws essentially require American lawyers (not to mention judges – members of co-equal branches of state government) to pretend that foreign and international law do not exist. Such proposals are neither workable nor wise, and they amount to little more than misguided hope that certain global legal realities – if sufficiently ignored – might simply go away.

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“Just because something doesn’t exist, doesn’t mean you shouldn’t ban it.”

I. Introduction – Globalization and the Legal Profession

The world is globalizing. As long-standing economic, social, cultural, geographic, financial, and communication barriers fall, these various dimensions of modern life become increasingly connected in even more complex – and often unpredictable – ways. Lawyers play a key role in both facilitating and regulating transnational dealings even as the underlying legal structures themselves experience significant change. Particularly in the commercial setting, globalization puts enormous pressure on local law to accommodate a much wider context whose borders are considerably more porous.2

The impact of globalization on legal practice is a front-page issue for the profession (literally – as the ABA Journal’s November 2011 cover story3 attests) and will continue to drive change within it for many years to come. The World Trade Organization has recognized the key role of lawyers in global commerce,4 with American practitioners often at the vanguard. Recent

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2 Per the Association of Corporate Counsel’s former chief lawyer: “[a] lot of law used to be state and federally oriented, but the modern company is borderless . . . . The problem here is that the rules and laws that originally made sense when they were written have not caught up with modern technologies and the way clients do business.” See Jason Massad, Global Village Gets Complicated: Corporate Attorneys Battle Increasing Complexity in International Business, ATL. BUS. CHRON., Mar. 12, 2010.


4 See World Trade Organization, Council for Trade in Services, Legal Services: Background Note by the Secretariat, Doc. No. S/C/W/43 (98-2691) Jul. 6, 1998 at ¶3 (“Increasingly, lawyers are faced with transactions involving multiple jurisdictions and are required to provide services and advice in more than one jurisdiction. The demand for lawyers to be involved in foreign jurisdictions often comes from their corporate clients, who do business across borders and choose to rely on the services of professionals who are already familiar with the firm’s business and can guarantee high quality services.”).
data from the Department of Commerce reveals that in 2010 the United States was a net exporter of legal work several times over, providing $7.3 Billion in legal services worldwide while importing only $1.5 Billion. In the past five years alone, the export of American legal services grew nearly 40%.

The American legal profession faces unique challenges in squaring these rapidly-emerging global realities with a regulatory paradigm centered on control at the state level. Although subject to principles of federalism, American states have enjoyed a long tradition of control over the admission and conduct of legal practitioners. The dialogue on the proper balance of the interests affected by globalization really is just beginning. Recent ABA proposals, for example, seek to align transnational pragmatism with regulatory tradition for both “outbound” services (e.g., off-shoring legal work to overseas legal service providers) and

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6 See id. at 33, 51. The U.S. has led the world in exporting legal services for at least the past decade. Id. at 32, 50 (demonstrating 38.94% increase in the dollar value of legal services exported from 2006-10).

7 See, e.g., Application of Griffiths, 413 U.S. 717 (1973) (unconstitutional to treat otherwise-qualified permanent U.S. residents as ineligible to sit for the Louisiana bar exam).

8 See, e.g., Leis v. Flynt, 439 U.S. 438, 442 (1979) (“Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.”). A more pragmatic limitation on unauthorized practice is the inability to collect fees for services rendered. See, e.g., Birbrower, Montalbano, Condon & Frank, P.C. v. The Superior Court of Santa Clara County, 17 Cal.4th 119 (Cal. 1998) (public policy prohibited quantum meruit recovery for New York Law firm that provided legal services in California, even as a set-off against malpractice damages).


“inbound” services (e.g., enabling foreign lawyers to practice in the U.S. without running afoul of American UPL prohibitions).¹²

These efforts by practicing lawyers, judges, and bar regulators to create a nuanced response to the challenges of globalization are in the process of being unceremoniously superseded by legislative efforts at the state level. Thirty-two states have “blocking” initiatives pending at various stages of the legislative process (see Appendix A) that prohibit state court judges from considering foreign or international law in judicial decisions.¹³ Some go even further and seek to intimidate the judiciary with threats of serious penalties for violation (e.g., impeachment, the creation of a private right of action against offending judges, and even arrest and criminal prosecution). This amounts to a direct attack on the authority of state judiciaries, which exercise primary regulatory oversight over lawyers, to determine the proper role of international and foreign law in questions of legal ethics and bar regulation.

Blocking measures will have a dramatic negative impact on American lawyers representing clients abroad and will create significant confusion and uncertainty in any legal matter that touches upon the international plane. They effectively require practitioners to decline foreign representations whenever overseas ethical rules differ from those of the blocking jurisdiction (which, as a practical matter, will be nearly all the time). When American lawyers do proceed with such matters, they will run the simultaneous risk of local bar discipline for


¹³ Blocking measures are arising in the context of a wider debate over the proper balance of legislative versus judicial control over the application of state law. See, e.g., John Gibeaut, Co-Equal Opportunity, 98 A.B.A. J. 45 (Jan. 2012). This wider setting acknowledged, this article focuses on the ways in which blocking measures interfere with judicial regulation of the legal profession itself, particularly when American lawyers practice overseas.
following contrary foreign standards and bar discipline (or even criminal prosecution) in the foreign state for following American practices.

Blocking initiatives also impede client representation and preclude lawyers from even advocating foreign law as a judicial rule of decision, even where contractual agreements or the state’s prior adoption of *lex loci* choice of law principles specify that foreign rules apply. They even prevent lawyers who comply with foreign ethical rules in overseas representations from drawing upon those standards in the defense of malpractice claims.

As discussed below, this confluence of negative outcomes is completely unnecessary. The American judiciary has sufficient tools already to secure the rights of American citizens against potential abuses arising out of foreign or international law. Whatever the scope of legitimate debate over the use of foreign and international law in state courts, it does not include per se legislative and/or constitutional enactments that strip courts of their power to use these tools to balance the interests in question and create a nuanced response to global legal realities.

**II. Blocking Initiatives by State Legislatures**

Since 2010 alone, thirty-two states have introduced “blocking” initiatives that prohibit state court judges from referencing international, foreign, and/or religious law. At least eighty-seven distinct measures have been introduced, with multiple versions filed in some jurisdictions.\(^{14}\) Blocking measures even have become law in five states.\(^{15}\)

The specific texts vary considerably, but many include departures from ordinary usages of legal terminology. Legislative prohibitions on “foreign law” typically encompass both public and private international law as well as domestic law from foreign nations. Arizona’s initiative,

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\(^{14}\) See Appendix A (detailing 87 state blocking initiatives across 32 states).

\(^{15}\) Id. (Arizona, Idaho, Louisiana, Oklahoma, and Tennessee).
for example, provides that “unless the context otherwise requires, ‘foreign law’ means any law, rule or legal code or system other than the constitution, laws and ratified treaties of the United States and the territories of the United States, or the constitution and laws of this state.” Iowa’s bill covers “any law enacted by a jurisdiction or a governmental or quasi-governmental body other than the federal government or a state of the United States . . . . [including] a religious law, legal code, accord, or ruling . . . by an international organization, tribunal, or formal or informal administrative body.” To facilitate the present analysis, references herein to “foreign law” should be taken as including international law as well as laws from other countries, even though these categories clearly are distinct in practice.

Blocking measures often are styled as responses to amorphous foreign or international “threats” described in ambiguous “findings” and vague statements about citizens’ rights and public policy. Their true necessity is highly suspect, however. They have been critiqued as a

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17 See H.B. 575 art. 3(b) (Iowa 2011).
18 International law is federal law, for example, which is not the case with law from foreign states. See U.S. Const. art. VI, cl. 2. There also are instances where rules of international law are bound up in domestic application by a foreign jurisdiction (e.g., where France applies international rules in its domestic courts). To make things even more complex, constitutional structures in some foreign states (e.g., Germany) incorporate international law automatically; no further local action is required for international rules to become binding domestic law. See, e.g., Basic Law for the Federal Republic of Germany (Grundgesetz, GG), May 23, 1949 (German Constitution, as amended) art. 25 [Primacy of international law] (“The general rules of international law shall be an integral part of federal law. They shall take precedence over the other German laws and directly create rights and duties for the inhabitants of the federal territory.”).
solution in need of a problem, and the primary motivation for many provisions appears to be political posturing by state legislators.

Whatever the true motivations, however, it is important to note that this is hardly the first time that states have legislated hostility to foreign law. The practice dates back to the nation’s founding. It also is not confined to the states. Congressional efforts aimed at state and federal judges failed in 2004 but expressed remarkably similar sentiments about “threats” from foreign law. History continues to repeat itself even today in both legislative and political settings.

The precise impact of any particular blocking measure will depend on its specific text and the constitutional structures of the state where it is adopted. There are sufficient commonalities, however, to allow general conclusions to be drawn about their overall effects. These provisions

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21 Oklahoma’s measure, for example, overtly bans Sharia law from Oklahoma’s state courts. Yet electronic research for references to Sharia law (and related keywords) revealed not one judicial decision, administrative ruling, or other official determination in Oklahoma where Sharia law was even mentioned, let alone used as a rule of decision. The only references appearing in Oklahoma’s statutory materials relate to the constitutional amendment that bans Sharia law. See Westlaw Searches of Nov. 20, 2011 (on file with the author).


24 For a critique of these efforts and discussion of the traditional use of foreign and international law in federal courts, see David Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 BOST. UNIV. L. REV. 1417 (2006).


26 See, e.g., Donna Leinwand, *More States Enter Debate on Sharia Law*, USA Today, Dec. 9, 2010 (quoting 2012 presidential candidate and former House speaker Newt Gingrich’s advocacy of “a federal law that ‘clearly and unequivocally states that we’re not going to tolerate any imported law.’”).
generally fall into one of three categories: “full,” “rights-based,” and “reciprocal” blocking initiatives.\textsuperscript{27}

Full blocking initiatives are outright bans on foreign law, regardless of circumstance or context. The court looks no further than the source of the legal tenet in question. If it comes from “foreign law,” it must be disregarded. Oklahoma’s law, which is a constitutional amendment adopted through a ballot initiative known as State Question 755 (“SQ 755”), is a good illustration:

\textit{The Courts . . . shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law, in making judicial decisions. The courts \textit{shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law} or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.\textsuperscript{28}}

Rights-based initiatives consider the \textit{application} of foreign rules and prohibit usages that interfere with the state or federal rights of citizens. A court must consider not only the source of the law, but also whether it works a rights infringement in practice. Arizona’s rights-based measure became law in April 2011:

\textit{A court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States or conflict with the laws of the United States or of this state.\textsuperscript{29}}

Reciprocity-based initiatives block foreign laws that do not provide the same rights protection as American state or federal law. As with rights-based measures, the court must

\textsuperscript{27} Although most initiatives reflect a dominant approach, the categories are not entirely insular, and some blocking initiatives reflect more than one blocking methodology within a specific law or legislative proposal.

\textsuperscript{28} See Oklahoma State Question 755 § 1(C) (emphasis added), amending OKLA. CONST. art. 7 § 1 (2010).

\textsuperscript{29} See ARIZ. REV. STAT. 12-3103.
consider the rule’s source and whether rights are infringed in practice. But it also must consider operational equivalency and the extent to which the foreign jurisdiction as a system would protect rights guaranteed under state or federal law. A Kansas initiative provides that:

Any court, arbitration, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions.30

The three categories may amount to distinctions without a difference. All are framed in the imperative (“shall” / “shall not”), which means that their prohibitions are absolute.31 Rights-based and reciprocity-based measures both seek to ensure identical treatment for American citizens. It is unlikely that this standard can be met in practice because foreign law rarely provides the same protections to those available in the United States.

Civil jury trials, for example, are American “rights” that generally do not exist overseas, even in countries that allow juries in criminal cases. Many other constitutional protections (e.g., due process and exclusionary rules, evidentiary privileges, and the like) arise from the American adversarial system and have no analogues in civil / inquisitorial trial systems. As noted previously,32 blocking measures also generally make no allowance for choice of law or waiver (e.g., agreeing by contract that foreign law governs disputes).33

30 See H.B. 2087 (Kan. 2011).
31 See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (courts must follow legislative “instruction [that] comes in terms of the mandatory ‘shall,’ which normally creates an obligation impervious to judicial discretion”). This is true for ethical rules as well. See MR Scope ¶14 (distinguishing mandatory rules from advisory and aspirational provisions).
32 See supra text to notes 35-36.
33 See, e.g., H.B. § 5327(b)(1)(ii) (Pa. 2011) (“A contract which provides for the choice of a foreign legal code or system to govern a dispute which arises out of the contract violates the public policy of the Commonwealth and shall be void and unenforceable if the foreign legal code or system chosen . . . would not grant the parties the same fundamental liberties, rights and privileges granted under the United States Constitution and the Pennsylvania Constitution.”).
The unique nature of the American legal system thus makes it highly unlikely that foreign law could ever afford rights identical to those under American law. Even foreign systems that are entirely legitimate cannot satisfy requirements focused on sameness (as opposed to equivalent degrees of fairness). Rights-based and reciprocity-based measures likely will function as full blocking provisions in nearly all cases, such that rules of foreign law cannot be applied for any purpose in jurisdictions that adopt them. All three types of blocking measures thus reject the nuanced assessment that courts typically apply to foreign materials in favor of a blanket prohibition, which amounts to a per se determination of public policy for all branches of state government.34

These wholesale bans on foreign and international law create serious legal complications for the states that adopt them. While the benefits are dubious, the costs are substantial, including a direct impact on commercial matters. While foreign forum selection and choice of law clauses in private contracts normally are enforceable,35 blocking provisions seek to eviscerate contractual clauses selecting foreign law on public policy grounds.36 They also create substantial uncertainty over the enforceability of international commercial arbitration awards. Indeed, they could prevent the adjudication of any legal dispute where the validity of a foreign law or legal

34 Compare Restatement (Foreign Relations) § 482 (setting forth public policy grounds allowing judges to treating foreign judgments as unenforceable within the state) with LA. REV. STAT. § 9:6001(B) (“The legislature finds that if shall be the public policy of this state to protect its citizens from the application of foreign laws . . . .”) (emphasis added).

35 See, e.g., M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972) (“There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect.”).

36 See, e.g., H.B. 3768 (Tenn. 2010) (“Any court, arbitration panel, tribunal, or administrative agency ruling or decision that is based in whole or in part on any substantive or procedural law, legal code or legal system of another state, foreign jurisdiction or foreign country that would violate rights and privileges granted under the United States or Tennessee Constitution is declared to be against the public policy of this and is unenforceable in this state.”) (emphasis added) and M/S Bremen v. Zapata Off-Shore Co., 407 U.S. at 15-16 (“A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”) (emphasis added).
determination is at issue (eg, in family law cases involving foreign marriages and adoption, in commercial disputes or state tax cases where the ownership of foreign property is in question, etc.).

Blocking measures also create serious problems of constitutional federalism as it relates to foreign affairs. To the extent that they reject international law, for example, blocking measures likely violate state obligations under the Supremacy Clause\(^\text{37}\) to respect this dimension of federal law.\(^\text{38}\) The absolute nullification of all foreign law also implicates international comity, which is the harmony arising out of respect demonstrated by judicial officers in one jurisdiction for legal determinations in another, particularly on matters involving the foreign state’s own laws.\(^\text{39}\) This in turn could impact federal interests in preserving good relations with foreign nations, in terms of either the Executive’s broad foreign relations power,\(^\text{40}\) or Congressional authority under the Foreign Commerce Clause.\(^\text{41}\)

Blocking measures create constitutional problems domestically as well. To the extent that they prohibit the enforcement of judgments from other American states or federal courts that are grounded in foreign law, they violate the Full Faith and Credit and Due Process Clauses of

\(^\text{37}\) See U.S. CONST. art. VI, cl. 2.

\(^\text{38}\) See, e.g., Medellín v. Texas, 552 U.S. 491, 536 (2008) (Stevens, J., concurring) (noting that “sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation” by complying with international treaty standards).

\(^\text{39}\) See Restatement (Third) of the Foreign Law of the United States § 101 cmt. e (1987) [hereinafter Restatement (Foreign Relations)].

\(^\text{40}\) See U.S. CONST. art. II § 2. See also American Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (California law requiring insurers doing business in California that had provided insurance in Europe during the Holocaust era to provide details to California officials impermissibly interfered with Executive Branch’s exclusive power to control foreign affairs).

\(^\text{41}\) See U.S. CONST. art. I § 8, cl. 1, 3 (“The Congress shall have the power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes”). See also Symeon C. Symeonides, Choice Of Law in The American Courts in 2010: Twenty-Fourth Annual Survey, 59 AM. J. COMP. L. 303, 320-23 (2011) (discussing constitutional implications of Oklahoma’s blocking initiative).
Apart from these general issues, as discussed below blocking measures have a particularly negative impact on American lawyers, who now will have little certainty about the source or scope of their ethical obligations while practicing abroad. They also interfere directly with judicial regulation of the admission, ethical conduct, and discipline of lawyers. These negative outcomes are particularly ironic because consideration of how blocking measures could impact the American legal profession appears to have played no role whatsoever in the legislative process.  

III. Foreign and International Law in Ethical Regulation  

Foreign rules enter the lawyer regulatory and disciplinary processes through Model Rule 8.5, which addresses both the court’s jurisdictional authority over lawyers and choice of law for disciplinary purposes. But it was only recently that American ethical rules began to address these questions at all. The 1983 version of Rule 8.5, which had no counterpart in the predecessor Model Code, provided simply that bar admission granted disciplinary jurisdiction over a
lawyer’s conduct regardless of where it occurred. This confirmed the state’s regulatory interest in all conduct by its own lawyers but did not address its authority over non-admitted lawyers who acted within its borders. Courts typically regulated unauthorized practice through injunctions prohibiting further activity in the state, rather than through disciplinary proceedings per se. They relied principally on bar authorities where offending lawyers were admitted to discipline them for misbehavior in the target jurisdiction, although this mechanism worked poorly in practice.

The Model Rules first provided guidance on choice of law with the 1993 revision. This version of Rule 8.5 applied the disciplinary standards of the jurisdiction where a lawyer “principally” practiced unless his conduct “clearly” had its predominant effect in another jurisdiction where the lawyer also was admitted. The 1993 rule allowed ethical standards to be drawn from more than one location but limited the choice to jurisdictions where the lawyer was admitted. Even accounting for temporary admission (e.g., admission pro hac vice), choice of law remained tightly bound to a small group of potential sources.

The 2002 revisions, which apply today, were far more reaching. Rule 8.5(a) was revised to specifically allow bar regulators to discipline lawyers who provided (or offered to provide)

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46 See MR 8.5 (1983) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.”).
47 See 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, 748-49 (1995).
48 See, e.g., Restatement (Third) of the Law Governing Lawyers § 5 cmt. h (2000) [hereinafter Restatement (Lawyers)].
49 See id. (noting that, although bar authorities could discipline their lawyers for conduct elsewhere, as a practical matter “the motivation for enforcement against wholly out-of-jurisdiction activity [was] often not great.”).
50 The masculine pronoun is used herein solely because it corresponds to the gender of the author. References to “his”, “himself,” etc. apply equally to both genders, unless context or quoted material dictate otherwise.
51 See MR 8.5(b)(2)(ii) (1993) (“If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct”).
legal services in their jurisdiction. This recognized the reality that “[a] jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct” and filled the regulatory gap the ABA had identified twenty years earlier. The new system also facilitates reciprocal discipline in jurisdictions where lawyer are formally admitted, which provides far greater incentives to remain in line.

The choice of law mechanism in Rule 8.5(b) was revised as well:

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

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

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

Rule 8.5(b) represents a massive shift because it decouples choice of law from the jurisdictions where a lawyer is admitted to practice. It works in tandem with the revised Rule 8.5(a), which grants disciplinary authority based simply on a lawyer acting (or attempting to act) in a particular jurisdiction.

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52 See MR 8.5(a) and cmt. 1 (basing authority to discipline non-admitted lawyers on the need for public protection).


54 See Implementing Existing ABA Policy to Expedite the Disciplinary Process: Jurisdiction over all Lawyers Practicing in the State, in REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1989-1992) cmt. (noting that 33 jurisdictions had no authority to discipline lawyers that practiced there but who were admitted only in other states, such that it was “essential” for state judiciaries to adopt rules providing “jurisdiction over all lawyers practicing law within the jurisdiction” in order to address this “significant gap in the ability to enforce the rules of professional conduct”).

55 See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Rule 22(A) (2002) [hereinafter “MRDE”].
Like its predecessor, the revised Rule 8.5(b) seeks to ensure that lawyers are subject to only one set of ethical rules at a time.\textsuperscript{56} This solves the “double deontology” problem, where professional conduct is prohibited in one jurisdiction but required in another. The rule’s touchstone is \textit{place}, not admission status. Absent practice before a tribunal, whose location presumptively governs, the law of the jurisdiction where conduct or its predominant effect occurs apply – whether or not a lawyer also is admitted there.

Rule 8.5 has been widely adopted by the American states. Some twenty-four states have a rule identical to Rule 8.5, twenty-one have a similar (but not identical) rule, two states are proceeding on favorable recommendations for adoption, and three have commissions studying the issue.\textsuperscript{57} Rule 8.5 governs only the selection of disciplinary rules and does not otherwise alter choice of law on related questions of criminal law, civil liability, and the like.\textsuperscript{58} Where it applies, however, the rule’s emphasis on conduct and effects serves the interests of lawyers, regulators, and the public by minimizing both rules conflicts between jurisdictions and uncertainty over which rules apply.\textsuperscript{59}

\textsuperscript{56} See MR 8.5 cmts. 4-5.

\textsuperscript{57} See ABA Center on Professional Responsibility, Chart on State Implementation of Model Rule 8.5, Oct. 27, 2010. Only forty states also have adopted the comments to the rules, however. See ABA Center on Professional Responsibility, Chart on State Adoption of the ABA Model Rules of Professional Conduct and Comments, May 23, 2011.

\textsuperscript{58} See Restatement (Lawyers) § 1 cmt. e (“In general, traditional choice-of-law principles, such as those set out in the Restatement Second of Conflict of Laws, have governed questions of choice of law in nondisciplinary litigation involving lawyers.”). See also Nancy J. Moore, \textit{Choice of Law for Professional Responsibility Issues in Aggregate Litigation}, 14 ROGER WILLIAMS L. REV. 73, 84-85 (2009) (discussing complications arising out of the “existence of remedies other than lawyer discipline” that involve related conduct but to which different law is applied).

\textsuperscript{59} See MR 8.5 cmt. 3.
This does not mean that the aspirations of fluidity and predictability are easily achieved. Identifying the locus or “predominant effect” of conduct can be quite difficult, particularly in the multi-jurisdictional dealings that characterize modern business:

If a lawyer is working on the acquisition of the stock of a corporation that is formed under Delaware law but conducts all of its activities in New Jersey where the buyer is in New York and the seller in Pennsylvania, is there a jurisdiction in which the conduct clearly has its predominant effect? If one starts to shift the factors around so that the corporation is both formed in and doing its business in New Jersey, does that now produce a predominant effect there? The answer involves sorting out a variety of factors about which reasonable minds can disagree. Professor Prosser described the landscape nearly sixty years ago, opining that “[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.” Given such difficulties, the 2002 amendments sensibly added a safe harbor for lawyers that follow the ethical rules of a jurisdiction they erroneously (but reasonably) believed would apply.

The safe harbor is an integral part of the rule itself and is critical to ensure that it operates as intended. The pre-2002 link to admission status provided an inherent limitation on the potential sources of disciplinary rules. After 2002, these sources now include at least all

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60 See, e.g., Daynard v. Ness, 178 F.Supp.2d 9 (D. Mass. 2001) (applying Rule 8.5 to an oral fee splitting agreement between lawyers made in Illinois (where they “shook on it”) between a Massachusetts law professor licensed in New York and attorneys licensed in Mississippi and South Carolina in connection with the representation of multiple states as plaintiffs in litigation against the tobacco industry).


63 See MR 8.5(b)(2). This means that the lawyer actually believes the jurisdiction’s rules apply and that a “reasonably prudent and competent lawyer” in the same circumstances would reach the same result. See MR 1.0(h), (i).
American jurisdictions where a lawyer acts (or causes effects). Practitioners no longer can look solely to jurisdictions where they are permanently or temporarily admitted to assess the universe of potential ethical duties. Rule 8.5 recognizes the myriad challenges this poses in application and the fact that counsel may well get it wrong – hence the safe harbor provision.

The safe harbor might be seen as reflecting (and enabling) broader policy choices on the regulation of modern legal practice. A state’s interest in having its own rules (applicable based on conduct or effects in that jurisdiction) enforced in any particular case yields to the wider benefits of regulation based on the reality that lawyers can and will provide legal services in multiple jurisdictions (presumably with appropriate permission). Given the ambiguities of determining up front the correct source of ethical obligations, fewer lawyers would provide multi-jurisdictional services without safe harbor protection. Others at least would charge more for the enhanced risks to license and livelihood should 20-20 judicial hindsight prove the lawyer wrong. Rule 8.5 facilitates modern commerce by allowing lawyers to conform their conduct to what they reasonably conclude is appropriate for legal representation in the places where they act or cause effects (as reflected in the disciplinary rules and other laws of that jurisdiction).

The safe harbor grants lawyers the right to be wrong – tempered by objective standards of reasonableness. It does not alter the calculus of which rules actually apply to the matter in question. A lawyer’s reasonable belief that the rules of Jurisdiction “X” applied does not artificially require subsequent disciplinary proceedings to be based on X’s standards. Rather, it operates as an affirmative defense: “Yes, I breached the rules of Jurisdiction Y, but only because I thought I should comply with the rules of X, which I did, and it would be wrong to discipline

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64 The application of Rule 8.5 abroad is discussed below. See infra text accompanying notes 66-85.
65 This reflects the broader underlying principle that it is “unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.” See Restatement (Second) of Conflict of Laws § 6 cmt. g (1971) [hereinafter Restatement (Conflicts)].
me because my determination that X applied was reasonable at the time, even if it proved incorrect in hindsight.”

A. Transnational Practice and Rule 8.5

The Model Rules specifically disclaimed transnational application prior to 2002, providing that “[t]he choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.”\(^6^6\) Information is scant on why\(^6^7\) but appears predicated on the view that the Model Rules and Model Code together formed a closed regulatory system exclusive to the United States. The ABA’s Standing Committee noted in the early 1990s that:

> References in the Rule to other ‘jurisdictions’ implicitly only assume other jurisdictions as have promulgated some version of the [Model Rules] (or the predecessor [Model Code]), thus providing complete reciprocity and certainty. Unlike domestic choice of law, on the other hand, international choice of law issues are not at this time resolvable by the adoption of uniform rules; although this may be possible in the future, at present they must continue to be resolved by internationally accepted choice of law principles.\(^6^8\)

It seems clear that foreign and international law now have some role in the question of whether (and how) American lawyers are regulated on the international plane.\(^6^9\) Rule 8.5 mirrors the two primary bases of international jurisdiction: nationality and territoriality.\(^7^0\) But these

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\(^6^6\) See MR 8.5 cmt. 6 (2001) (1993 version of Model Rule 8.5).


\(^6^9\) See ABA Center for Prof’l Responsibility, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, 827, 831 (2006) (“The Commission believes that lawyers engaged in transnational practice ought to be governed by this Rule’s choice of law provision, unless international law or other agreements between countries or competent regulatory authorities provide otherwise. Moreover, the Commission believes that such lawyers will benefit from the guidance provided in this Rule, as well as from the safe harbor provision.”).

\(^7^0\) See Restatement (Foreign Relations) § 402.
default grounds can be subordinated if the transnational context so-warrants.\textsuperscript{71} Per Comment 7 to Rule 8.5:

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.\textsuperscript{72}

Not all states have adopted Comment 7. While this does not automatically preclude its application to transnational matters in that jurisdiction, it does make it less clear. Different inferences can be drawn from the absence of a clear statement on transnational application.\textsuperscript{73} The absence of Comment 7 could reflect state judicial policy to limit the rule solely to domestic matters, at least in states that adopted the remaining Comments.\textsuperscript{74} But it also could reflect a decision to leave this determination to the courts applying the wider body of that jurisdiction’s conflict rules on a case-by-case basis. With that in mind, the analysis here should be taken as applying to any jurisdiction that would apply Rule 8.5 transnationally, whether or not a state analogue to Comment 7 provides so directly.

Whether foreign or domestic conduct is at issue, the underlying premise of disciplinary regimes is that holding a law license is a privilege. Consequently, “[m]ost of the disciplinary


\textsuperscript{72} MR 8.5 cmt. 7. Comment 7 seems to recognize the broad range of transnational legal options available to address conflicting regulatory schemes. See \textsc{Harold Hongju Koh}, \textit{Transnational Litigation in United States Courts} 52 (Foundation Press 2008) (noting that “the legal solution to such conflicts range from unilateral forbearance by one nation’s regulators, to formal and informal bilateral, regional and multilateral accords or treaties.”).

\textsuperscript{73} Compare \textit{In the Matter of Jinhee Kim Wilde}, Bar Docket No. 244-09, Report and Recommendation of the District of Columbia Court of Appeals Board on Professional Responsibility, Jun. 14, 2011 at 6-10 (“absent an express indication that the inclusion of foreign countries was intended within the meaning of the words ‘in a court outside the District of Columbia,’ the rule cannot be interpreted to encompass convictions outside the United States.”) with \textit{In re Scallen}, 269 N.W.2d 834 (Minn. 1978) (noting unambiguous prohibitions on “illegal conduct involving moral turpitude” and conduct involving dishonesty, fraud, deceit, or misrepresentation” in DR 1-102(3) and (4) and holding that “[n]othing in this language or elsewhere indicates that its effectiveness is restricted by political or geographic boundaries,” such that a Canadian conviction could form basis of Minnesota discipline).

\textsuperscript{74} See \textit{ABA Center on Professional Responsibility: Chart on State Adoption of the ABA Model Rules of Professional Conduct and Comments}, May 23, 2011 (providing details on 40 states that have adopted the Model Rules and Comments and 10 states that declined to adopt the comments).
sanctions available to deal with errant lawyers are bound up with their *status as members of a bar* – suspension, disbarment, censure and so forth. Being a member of a bar is something that accompanies one on one’s travels.”

This involves some measure of consent. By joining a state’s bar, the lawyer consents to its ongoing supervision, at least insofar as professional discipline is concerned. But regulatory authority also derives from the jurisdiction’s grant of permission to licensed attorneys to initiate legal proceedings and monopolize the delivery of legal advice. Misconduct wholly outside of the admitting jurisdiction is subject to discipline within it, including behavior abroad. Jurisdiction on this basis is far from remarkable, even in the transnational context. It is an application of the nationality principle under international law, which recognizes the right to regulate conduct by a particular person, regardless of where he acts.

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75 See Vagts, supra note 61, at 691 (emphasis added). See also Restatement (Lawyers) § 5 cmt. h (“A charged offense involving . . . a locally licensed lawyer is within the jurisdiction of the disciplinary agency, and the tribunal may apply the state’s lawyer code even with respect to acts that occur wholly outside the jurisdiction and that have no significant impact within the jurisdiction.”).

76 See, e.g., Colo. Bar Ass’n v. Lindsey, 283 P. 539, 546 (Col. 1929) (lawyer’s oath “is not only binding in Colorado, but everywhere . . . at all time and all places.”).

77 Disciplinary jurisdiction extends to all misconduct by the lawyer, even when it goes beyond the specific incident that originally brought the lawyer to the attention of bar overseers. See, e.g., In re Nathanson, ___ Minn. ___, 2012 WL 638014 at *11 (Minn. Sup. Ct. Feb. 29, 2012) (per curiam) (concluding that additional investigation by disciplinary authorities that “reasonably related to the [client’s initial] complaint” was appropriate and that “the Director was within his authority to investigate all of the matters alleged in the petition, including those not mentioned in the client complaint that initiated the Director’s investigation.”).

78 See MR 8.5(a) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.”). The right to discipline lawyers for conduct anywhere by virtue of granting them a law license is reflected further in reciprocal enforcement measures that “further advance the purposes of the Rule.” Id. at cmt. 1.

79 See, e.g., In re Scallon, 269 N.W.2d 834 (Minn. 1978) (conviction abroad was admissible proof of underlying facts ascertained by foreign court because the accused lawyer was accorded due process and other guarantees of fundamental fairness).

80 See Restatement (Foreign Relations) § 402(2) (jurisdiction over nationals).

81 See, e.g., Skirotes v. Florida, 313 U.S. 69, 73 (1941) (“With respect to such an exercise of authority there is no question of international law, but solely of the purport of municipal law which establishes the duty of the citizen in relation to his own government.”). See also Restatement (Conflicts) § 39 (“[A] state has power to exercise judicial jurisdiction over an individual ... where the individual has such a relationship to the state that it is reasonable for the state to exercise such jurisdiction.”).
This is not to suggest that where conduct occurs is irrelevant. States have strong interests in policing all conduct within their territory, regardless of the nationality or other special characteristics (e.g., bar admission) of the actors. Criminal law,\textsuperscript{82} and tort law,\textsuperscript{83} for example, both rely heavily on territorial jurisdiction. Rule 8.5(a) also directs states to apply this same principle to lawyer misconduct within their borders, whether or not a lawyer also is privileged to practice there.\textsuperscript{84}

Apart from power to adjudicate, the same principle also provides the means for selecting applicable disciplinary standards under Rule 8.5(b). Whether authority to discipline is based on admission or conduct, the relevant standards are those of the place where the lawyer acted (or caused effects). This too amounts to a specific application of a long-recognized principle of international jurisdiction – the territorial principle – and also is uncontroversial.\textsuperscript{85}

\textbf{B. Judicial Control over Foreign Law Through Existing Public Policy Limitations}

Legislative determinations that references to foreign law are never proper in state courts contrast starkly with prior determinations by many state judiciaries that such materials are relevant, at least for purposes of lawyer regulation. As discussed above, foreign law is an important consideration in the ethical obligations of American lawyers who practice overseas. Although the Model Rules apparently were not designed with the transnational setting in mind,\textsuperscript{86}

\begin{footnotes}
\item[82] With minor exceptions, the Model Penal Code allows criminal jurisdiction whenever an element of an offense or the result of the criminal conduct occurs in the jurisdiction. See \textit{Model Penal Code} § 1.03(1).
\item[83] The applicable law in products liability cases generally focuses on the \textit{locus} of either injury, actors, or both. See, e.g., Convention on the Law Applicable to Products Liability, Oct. 2, 1973, arts. 4-7.
\item[84] See MR 8.5(a). See also Restatement (Lawyers) § 5 cmt. h (noting American states that “extend the competence of their lawyer-disciplinary bodies to \textit{any lawyer} who commits an offense within the jurisdiction”) (emphasis added).
\item[85] See MR 8.5(a). See also Restatement (Foreign Relations) § 402(1) (jurisdiction over territory and effects occurring within territory).
\item[86] See Rogers, supra note 71, at 1062.
\end{footnotes}
they clearly contemplate that the regulatory context now extends beyond the closed system of American law.⑧ They clearly contemplate that the regulatory context now extends beyond the closed system of American law. ⑧ The national Conference of Chief Justices, for example, has encouraged states to take steps to cooperate in disciplinary enforcement with European countries.⑨ This reflects consensus among state judicial leaders that engaging with foreign jurisdictions (and presumably with foreign and international law) is genuinely desirable for state judiciaries.⑩ More directly relevant are the two-thirds of American jurisdictions that adopted Comment 7 to Rule 8.5, which even more clearly expresses the judicial viewpoint on the relevance of foreign and international law.⑩

Such use of foreign law is hardly tantamount to transferring control over a locally-regulated profession to the vagaries of the international plane, however. Long-existing judicial tools of public policy limit the operation of foreign substantive and procedural rules whose application would offend important American values or otherwise be unfair or unlawful. To consider one important example, what constitutes a “crime” varies considerably by jurisdiction.⑪ Lawyers practicing outside the United States inevitably will run into complications in complying

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⑨ See Conference of Chief Justices Resolution 2, In Support of Cooperation Among United States and European Disciplinary Bodies, Jan. 28, 2009 (encouraging “the competent lawyer disciplinary body in each United States state, territory or District of Columbia . . . to consider” cooperative measures with “the competent disciplinary body of the home jurisdiction of a European lawyer . . . .” and noting the Conference’s plan to “use its best efforts to enable the . . . described disciplinary cooperation . . . .”).

⑩ Note that the CCJ Resolution does not authorize reciprocal discipline of the kind that exists among state and federal courts in the American regulatory system. The CCJ’s position is best seen as a statement of desirable judicial policy, rather than an “agreement[] between competent regulatory authorities” that impacts choice of law under Rule 8.5. See MR 8.5 cmt. 7.

⑪ See Chart, American Bar Association CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct: Rule 8.5 Comment [7], Oct. 21, 2009 (providing details on 31 states that have adopted Model Rule 8.5 Comment 7). See also Appendix A (detailing jurisdictions where blocking measures have been proposed that would conflict with the state judiciary’s prior adoption of Comment 7).

⑫ See, e.g., Carl A. Pierce, Client Misconduct in the 21st Century, 35 U. MEM. L. REV. 731, 762 (2005) (“Although the rules of professional conduct in all states prohibit lawyers from encouraging or assisting clients to commit crimes, there is less uniformity in the criminal codes than in the codes of professional conduct.”).

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with ethical rules linked to “crimes” because “[t]he world is composed of territorial states having separate and differing systems of law”\textsuperscript{92} with little parity in substantive and procedural requirements.\textsuperscript{93}

Criminal conduct by a lawyer or client in any jurisdiction at least potentially constitutes a “crime” for purposes of discipline under Rule 8.4\textsuperscript{94} and other ethical rules that incorporate criminal prohibitions and “other law” by reference.\textsuperscript{95} But there already are outside limits on the use of foreign or international crimes for domestic purposes. At some point, public policy prohibits such rules from providing content for American ethical obligations.

In Madanes v. Madanes,\textsuperscript{96} for example, the court considered whether the crime/fraud exception to the attorney-client privilege applied to allegations of criminal fraud in foreign legal proceedings under Ecuadorian law. The court held that the exception “is forum-specific since what constitutes a crime will vary from one jurisdiction to the next. Accordingly, foreign criminal law should be recognized for purposes of federal common law crime-fraud analysis only when it has an analogue in American jurisprudence.”\textsuperscript{97} Thus:

[S]uppose that it is a criminal offense in another culture to work on Tuesdays. In connection with litigation in this Court, a client in that country advises his attorney, also in that country, that he intends to work on Tuesdays. That communication would not be subject to the crime-fraud exception and would not result in abrogation of the attorney-client privilege because it does not violate the public policy of the United States for

\textsuperscript{92} See Restatement (Conflicts) § 1.

\textsuperscript{93} Legal matters about which widespread consensus exists may be recognized as a source of international law. See ICJ Statute art. 38(1)(c) (recognizing “the general principles of law recognized by civilized nations” as a source of international rules).

\textsuperscript{94} See, e.g., In re Scallon, 269 N.W.2d 834 (Minn. 1978) (Minnesota discipline for crimes in Canada).

\textsuperscript{95} See, e.g., Pierce, supra note 91, at 763-64 (noting that “a lawyer should consult the criminal law in the jurisdiction(s) in which the client could be convicted of an offense by virtue of his own conduct or the conduct of another for which he is legally accountable”).


\textsuperscript{97} Id. at 148.
someone to work on Tuesdays or for the courts to protect from disclosure communications relating to such conduct. 98

Although Ecuadorian law imposed criminal liability on lawyers who divulged client confidences or accepted representations that create conflict of interests, this behavior was not criminal for purposes of crime-fraud exception because there was no American equivalent to the Ecuadorian offense. In a similar vein, American lawyers acting in the United States for foreign clients have no obligation to comply with foreign criminal laws that are not otherwise enforceable in the United States via a treaty or similar means. 99

Similar limitations apply in civil cases where the substantive elements of liability differ substantially from those prescribed for similar claims in the American legal system. 100 Where warranted, negative impacts of foreign and international law also can be altered through narrower applications of existing legal principles such as the act of state doctrine and judicial comity. 101 Thus, to the extent that foreign law is an appropriate source of substantive ethical obligations under Rule 8.5, judicial mechanisms already are in place to prevent abuses that would violate American public policy.

So too with respect to procedural differences between overseas tribunals and American courts. Because the stakes are so high (e.g., potential disbarment and loss of livelihood), lawyers

98 Id. at 148 n.3.
99 See, e.g., N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 90-37 (1990) (New York lawyer could open bank account for foreign client even though client’s home country made it a crime for residents to open bank accounts in foreign countries without permission).
100 See, e.g., Telnikoff v. Matusevitch, 347 Md. 561, 599-600 (Md. 1997) (declining to enforce British court’s libel judgment as “repugnant to the public policy of the State” under the Uniform Foreign-Money Judgments Recognition Act where the foreign judgment’s legal basis was “so contrary to Maryland defamation law, and to the policy of freedom of the press underlying Maryland law, that [plaintiff’s] judgment should be denied recognition under principles of comity”).
are entitled to many due process protections in disciplinary proceedings. Such guarantees have applied for nearly two centuries, per Chief Justice Marshall’s exposition that “the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him.” Nevertheless, bar regulators imposing discipline based upon criminal proceedings in sister states or federal courts typically presume that the lawyer received a fair criminal trial. The crime is not subject to re-litigation and is deemed conclusively established.

This is not the case for criminal proceedings abroad. American disciplinary authorities are understandably cautious in predicking discipline based upon convictions procured through vastly different trial procedures, where the role of defense counsel, judicial qualifications, and the degree of executive interference can vary widely from American norms. Disciplinary bodies must ensure that foreign proceedings comport with American notions of due process and

102 See Ex Parte Burr, 22 U.S. (9 Wheat.) 529, 530 (1824). See also Ex parte Garland, 71 U.S. (4 Wall.) 333, 379 (1866) (rights of legal practice only can be “deprived by the judgment of the court, for moral or professional delinquency”).

103 See, e.g., People ex rel. Atty. Gen. v. Laska, 101 P.2d 33, 34 (Colo. 1940) (minor irregularities and technical errors that did not undermine the merits of lawyer’s conviction were insufficient to overcome the presumption of a fair trial in federal court).

104 See, e.g., MRDE 19(E) (“For purposes of a hearing on formal charges filed as a result of a finding of guilt, a certified copy of a judgment of conviction constitutes conclusive evidence that the lawyer committed the crime, and the sole issue in any such hearing shall be the nature and extent of the discipline to be imposed.”).

105 See, e.g., Jesse Berman, The Cuban Popular Trials, 60 COLUM. L. REV. 1317, 1348 (1969) (discussing Chinese legal procedure where “[w]ork groups,’ consisting of police officers, a procurator and a judge, were organized to rush to the scene of a crime and to administer the “three on-the-spots” (investigate on-the-spot, mediate on-the-spot, try and sentence on-the-spot”).

106 See, e.g., id. at 1341 (Cuban advocate’s viewpoint that “the first job of a revolutionary lawyer is not to argue that his client is innocent, but rather to determine if his client is guilty and, if so, to seek the sanction which will best rehabilitate him”).

107 See, e.g., id. at 1348 (noting that “the Chinese People’s Court judges were ‘professional’ only in that they worked full time as judges. Any citizen who was at least twenty-three years old and who had never been deprived of political rights was eligible for selection as a people’s judge.”)

fundamental fairness. Where genuine doubts exist, foreign convictions cannot be used as a basis for discipline.

This is little more than a specific application of the traditional approach to foreign judgments in American courts, however. Foreign legal determinations generally are respected unless they “prejudice the rights of United States citizens or violate domestic public policy.” Enforcement is prohibited “if, among other reasons, ‘the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law,’ ‘the judgment was obtained by fraud,’ or ‘the cause of action on which the judgment is based is repugnant to the public policy of this state.’” The court must consider the overall fairness of the foreign criminal system itself as well as proceedings in the specific case at issue. Where proper standards are met, however, foreign convictions provide a basis for discipline and can be taken as established for purposes of prohibiting re-litigation of the crime.

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109 See, e.g., In re Scallen, 269 N.W.2d at 840 (Minn. 1978). See also Restatement (Foreign Relations) § 482 cmt. b (discussing requirements for general fairness in legal proceedings as well as fairness as applied to specific classes of litigants and in individual cases).

110 See, e.g., In the Matter of Jinhee Kim Wilde, No. 244-09, Report and Recommendation of the District of Columbia Court of Appeals Board on Professional Responsibility, Jun. 14, 2011 at 6-10 (recommending reversal of automatic suspension arising out of Korean conviction for felony theft during lawyer’s flight to South Korea based on numerous defects in the translation of foreign conviction documentation, serious defects in trial procedures, and other irregularities, and noting that Maryland courts already had done the same).


113 Id. (“Analysis of such a claim requires consideration of the fairness of a foreign adjudicating system, as well as a case-specific inquiry to identify fraud in procuring the judgment.”) (internal quotations and citations omitted).
itself.\textsuperscript{114} Foreign convictions also provide grounds for discipline in related settings, such as the failure to disclose prior criminal activity on a bar application.\textsuperscript{115}

That said, there are inherent limits to the nature of disciplinary consequences that arise from a lawyer’s breach of an overseas ethical obligation, particularly where ethical violations are treated as violations of criminal prohibitions. Some European states, for example, regard the breach of a lawyer’s professional obligations to avoid conflicts of interest and/or to maintain client confidentiality as criminal acts.\textsuperscript{116} As noted above, American courts would not regard such conduct as a criminal violation because no domestic analogue exists under American law. And neither would disciplinary authorities. While Rule 8.5 might require the use of foreign ethics rules to determine whether the lawyer breached ethical obligations, it is unlikely that bar overseers would treat this conduct as inherently criminal in assessing its disciplinary consequences. Violations of overseas conflicts rules or confidentiality duties may warrant discipline under Rule 8.4, but they would not be considered “criminal acts” warranting discipline under Rule 8.4(b).\textsuperscript{117}

\textsuperscript{114} See, e.g., In re Scallen, 269 N.W.2d at 840 (Minnesota discipline allowed based on criminal conviction for theft and circulating a false prospectus in Canada because the Canadian justice system provided sufficient protections to criminal defendants and there was no evidence of unfairness in the specific proceedings against the American lawyer).

\textsuperscript{115} See In Re Bailey, 976 A.2d 176, 178-79 (D.C. App. 2009) (lawyer convicted of manslaughter in Jamaica was obligated to disclose this foreign conviction on his bar application despite his claim that the prosecution amounted to a blackmail scheme in a corrupt foreign jurisdiction).

\textsuperscript{116} See, e.g., Criminal Code of Germany (Strafgesetzbuch, StGB), Gen. Part Ch. 30, Sec. 356 (Betrayal of a Party) (“An attorney or other person rendering legal assistance, who, in relation to matters confided to him in this capacity in the same legal matter, serves both parties with counsel and assistance in breach of duty, shall be punished with imprisonment from three months to five years . . . .”). See also French Criminal Code art. 226-13 and Criminal Code of Germany (Strafgesetzbuch, StGB), Gen. Part Ch. 15, Sec. 203 (providing criminal penalties for breaches of professional confidentiality).

\textsuperscript{117} Compare MR 8.4(a) (professional misconduct to violate ethical rules), 8.4(c)(professional misconduct involving dishonesty, etc.), and 8.4(d) (professional misconduct prejudicing the administration of justice) with MR 8.4(b) (professional misconduct for committing “a criminal act that reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects . . .”).
These existing tools of judicial public policy are more than sufficient to evaluate the fairness and legitimacy of foreign or international proceedings and to enable regulatory authorities to refuse to recognize irregular results. But despite the availability and utility of such mechanisms to mitigate undesirable effects, some thirty-two states either have enacted or are seriously considering blocking measures that would prohibit the use of foreign law for any judicial purpose (including lawyer regulation). As demonstrated below, the negative effects of such measures far outweigh any possible benefit that they might offer.

IV. Negative Effects Within Blocking Jurisdictions

A. Impact on Practitioners – Resurrecting Double Deontology and Eviscerating Safe Harbor Protection

Blocking provisions make it extremely difficult for practitioners to successfully identify and meet the full range of ethical obligations that may apply in overseas practice. American lawyers easily (perhaps even unintentionally) could find themselves in a situation where foreign ethics rules apply to their conduct under Rule 8.5. Yet now it is far from clear whether lawyers from blocking jurisdictions should comply with their own state’s rules, with the rules of the foreign nation, or with the rules of another applicable American jurisdiction.

Consider an Oklahoma energy lawyer representing (with appropriate permission from the French Law Society) a French oil company in France who receives a letter from French opposing counsel offering to resolve a dispute over land leases that is not yet pending before a tribunal. The letter is marked “confidential – between counsel.” Rule 1.4 notwithstanding, the Oklahoma lawyer does not notify the client about the settlement offer. Assume now that the foreign client files a grievance with the Oklahoma Board of Bar Overseers (BBO) (before whom

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118 See Okla. RPC 1.4(a)(1) and cmt. 2 (duty to communicate promptly about all matters about which informed client consent is required, including all settlement offers). See also Okla. RPC 1.2(a) (duty to abide by client decisions on settlement).
the lawyer is subject to disciplinary jurisdiction under Rule 8.5(a)) based upon the lack of notification.

Because Oklahoma recognizes Comment 7, the BBO would assess discipline by drawing upon French disciplinary rules as the applicable standards to measure the lawyer’s conduct.\textsuperscript{119} The French ethical practice of “sous la foi du Palais” requires lawyers to keep correspondence between lawyers marked “confidential” secret – even from clients.\textsuperscript{120} Because the Oklahoma lawyer complied with the French rule while acting in France, no discipline is warranted.\textsuperscript{121} If the facts were more ambiguous, such that Oklahoma’s BBO determined later that Rule 1.4 in fact applied, the lawyer could defend himself by showing that the ethical rules of France were a reasonable choice under the circumstances.\textsuperscript{122}

Neither is the case if Oklahoma’s SQ 755 blocking amendment applies. Presumably, the only remaining options for the BBO (operating with delegated judicial authority) under Rule 8.5 would be American jurisdictions where the Oklahoma lawyer acted or caused effects. For overseas conduct, the likely default would be the lawyer’s home jurisdiction. Because rules of foreign law are verboten in Oklahoma courts, the lawyer could not comply with the French practice and hope to avoid Oklahoma discipline for violating Oklahoma’s Rule 1.4.

The BBO thus would have to apply Oklahoma’s Rule 1.4 even though Rule 8.5 (as adopted by the Oklahoma Supreme Court) normally selects French ethics rules to govern this

\textsuperscript{119} See Okla. RPC 8.5 cmt. 7.
\textsuperscript{121} See, e.g., N.Y. Opinion 815, Oct. 25, 2007 (in connection with overseas practice, lawyer admitted in New York is “subject to New York’s disciplinary authority for his conduct in the foreign jurisdiction, but unless the conduct clearly has its predominant effect in New York, the applicable rules will be those of the foreign jurisdiction.”).
\textsuperscript{122} See Okla. RPC 8.5(b)(2).
issue. The lawyer has a real problem now, because he is still practicing in France, which no
doubt expects him to comply with French rules on confidences between lawyers. Oklahoma’s
blocking measure thus resurrects the “double deontology” problem that the 2002 revisions of
Rule 8.5 had solved. It also eviscerates the rule’s safe harbor provision because Oklahoma will
not recognize rules of foreign law for this affirmative defense, whether or not the lawyer’s
determination that foreign law applied was reasonable.

The outright prohibition on international / foreign law also could prevent the Oklahoma
lawyer from resisting compelled disclosure (eg, during civil discovery or in response to a
government investigation) of the confidences of the overseas clients based on the professional
secrets doctrine, which draws upon broader conceptions of professional secrecy than that
available in American jurisdictions. Oklahoma lawyers who reveal such information even risk
criminal punishment abroad, as the breach of professional secrecy in some countries (eg, France,
Germany) is regarded as a criminal act. This applies even to the release of material such as

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123 A less direct manifestation of the same problem would be whether a lawyer must consider the impact of Sharia
law on Islamic clients as a matter of competence (see MR 1.1) or at the very least as a relevant special context for
that client (see MR 2.1). These obligations would apply even to lawyers representing such clients locally in
Oklahoma.

124 The professional secrets doctrine protects all confidential materials and is not limited to client communications
(eg, the attorney-client privilege) and/or materials prepared in anticipation of litigation (eg, the work product
document). See JAMES MOLITERNO AND GEORGE HARRIS, GLOBAL ISSUES IN LEGAL ETHICS 86 (2007). An American
lawyer’s obligations of confidentiality are governed by Rule 1.6, which is an ethical rule that operates independently
of evidentiary and procedural rules. See MR 1.6 and cmt. 3.

125 See, e.g., French Criminal Code art. 226-13 (“The disclosure of secret information by a person entrusted with
such a secret, either because of his position or profession, or because of a temporary function or mission, is punished
by one year’s imprisonment and a fine of € 15,000.”) and Criminal Code of Germany (Strafgesetzbuch, StGB), Gen.
Part Ch. 15, Sec. 203 (Violation of Private Secrets) (“Whoever, without authorization, discloses a the secret of
another, in particular, a secret which belongs to the realm of personal privacy or a business or trade secret, which
was confided to, or otherwise made known to him in his capacity as a . . . lawyer, patent attorney, notary, [or]
defense counsel or member of an organ of a [law firm] . . . shall be punished with imprisonment for not more than
one year or a fine.”).
correspondence between opposing lawyers, which is protected under French law and is not subject to discovery or governmental seizure, for example.\textsuperscript{126}

The inability to draw upon foreign rules as the appropriate standards for ethical duties also has a direct impact on the business relationships between American lawyers in blocking jurisdictions and their overseas peers. French lawyers, for example, must not associate with foreign lawyers where professional confidentiality (per the French standard) cannot be guaranteed in the other jurisdiction.\textsuperscript{127} The inability to guarantee such confidentiality also creates an irreconcilable conflict of interest for American lawyers in such cases under French ethics rules, which in turn obligates them to decline the foreign representation.\textsuperscript{128}

Blocking measures also impose substantial impediments to lawyers arguing otherwise-relevant authorities to the court (e.g., foreign law specified in a contract that now is in dispute). This problem becomes particularly acute when the blocking state’s own choice of law rules provide that the place of injury or contracting should apply even when that location is a foreign jurisdiction.\textsuperscript{129} Fourteen states (including Oklahoma) continue to apply the First Restatement’s

\begin{footnotesize}
\begin{enumerate}
\item See French National Bar Council Harmonized Practice Rules art. 3.1 (Professional Secrecy – Correspondence between lawyers) (“Any written or verbal exchange between lawyers is covered by professional secrecy and consequently is, by its very nature, confidential. Correspondence between lawyers, in whatever medium, may never be seized or attached, nor be the subject of a waiver of confidentiality.”).
\item See French National Bar Council Harmonized Practice Rules art. 3.4 (Relations with other foreign lawyers) (“In their relations with foreign lawyers from a non-Member State of the European Union, lawyers \textit{shall ensure that} rules securing confidentiality of correspondence exist in the country where the foreign lawyers practice \textit{before exchanging confidential information} and, if that is not the case, shall either make an agreement with those lawyers to ensure confidentiality or ask their clients whether they accept the risk of a non-confidential exchange of information.”) (emphasis added).
\item Id. at art. 4.3 (Limits on the freedom of lawyers to act – Cases where lawyers should not act) (“Lawyers shall, unless the parties agree, cease to act for all the clients concerned when a conflict of interest arises, \textit{when confidentiality risks being breached} or when the lawyers’ independence risks being compromised.”) (emphasis added).
\item See, e.g., Hodson v. A. H. Robins Co., 528 F. Supp. 809, 823 (E.D. Va. 1981) (applying English law to plaintiff’s personal injury claims because Virginia had adopted “the law of the place of the injury, the \textit{lex loci delecti}” to such cases). For a discussion of choice of law at the state level in connection with claims arising under international law, see Donald Earl Childress III, \textit{The Alien Tort Statute, Federalism, and the Next Wave of International Law Litigation}, 100 GEO. L.J. __ (2012).
\end{enumerate}
\end{footnotesize}
lex loci test for choice of law in such disputes,\textsuperscript{130} which runs directly afoul of the contrary requirements of blocking measures in twelve of them.\textsuperscript{131}

Lawyers can be disciplined for “knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.”\textsuperscript{132} If blocking provisions are taken at face value, lawyers advocating a foreign rule in court (or even law clerks suggesting that the judge rely on foreign law) would violate ethics rules if the judge agrees and adopts the foreign law. Even if the judge withstands such unlawful temptations, the offending lawyer still may be disciplined for attempting to induce the judge to violate state law.\textsuperscript{133} Judges presumably are obligated to refer such violations to bar authorities for disciplinary purposes.\textsuperscript{134} When the situation is reversed, a lawyer (perhaps the lawyer representing the party against whom offending foreign rules are applied) becomes obliged to report the matter as judicial misconduct.\textsuperscript{135}

Blocking measures also limit the compensatory mechanisms available to protect the public from incompetent lawyers – notably malpractice claims for negligence, breach of fiduciary duty, and the like. Given the growing pace of global activity, it is entirely probable that an incompetent lawyer could misadvise even a purely local client on international or foreign law and thereby cause the client injury. An Oklahoma energy lawyer, for example, could misadvise a local client whose oil tanker was damaged in international waters about rights of salvage governed by international law or the time standards for asserting claims in an international


\textsuperscript{131} See Appendix A (Alabama, Florida, Georgia, Kansas, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming). Such conflicts are far more immediate in First Restatement states such as Tennessee where blocking measures have passed into law. See, e.g., Pub. Acts 550 (Tenn. 2010).

\textsuperscript{132} See MR 8.4(f) (emphasis added).

\textsuperscript{133} See MR 8.4(a) (providing that attempts to violate rules are disciplinable conduct).

\textsuperscript{134} See MR 8.3(a) (duty to report misconduct by lawyers).

\textsuperscript{135} See MR 8.3(b) (duty to report judicial misconduct).
forum. If the client subsequently was precluded from seeking compensation due to the lawyer’s mistake, normally the lawyer would be liable for malpractice. But it is hard to see how an Oklahoma court could adjudicate a malpractice claim that necessarily requires it to evaluate the very questions of foreign and international law that blocking measures forbid.

On the flip side, lawyers facing malpractice claims may be denied full and fair consideration of strategic choices based on applicable rules of foreign law. Under American law, for example, the failure to interview witnesses as part of trial preparation can provide the basis of a malpractice claim136 or even a later grant of habeas corpus137 or other constitutional remedies for providing ineffective assistance of counsel.138 Yet many foreign nations prohibit such contacts as an interference with judicial processes and the administration of justice.139 If courts are forbidden from considering foreign rules as relevant to the reasonableness of the lawyer’s strategic choices, practitioners face the Hobson’s choice of either violating foreign laws to comply with the American standard (and suffering the consequences) or declining overseas representations because they cannot comply with both standards.140

136 See, e.g., Woodruff v. Tomlin, 616 F.2d 924, 934 (6th Cir. 1980) (en banc) (reinstating malpractice verdict and holding that although “the determination of whether to call a particular person as a witness at trial is a tactical decision involving the exercise of professional judgment, the same cannot be said concerning the failure to interview a potential witness brought to the attention of an attorney by his client.”).

137 See, e.g., Long v. Wallace, 448 S.E.2d 229 (Ga. App. 1994) (dismissing malpractice action on statute of limitations grounds but discussing prior habeas corpus proceedings where the writ was granted, inter alia, based upon counsel’s failure to interview key witnesses).

138 See, e.g., United States v. Schultz, 385 Fed. Appx. 842, 844 (10th Cir. 2010) (noting that lawyer’s failure to interview and call an important witness “fell below an objective standard of reasonableness” but denying ineffective assistance claims based upon claimant’s inability to establish prejudice from counsel’s errors).

139 See, e.g., MOLTENO & HARRIS, note __ supra, at 156-65 (discussing prohibitions on witness interviews and contact with lawyers in other countries) and Christopher J. Clark, The Complexities To International White Collar Enforcement, Aspatore (Jan. 2010) (discussing European practices on lawyers and witness contacts).

140 See, e.g., MR 1.7 (a)(2) and (b)(1), (2) (requiring lawyers to decline matters where the representation would be impermissibly limited by external considerations or illegal).
B. Impact on the Judiciary – Separation of Powers and Unconstitutional Interference with Judicial Control of the Legal Profession

In the American legal system, bar regulation historically has been an extension of the inherent power of the judicial branch.\textsuperscript{141} Per the Supreme Court, “it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed.”\textsuperscript{142}

There is unanimous consensus in all fifty states about judicial authority over the legal profession.\textsuperscript{143} One premise is that “[t]he practice of law is so intimately connected and bound up with the exercise of judicial power and the administration of justice that the right to regulate its practice naturally and logically belongs to the judicial department of the government.”\textsuperscript{144} The power extends beyond matters in courts,\textsuperscript{145} however, to encompass all dimensions of legal practice:

Our inherent power of superintending control encompasses as well this Court’s authority and duty to prescribe the qualifications for admission to the bar, to prescribe standards of conduct for lawyers, to determine what constitutes grounds for the discipline of lawyers, and to discipline, for cause, any person admitted to practice law in this state . . . .\textsuperscript{146}


\textsuperscript{142}See Ex parte Secombe, 60 U.S. (19 How.) 9, 13 (1856).

\textsuperscript{143}See Report of the Commission on Evaluation of Disciplinary Enforcement (1989-1992), Rec. 1 (noting that “judicial regulation of lawyers is a principle firmly established in every state. A 1987 study by the National Center for State Courts . . . . found state high courts’ opinions unanimous that regulation of lawyers is an inherent judicial function.”).

\textsuperscript{144}See Martin v. Davis, 357 P.2d 782, 787-88 (Kan. 1960). See also Ruckenbrod v. Mullins, 133 P.2d 325 (Utah 1943) (“The attorney alone has the right to set the judicial machinery in motion in behalf of another and to thus participate as an officer of the court in a judicial proceeding.”).

\textsuperscript{145}See, e.g., In re Integration of Bar, 5 Wis. 2d 618, 622 (1958) (“The practice of the law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial power that this court should continue to exercise its supervisory control of the practice of the law.”) (emphasis added).

\textsuperscript{146}See In re Treinen, 131 P.3d 1282, 1284 (N.M. 2006). See also Restatement (Lawyers) § 1 cmt. c (“[T]he grant of judicial power in a state constitution devolves upon the courts the concomitant regulatory power” over lawyers that
This broad exclusivity of judicial oversight is called the “negative powers doctrine.”\(^{147}\) It has been used to invalidate a variety of legislative attempts to regulate lawyers on matters such as the grounds for professional discipline,\(^ {148}\) non-solicitation rules,\(^ {149}\) unauthorized practice,\(^ {150}\) and bar admission.\(^ {151}\) The nature and degree of infringement appear far more salient than the identity of the infringer. State judiciaries reacted with vehement collective hostility, for example, to federal proposals that interfered with the state judicial province.\(^ {152}\)

As applied to the legal profession, blocking measures raise serious separation of powers concerns. While state legislatures can establish court rules to effect public policy (e.g., on choice of law), this power is subject to constitutional limitations.\(^ {153}\) Some state judiciaries tolerate greater legislative activity touching upon the legal profession than others.\(^ {154}\) But even under the

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\(^{148}\) See, e.g., *In re Treinen*, 131 P.3d at 1284 (“Any legislative attempt to limit what conduct we may consider as grounds for imposing attorney discipline would be an unconstitutional infringement of this Court’s authority to regulate the practice of law.”).

\(^{149}\) See, e.g., *Lloyd v. Fishinger*, 529 Pa. 513, 520 (1992) (“Rules of conduct disapproving direct solicitation have always been part of this Court’s disciplinary focus. As [the Pennsylvania law] is a clear attempt by the legislature to enact rules of conduct in an area exclusively within the province of this Court that section of the statute is unconstitutional.”).

\(^{150}\) See, e.g., GRECCA, Inc. v. Omni Title Servs., Inc., 277 Ga. 312 (2003) (“The Supreme Court of Georgia has the inherent and exclusive authority to govern the practice of law in Georgia,” including determinations involving unlicensed legal practice) (emphasis added).

\(^{151}\) See, e.g., *Eckles v. Atlanta Tech. Group*, 485 S.E.2d 22, 25 (Ga. 1997) (“[N]o statute is controlling as to the civil regulation of the practice of law in this state. Only [the Supreme Court of Georgia] has the inherent power to govern the practice of law in Georgia.”). Admission criteria have long created tension between courts and legislatures. See, e.g., *In re Splane*, 16 A. 481, 483 (Pa. 1889) (law purporting to regulate Pennsylvania bar admission held to violate separation of powers).

\(^{152}\) See Conference of Chief Justices Resolution 26, *In Opposition to Federal Usurpation of State Court Authority as Guaranteed by the United States Constitution*, Jan. 26, 2005 (opposing federal proposals that would “drastically change the traditional state role in determining ethics, jurisdiction, and venue rules in state litigation.”).

\(^{153}\) See Restatement (Conflicts) § 6(1) (“A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”).

\(^{154}\) See Restatement (Lawyers) § 1 cmt. c. (discussing stronger and weaker applications of the negative powers doctrine).
most limited conception of the negative powers doctrine, blocking measures clearly interfere
with core issues of control over the profession itself.

The Restatement provides that “a claim of exclusive judicial power to regulate lawyers is
well-founded as a general proposition of American constitutional law when intrusion by the
executive or legislative branch into the court’s power to regulate would significantly prejudice
the judicial branch in its essential activity of adjudicating disputes.” Core judicial activities
include: (i) bar admission (including that of foreign lawyers, with education, qualifications, etc.
based on foreign law); (ii) developing and revising the substantive content of ethical codes
(including requirements for American lawyers practicing overseas and foreign practitioners in
the state); and (iii) regulatory oversight through disciplinary proceedings (including discipline
for misconduct abroad by American lawyers or incompetent domestic practice in matters
involving international and foreign law).

Blocking measures interfere with all three of these core aspects of judicial regulation.
Oklahoma’s SQ 755 (to draw on just one example) applies to the broad category of “judicial
decisions.” This encompasses bar admission and disciplinary proceedings as well as the
Oklahoma Supreme Court’s adoption of substantive ethics rules.

155 Id.
156 Id.
157 See Oklahoma State Question 755 § 1(C) (emphasis added), amending OKLA. CONST. art. 7 § 1 (2010).
158 See, e.g., In re the Integration of the State Bar of Oklahoma, 95 P.2d 113 (Okla. 1939) (holding that Oklahoma
Supreme Court has the exclusive right under the Oklahoma Constitution to establish criteria and assessment
mechanisms for admission to the Oklahoma bar).
159 See, e.g., Clulow v. State of Oklahoma, 700 F.2d 1291, 1297, 1299 n.10 (10th Cir. 1983) (delegating authority to
bar overseers was permissible because the Oklahoma Supreme Court “retained the ultimate power and merely has
utilized [Oklahoma’s disciplinary board] as an officer of the court in enforcing its rules regarding suspension and
reinstatement of attorneys.”).
160 See In re: Application of the Oklahoma Bar Association to Amend the Rules of Professional Conduct, 171 P.3d
780 (Okla. 2007) (adopting the revised Model Rules as the Oklahoma Rules of Professional Conduct).
Conflicts are direct and unavoidable in any state (like Oklahoma) where the state Supreme Court has adopted the jurisdictional and choice of law provisions of Model Rule 8.5 and Comment 7.\textsuperscript{161} On its face, SQ 755 prohibits any use of ethical standards from foreign states,\textsuperscript{162} even where an Oklahoma lawyer practices abroad and Oklahoma’s Rule 8.5 normally would select the rules of the foreign jurisdiction where he acted or caused effects.

Although SQ 755 is currently stayed and the injunction recently was affirmed by the Tenth Circuit, the validity of Oklahoma’s constitutional amendment ultimately will be subject to final resolution through litigation.\textsuperscript{163} It will become effective unless it is declared unconstitutional and enjoined permanently by a federal court or the Oklahoma Supreme Court. If it does pass into law, Oklahoma judges who fail to enforce the blocking provision risk violating Oklahoma’s Code of Judicial Conduct.\textsuperscript{164} This Code requires judges to comply with the “law,”\textsuperscript{165} which includes Oklahoma’s state constitution as well as its case law and statutes.\textsuperscript{166}

\textsuperscript{161} See Okla. RPC 8.5 (text identical to Model Rules 8.5(a) and 8.5(b)) and Okla. RPC 8.5 cmt. 7 (text identical to MR 8.5 cmt. 7, including reference to international law).

\textsuperscript{162} An open question is whether determinations from one of Oklahoma’s many tribal courts also would be denied effect as “legal precepts of other nations or cultures.” See Seeking Native Justice: Oklahoma Indian Legal Services, Inc. Guide to Pro Se Form Pleadings Available in Tribal Courts (detailing 39 tribal governments within the state of Oklahoma), available at http://thorpe.ou.edu/OILS/court.html (visited Feb. 29, 2012).


\textsuperscript{164} Oklahoma has adopted the ABA’s Model Code of Judicial Conduct. See In Re: Oklahoma Code Of Judicial Conduct (Title 5, Ch. 1, App. 4), 2010 O.K. 90, Order Approving Proposed Oklahoma Code Of Judicial Conduct, Dec. 13, 2010. The identical issues would arise for judges facing blocking measures in any jurisdiction where the ABA’s judicial code applies.

\textsuperscript{165} See Okla. Code of Judicial Conduct, Rule 1.1 (“A judge \textit{shall comply} with the law, including the Code of Judicial Conduct”) (emphasis added). See also ABA Model Code of Judicial Conduct, Rule 1.1 (same).

\textsuperscript{166} See Okla. Code of Judicial Conduct, Terminology (“‘Law’ encompasses court rules as well as statutes, constitutional provisions, and decisional law”). See also ABA Model Code of Judicial Conduct, Terminology (same).
The failure to do so breaches this judicial obligation\textsuperscript{167} as well as separate judicial duties of integrity and impartiality.\textsuperscript{168}

The penalties for violations are serious. Oklahoma has a special court where judges can be impeached for “illegal acts” and where complaints can be filed against them by private citizens.\textsuperscript{169} Oklahoma’s Supreme Court justices can be tried in a special “Court of Impeachment,” which is a \textit{legislative} body.\textsuperscript{170} Similar disincentives exist for Oklahoma practitioners, who can be disciplined for assisting or encouraging judicial misconduct.\textsuperscript{171}

Other states go even further. One Arizona proposal (which was not adopted) provided that “[a]ny decision or ratification of a private agreement that is determined, on the merits, by a judge in this state who relies on any body of … foreign law is null and void, is appealable error and is \textit{grounds for impeachment and removal from office}.“\textsuperscript{172} Arizona’s measure is mild compared to a proposal in Iowa that treats judicial decisions based on foreign law as a criminal offense\textsuperscript{173} and grants aggrieved parties a private right of action against the judge.\textsuperscript{174} This is particularly ironic in light of the Iowa Supreme Court’s adoption of Rule 8.5 and its Comment

\textsuperscript{167} See Okla. Code of Judicial Conduct, Rule 2.2 (“A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially”). See also ABA Model Code of Judicial Conduct, Rule 2.2 (same).

\textsuperscript{168} See Okla. Code of Judicial Conduct, Rule 1.2 cmt. 5 (“Actual improprieties include violations of law, court rules or other specific provisions of this Code”). See also ABA Model Code of Judicial Conduct, Rule 1.2 cmt. 5 (same).

\textsuperscript{169} See, e.g., League of Women Voters: The Oklahoma Court System 3 (2008) (describing special Oklahoma “Court on the Judiciary” that “is the court responsible for removing judges from their position if they have committed \textit{illegal acts}.”) (emphasis added).

\textsuperscript{170} Id. When an Oklahoma Supreme Court justice is charged, Oklahoma’s Senate appoints one of its own to preside over impeachment proceedings initiated in Oklahoma’s House of Representatives. Id.

\textsuperscript{171} See Okla. RPC 8.4(f) (misconduct for lawyers to “knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or \textit{other law}”) (emphasis added). See also MR 8.4(f) (same).

\textsuperscript{172} See H.B. 2379 art. 5(1)(C) (Ariz. 2010) (emphasis added).

\textsuperscript{173} See H.B. 575 art. 7(e)(1) (Iowa 2011) (“An official, agent, or employee of a state or federal government or an employee of a corporation providing services to state or federal government in this state who enforces or attempts to enforce a foreign law in violation of this section commits a class “D” felony.”).

\textsuperscript{174} Id. art. 7(e)(2) (“A party aggrieved by a violation of this section . . . shall have a private right of action against the person who committed the violation.”).
which expresses the clear view of Iowa’s judiciary that foreign law is useful and relevant, at the very least for purposes of bar regulation.

Even in states like Oklahoma, where the broad legislative oversight mechanisms discussed above suggests a mild application of the negative powers doctrine, there are serious questions about the enforceability of these blocking provisions. As discussed above, because they implicate core aspects of judicial power over the legal profession, measures structured as legislative initiatives should be voided on separation of powers grounds. The direct or implied threats against judges in more extreme versions provide additional grounds for declaring them unconstitutional. Far more problematic, however, are cases where blocking measures are structured as state constitutional amendments.

Thirteen states currently have such constitutional proposals, although only one (Oklahoma’s) has become law. The constitutional answer for any of these measures will require detailed analysis of the blocking provision against other articles that create and structure the state’s judiciary. Generally speaking, a reviewing court would reconcile the texts if

\[175\] See Iowa RPC 32:8.5 cmt. 7 (“The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.”).

\[176\] See supra text accompanying notes 154-160.

\[177\] Even implied threats (e.g., the reporting of judges who make downward departures from federal sentencing guidelines to the Attorney General) can violate separation of powers principles. See, e.g., United States v. Detwiler, 338 F.Supp.2d 1166, 1178 and n.17 (D. Or. 2004) (citing the “Feeney Amendment” as an attempt to intimidate judges that was inconsistent with the constitutional separation of powers) and United States v. Kirsch, 287 F.Supp.2d 1005, 1006 (D. Minn. 2003) (criticizing legislative interference with judicial operations where “Congress could call the [judge] to testify and attempt to justify the departure. This reporting requirement system accomplishes its goal: the Court is intimidated, and the Court is scared to depart [from the sentencing guidelines]”).

\[178\] The use of state constitutional amendments to advance particular social agendas appears to be on the rise. See Robert F. Williams, Why State Constitutions Matter, 45 NEW. ENG. L. REV. 901, 901-04 (discussing proposed amendments on gay rights, health care, and labor rights).

\[179\] See Appendix A (Alabama, Arizona, Arkansas, Georgia, Indiana, Iowa, Missouri, New Mexico, Oklahoma, South Carolina, South Dakota, Texas and Wyoming). As noted previously, Oklahoma’s law is stayed. See Awad v. Ziriax, __ F.3d __, 2012 WL 50636 (10th Cir. Jan. 10, 2012).
possible, \(^{180}\) although harmonious resolution is unlikely here. The conflict could play out either way. “Last in time” blocking articles could be upheld as the citizenry’s most recent declaration on the state judiciary’s constitutional authority.\(^{181}\) Alternatively, enforcement might be avoided by focusing on more fundamental organic allocations of constitutional power to specific governmental branches\(^ {182}\) or through an implied constitutional hierarchy implemented through the necessity doctrine.\(^ {183}\)

Deeper consideration of this issue is beyond the scope of the present writing, although it clearly underscores the regulatory stakes at issue and the need to take blocking proposals seriously as a potential threat to judicial control over the legal profession.

C. The Regulatory Lacuna

As discussed above, Rule 8.5 facilitates the judiciary’s ability to discipline lawyers for criminal conduct and other legal and ethical violations that occur overseas. The applicable standards often will come from the foreign jurisdiction where the lawyer acted or caused

\(^{180}\) See, e.g., Cavanaugh v. Davis, 440 A.2d 1380, 1382 (Pa. 1982) (“because the [Pennsylvania] Constitution is an integrated whole, effect must be given to all of its provisions whenever possible”) and People v. Anderson, 493 P.2d 880, 886 (Cal. 1972) (“[W]herever possible we construe [California’s] constitutional provisions in such a way as to reconcile potential conflicts among provisions and give effect to each ....”). See also Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393 (1821) (obligations of federal courts “to construe the constitution as to give effect to [each of the conflicting] provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other”).

\(^{181}\) See, e.g., Thompson v. Hunter, 119 S.W.3d 95, 100 (Mo. 2003) (noting that when state “constitutional provisions are found to be in conflict, the later in time prevails, as it is the most recent expression of the will of the people”); People v. Adamson, 165 P.2d 3, 8 (Cal. 1946) (discussing state constitutional “amendment, which, being later in time, controls provisions adopted earlier”).

\(^{182}\) See, e.g., Hitchcock v. Hewitt, 52 N.W. 875, 878-79 (S.D. 1892) (in a case involving the removal of public officials, resolving constitutional conflict by focusing on the organic allocation of removal authority to legislative branch, as opposed to whether officials were removed through acts of the respective executive, judicial or legislative branches).

\(^{183}\) See, e.g., Michael Stokes Paulsen, The Constitution Of Necessity, 79 NOTRE DAME L. REV. 1257, 1283 (2004) (recognizing necessity doctrine as controversial but discussing its potential use as “an interpretive rule for reconciling conflicting (by hypothesis) constitutional provisions. Where one concludes that two constitutional provisions unavoidably conflict, apply the more fundamental, foundational provision rather than the less important one, precisely to the extent of the conflict.”).
effects. But legislative measures that block references to foreign rules effectively leave such conduct unregulated as a disciplinary matter. Three states already have enacted blocking measures that conflict directly with their respective state judiciary’s prior adoption of Rule 8.5 and its Comment 7. The inability to reference foreign law directly impacts the ability of bar regulators in these states to discipline lawyers for serious misconduct overseas. This is a highly undesirable result, particularly when misconduct involves criminal activity, where the connection to legal practice provides even stronger grounds to regulate it effectively.

It is essential for modern bar overseers to have the authority to discipline criminal conduct abroad because an inevitable consequence of global interconnectivity is that lawyer crimes increasing will have transnational and foreign dimensions. Criminal conduct by lawyers normally leads to three distinct (albeit inter-related) legal consequences. First, they may be criminally prosecuted for the offense. Second, they may be civilly obligated to compensate the victims. Third, they are subject to bar discipline to assess their ongoing fitness to remain in practice.

For example, if an Oklahoma lawyer uses legal work to pilfer client assets in France, it is clear that he could be criminally prosecuted in France (based on criminal conduct there) and that French law governs the prosecution. Compensatory claims could be brought in France, which would be governed by French tort law principles (again – as lex loci delicti). He also is subject

184 See MR 8.5(b).
185 See Appendix A (Idaho, Oklahoma and Tennessee) and H.R. Con. Res. 44, 60th Leg., Reg. Sess. (Idaho 2010) (“For any domestic issue, no court should consider or use as precedent any foreign or international law, regulation, or court decision.”); OKLA. CONST. art. 7 § 1 (amend. approved Nov. 2, 2010 but currently stayed) (“The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.”); and Pub. Acts 550 (Tenn. 2010) (“Any court, arbitration panel, tribunal, or administrative agency ruling or decision that is based in whole or in part on any substantive or procedural law, legal code or legal system of another state, foreign jurisdiction or foreign country . . . is unenforceable in this state.”).
186 See Rogers, supra note 71, at 1063 (noting “that the gravity of the offense is less important when it is related to the practice of law.”).
187 See MR 8.4(b) (ethical consequences of criminal conduct).
to discipline by the French Law Society, the BBO in Oklahoma, and the bar regulators of any other American jurisdiction(s) in which he was admitted.

Per Rule 8.5(b), American disciplinary bodies would draw upon French law to ascertain whether theft from a client is a “crime” within the meaning of the applicable ethical rules.\textsuperscript{188} This use of criminal law from the same jurisdiction as the ethical rule itself is necessary to ensure that the overall choice of law system envisioned by Rule 8.5 works as contemplated. Lawyers must account for the wider setting in providing legal advice,\textsuperscript{189} and many ethical duties explicitly draw on the surrounding legal context for meaning.\textsuperscript{190} Per the Restatement:

\begin{quote}
The lawyer codes and much general law remain complementary. The lawyer codes draw much of their moral force and, in many particulars, the detailed description of their rules from preexisting legal requirements and concepts found in the law of torts, contracts, agency, trusts, property, remedies, procedure, evidence, and crimes.\textsuperscript{191}
\end{quote}

To return to the example, Rule 8.5 normally would seek to ensure that the Oklahoma lawyer’s conduct is assessed under the same standards applicable to French lawyers in the same circumstances.\textsuperscript{192} This hardly would be the case if the disciplinary board drew instead upon the law of a different jurisdiction to determine whether conduct was a “crime” in France for disciplinary purposes. Yet this is exactly what Oklahoma’s SQ 755 requires. This result is nonsensical, based not only on the nature of the conduct in question, but also in terms of the parity that normally exists among the criminal, civil and disciplinary consequences of criminal

\begin{quote}
\textsuperscript{188} See, e.g., Restatement (Lawyers) § 5 cmt. g (discussing moral turpitude and noting that disciplinary standards are “applicable to acts wherever they occur, so long as they are also treated as criminal in the place of occurrence.”) (emphasis added).
\end{quote}

\begin{quote}
\textsuperscript{189} See MR 2.1 (lawyers should advise not only about “law” but also on “moral, economic, social and political factors” that affect the legal advice and the client’s situation).
\end{quote}

\begin{quote}
\textsuperscript{190} See MR Pmbl. ¶15 (noting that “[t]he Rules presuppose a larger legal context shaping the lawyer’s role.”). See also Restatement (Lawyers) § 1 cmt. b.
\end{quote}

\begin{quote}
\textsuperscript{191} See Restatement (Lawyers) § 1 cmt. b (also noting that “[l]awyer codes in turn reflect other law.”).
\end{quote}

\begin{quote}
\textsuperscript{192} See MR 8.5 cmts. 3-4.
\end{quote}

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Indeed, the Oklahoma Supreme Court sought to avoid such results here by applying Rule 8.5 to transnational matters, which the blocking measure has now unbalanced.

The effects extend beyond discipline into separate (but related) dimensions of legal practice, such as the crime-fraud exception to the attorney-client privilege. If state courts cannot reference foreign law in making this determination, the use of legal services to further foreign or international crimes falls outside of the exception. But it seems obvious that allowing the client to retain the privilege in this context directly contradicts the principles underlying the exception. “[T]he basis for the crime-fraud exception is . . . the overarching public policy principle that a court will not enforce a privilege where to do so would facilitate a crime.” Blocking measures thus force a highly undesirable result because counseling criminal activity is conduct lawyers (and clients) should never be encouraged to engage in.

The regulatory gaps created by state blocking measures, together with their negative impact on practitioners and patent unconstitutionality, raise serious questions about basic legislative competence in this area. Although self-regulation has its pros and cons, there is little reason to conclude that legislative control over the legal profession is desirable. Even if reasonable minds can differ over whether judges should consider foreign law in legal ethics, this is beside the point because the regulatory question already is firmly committed to the co-equal

193 In practice, there are instances where discipline is based on different law than other related matters. See Moore, supra note 58, at 84-85 (noting that different choice of law provisions may apply to the various legal consequences arising out of a lawyer’s conduct, which can lead to the oddity of legal rules from multiple jurisdictions applying to different legal aspects of the same underlying transaction).

194 See Okla. RPC 8.5 cmt. 7.


196 See MR 1.2(d) (ethical obligation not to counsel or assist with criminal activity).


198 The ABA studied this issue extensively and determined – perhaps not surprisingly – that legislative control over the legal profession was neither helpful nor wise. See Report of the Commission on Evaluation of Disciplinary Enforcement (1989-1992), Rec. 1 (noting that the “Commission found no persuasive evidence that legislative regulation of other professions has resulted in better protection of the public”).

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judicial branch in nearly every state. 199 The judiciary has far more expertise in such matters and is best positioned to make appropriate policy decisions on ethical regulation and other matters affected by blocking initiatives.

It also is important to recognize that foreign law is not being imposed upon states from the outside. Rather, it is the product of voluntary choice following the highly consultative and deliberative processes used by state judicial authorities to amend their rules of professional conduct. The fact that Rule 8.5 allows states to consider foreign or international law in ethical regulation does not mean they are compelled to do so. Foreign jurisdictions cannot force state bar regulators to utilize foreign criminal prohibitions for disciplinary purposes.

That said, there certainly are good reasons to do so, as two-thirds of state judiciaries already have determined. 200 Recognizing and applying foreign law in the ethical context imposes no significant burdens on lawyers, bar regulators, or courts because the door already is wide open. Foreign law already extends into the attorney-client relationship, at least insofar as the lawyer acts or causes effects in the foreign jurisdiction. 201 Applying disciplinary measures to such conduct simply recognizes the reality that foreign law already applies to an overseas representation. The only question is whether state judiciaries will be prevented from dealing with the further ethical implications of the lawyer’s conduct with respect to that foreign law.

It is far better for bar regulators and courts to deal directly with the reality of foreign and international law within their jurisdictions than to pretend it doesn’t exist. Consider a lawyer who is prosecuted and convicted overseas for a serious crime against the person (eg, murder,

199 The notable exception is California, which is the only state that does not follow the format of the Model Rules. See Robert E. Lutz, Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners, 16 FORDHAM INT’L L.J. 53, 73 n. 76 (1992).

200 See text supra to note 90.

201 See MR 8.5(b).
rape) or against economic interests (eg, stealing from clients, extortion). As in the American legal system, the substantive prohibitions on such conduct under foreign law address underlying activity that is inherently wrong and unquestionably *mala in se*. It is nonsensical to suggest that a legitimate foreign criminal conviction for such conduct does not justify a full measure of bar discipline as well. If the lawyer engages in criminal activity, or helps a client to do so, there will be (or at least should be) serious criminal and civil consequences. In a similar vein, foreign law should be allowed to operate in a normative way for ethical purposes as well. It should be allowed to fill out the contours of professional obligations and align them with this larger regulatory context that already applies to both lawyer and client.

**V. Negative Effects Outside of Blocking Jurisdictions**

The harmful consequences of blocking initiatives extend well beyond the jurisdictions in which they are enacted. They directly interfere with the operation of Rule 8.5, as well as with the relationships between the state’s judiciary and judicial authorities in other jurisdictions.

As discussed previously, Rule 8.5(a) anchors disciplinary authority in both licensing and territorial contacts. It grounds the *power* to discipline in authority over the lawyer’s person or the place where the lawyer acts. But the *standards* for this discipline are selected based on conduct alone: the place where the lawyer acted or where his conduct had its predominant effect. But state blocking measures void overseas standards that normally would apply – essentially by forcing state courts to pretend that foreign and international law do not exist.

This is significantly disruptive to the disciplinary structure established by Rule 8.5, which is predicated on the ability to choose applicable law from *any* jurisdiction where a lawyer acts or causes effects. Cooperation is inherent. Bar authorities from state “X” know that other states will apply X’s disciplinary rules when lawyers act or cause injury in X but can only be found (for
disciplinary purposes) elsewhere. Blocking measures disrupt not only these initial disciplinary proceedings but also the ability of bar regulators to participate fully in the wider structures of reciprocal discipline among the American states and the federal courts.

**A. Interference with Reciprocal Discipline**

The premise of reciprocal discipline is that misconduct in one state is relevant to ongoing fitness to practice in another. States cooperate to ensure that offending lawyers are sanctioned in all jurisdictions in which they are admitted. In order to ensure prompt action, lawyers must promptly report discipline in any jurisdiction to all other states in which they are admitted. Bar regulators also report to one another and to the ABA’s national database on lawyer discipline.

Reciprocal discipline occurs on a far shorter timeline than initial proceedings. Upon receipt of the sending jurisdiction’s disciplinary order, receiving jurisdictions automatically impose identical discipline thirty days later. Lawyers can avoid this result only by establishing due process violations (e.g., lack of notice amounting to a “deprivation of due process,” genuine “infirmity of proof” or “grave injustice”) or some other serious offense to public policy. The result from transmitting jurisdictions is conclusive and not subject to re-litigation, even when discipline is imposed under Rule 8.5(a) on lawyers not otherwise admitted.

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202 The ABA’s model reciprocal enforcement rules were updated in 2002 in order to accommodate key revisions to Rule 8.5. See ABA Standing Committee on Professional Discipline: Amendments to the ABA Model Rules for Lawyer Disciplinary Enforcement Adopted by the ABA House of Delegates, Aug. 12, 2002.

203 See MRDE 22 cmt. (noting that “[t]he spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the administration of justice.”).

204 See MRDE 22(A) (duty to self-report discipline to other jurisdictions).

205 See MRDE 16(9) (disciplinary boards must “transmit notice of all public discipline imposed against a lawyer . . . to the National Lawyer Regulatory Data Bank maintained by the American Bar Association.”).

206 See MRDE 22(B).

207 See MRDE 22(D).
Receiving jurisdictions thus rely heavily upon the adjudicatory processes of the sending tribunals for both the determination that misconduct has occurred\textsuperscript{209} and the appropriate sanction for it.\textsuperscript{210}

Blocking measures impede the parity that normally exists within this reciprocal system. All jurisdictions are supposed to reach the same result – bounded only at the margins for serious issues of due process or public policy.\textsuperscript{211} Because misconduct determinations are conclusive and not subject to re-litigation, the reviewing “court [normally] should impose identical discipline” upon the defendant lawyer unless it determines that such public policy grounds exist.\textsuperscript{212} Even states that have not adopted Rule 8.5’ s Comment 7 would not automatically reject disciplinary results from other jurisdictions solely because they were based on foreign law.

Identical results are not possible, however, when receiving states are prohibited from imposing reciprocal discipline because the transmitting state’s disciplinary case relied on foreign law. Assume, for example, that a sending jurisdiction disciplines a lawyer for undertaking an overseas representation governed by European Union law for a reasonable contingent fee where a minor conflict of interest existed (which the foreign client agreed to waive). Contingent fees and conflict waivers are allowed in American jurisdictions but are prohibited under EU law.\textsuperscript{213}

\textsuperscript{208} See MRDE 22(E) and cmt.
\textsuperscript{209} See, e.g., Florida Bar v. Behm, 41 So.3d 136 (Fla. 2010) (use of findings by a North Carolina trial court for disciplinary proceedings in Florida).
\textsuperscript{210} See, e.g., Matter of Milchman, __ N.Y.S.2d __, 2012 WL 265728 (N.Y.A.D. 1 Dept. Jan 31, 2012) (affirming reciprocal discipline in New York for misconduct in Florida and imposing an identical penalty to that determined by the Florida Supreme Court because “great weight should be accorded to the sanction administered by the state where the charges were originally brought.”).
\textsuperscript{211} Reciprocal discipline can be declined, for example, whenever it “would result in grave injustice or be offensive to the public policy of the jurisdiction.” See MRDE 22(4).
\textsuperscript{212} Id. at cmt. ¶4.
\textsuperscript{213} Compare Code of Conduct for European Lawyers art. 3.2 (2006) (prohibiting representation whenever a conflict of interests exists or there is a significant risk of such a conflict arising) and art. 3.3 (“A lawyer shall not be entitled to make a pactum de quota litis”) with MR 1.7(b) (allowing representation of clients with concurrent conflicts of
Disciplinary authorities in the sending jurisdiction easily could determine that EU law applies to this matter, either because the lawyer acted in the EU or because the representation had its predominant effect there.\textsuperscript{214} The lawyer’s failure to follow applicable EU standards in the foreign representation subjects him to discipline, absent a reasonable belief that American law applied instead.\textsuperscript{215} Discipline in the sending jurisdiction thus is inextricably intertwined with (and substantively grounded in) the legal standards of a foreign jurisdiction.

Receiving jurisdictions will decline reciprocal discipline, however, when imposing it would offend the public policy of that jurisdiction.\textsuperscript{216} Disciplinary findings predicated upon foreign law certainly could run afoul of this standard because the express public policy articulated in many blocking measures is to deny operational effect to foreign law.\textsuperscript{217} In such cases, it is hard to see how receiving jurisdictions with blocking laws could recognize reciprocal disciplinary findings based in whole or part on foreign law. Yet this creates exactly the patchwork of disciplinary results that the reciprocal discipline system was meant to prevent.

Similar considerations apply to safe harbor defenses based on foreign law, where blocking jurisdictions would discipline lawyers when other jurisdictions declined to do so (eg, because they recognized foreign law as a defense). As transmitting states, blocking jurisdictions risk having their disciplinary judgments rejected in receiving jurisdictions whose conflicting

\textsuperscript{214} See MR 8.5(b).
\textsuperscript{215} See MR 8.5(b)(2).
\textsuperscript{216} MRDE 22(4).
\textsuperscript{217} See, e.g., H.B. 2087 (Kan. 2011) (“Any court, arbitration, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system . . . .”).
public policy recognizes foreign law as the correct rule of decision under Rule 8.5 (or for safe harbor purposes).

Note that reciprocal discipline is a system of voluntary cooperation between state judiciaries. It is distinct from the constitutional means by which states recognize final judgments from other American jurisdictions. The Full Faith and Credit clause precludes states from relying on public policy to deny effect to out of state judgments from other American courts. A state could not, for example, decline to recognize a malpractice judgment based on foreign law from another American state without violating the full faith and credit clause. But it could decline to impose reciprocal discipline for breaches of Rule 1.1. standards of competence based upon the very same errors of foreign law or practice.

The 2002 revisions to Rule 8.5 were intended to prevent exactly these kinds of contingencies: disciplinary proceedings against the same lawyer for the same conduct in multiple jurisdictions based upon inconsistent rules. Such anomalous results hardly serve the interests of states whose legislatures impose blocking measures upon the courts. This is particularly true in states whose judiciaries sought to avoid such problems by adopting the revised Rule 8.5 and by participating in the reciprocal discipline system. The latter suffers as well. Blocking measures inject considerable variation – not to mention confusion – into a system that whose structure depends on mutuality – participants applying the same rules to the same conduct and drawing identical disciplinary conclusions from them.

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218 See Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (while “[a] court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy . . . [the Court’s] decisions support no roving ‘public policy exception’ to the full faith and credit due judgments.”) (emphasis in original).

219 As noted previously, this is a separate problem with blocking initiatives. See supra text accompanying note 42.

220 See MR 8.5 cmt. 6 (“If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.”).
B. Interference with State Judicial Relationships with Federal Courts

Blocking measures also have negative implications for the American federalist system. The ethical duties of state and federal practitioners are not automatically co-extensive, even in the same jurisdiction.\(^\text{221}\) Although federal courts normally adopt the ethical rules of the states where they sit,\(^\text{222}\) they nevertheless retain inherent authority to sanction parties and lawyers before them.\(^\text{223}\) They also may impose different ethical obligations on lawyers admitted to a particular court’s federal bar.\(^\text{224}\) Breaches of state rules on legal practice can form the basis of federal crimes.\(^\text{225}\) While federal government lawyers must abide by state ethics rules,\(^\text{226}\) they also are subject to additional public integrity requirements (e.g., restrictions on financial holdings).\(^\text{227}\) Even when state and federal rules mirror one another, there is no guarantee that

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\(^{222}\) See, e.g., Local Rules of the U.S. District Court for the District of Massachusetts Rule 83.6(4)(B) (“Acts or omissions by an attorney admitted to practice before this court . . . that violate the ethical requirements and rules concerning the practice of law of the Commonwealth of Massachusetts, shall constitute misconduct . . . .”).

\(^{223}\) See, e.g., Spolter v. Sun Trust Bank, 403 Fed. App’x 387, 390 (11th Cir. 2010).

\(^{224}\) See, e.g., Local Rules of the U.S. District Court for the District of Massachusetts Rule 83.6(4)(B) (“The ethical requirements and rules concerning the practice of law mean those canons and rules adopted by the Supreme Judicial Court of Massachusetts . . . except as otherwise provided by specific rule of this court . . . .”).

\(^{225}\) See, e.g., United States v. Clark, 195 F.3d 446 (9th Cir. 1999) (affirming federal conviction of legal assistant who held herself out as a California lawyer and represented clients in court martial proceedings; California statute prohibiting unauthorized practice of law was assimilated into federal law through the Assimilated Crimes Act, 18 U.S.C. §§ 7 and 13) and United States v. Wallach, 935 F.2d 445, 461 (2d Cir. 1991) (fraudulent billing by lawyer could constitute mail fraud in connection with services not performed, although lawyer’s conviction was reversed for perjury by a government witness).

\(^{226}\) See McDade Act, 28 U.S.C. § 530B(a) (2010) (government lawyers are “subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”).

\(^{227}\) See, e.g., Acts Affecting a Personal Financial Interest, 18 U.S.C. § 208 (2011) (criminal prohibitions on personal involvement in matters where the government employee or certain family members have financial interests that could be affected by the outcome).
federal courts (or courts in other states, for that matter) will interpret this identical language in the same way.\textsuperscript{228}

While federal courts accommodate state interests whenever possible,\textsuperscript{229} federal law will prevail in the event of a conflict.\textsuperscript{230} This includes conflicts with international rules that are incorporated into federal law,\textsuperscript{231} which preempt inconsistent state laws dealing with the same subject matter.\textsuperscript{232} Blocking measures that infringe upon these federal interests in foreign affairs thus would be unconstitutional.\textsuperscript{233}

Defenders of blocking initiatives might suggest that there is no such intrusion on the federal province. Many blocking measures instruct state courts to respect and apply federal law. Where federal law and international law overlap, presumably the exception includes any “federalized” foreign law, such that there might be no genuine conflict in such cases.\textsuperscript{234} That

\textsuperscript{228} See, e.g., H. Geoffrey Moulton, Jr., \textit{Federalism and Choice of Law in the Regulation of Legal Ethics}, 82 MINN. L. REV. 73, 96 (1997) (noting that “even where two states (or virtually all states) have adopted the same language, judicial interpretation of that language may vary significantly from state to state.”).


\textsuperscript{230} See, e.g., N.C. Formal Ethics Opinion 2005-9, Lawyer for Publicly Traded Company May “Report Out” Pursuant to SEC Regulations, Jan. 20, 2006 (to the extent that state confidentiality obligations conflicted with federal “reporting out” requirements in SEC regulations enacted pursuant to the Sarbanes-Oxley Act, inconsistent North Carolina ethics rules were pre-empted by federal law).

\textsuperscript{231} To the extent that federalism requires it, rules of international law apply in state courts. See Restatement (Foreign Relations) § 702 cmt. c. There is some dispute about state obligations in the absence of Congressional action on international rules, although that issue is far beyond the scope of discussion here. See, e.g., Medellin v. Texas, 552 U.S. 491 (2008) (treaties may constitute valid international commitments but are not binding domestically unless the treaty itself is self-executing or Congress has enacted implementing legislation to make the treaty’s provisions applicable).

\textsuperscript{232} See, e.g., American Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (California law requiring insurers doing business in California who had sold Holocaust era insurance policies in Europe to provide details to California officials was pre-empted as an impermissible interference with the President’s conduct of foreign affairs) and Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) (Congressional sanctions on Myanmar pre-empted pre-existing Massachusetts restrictions on business activities connected to that country).

\textsuperscript{233} See supra text accompanying notes 40-41.

\textsuperscript{234} See, e.g., Okla. H.J.R. 1056 (2010) art. 1(A) (applicable courts) and art. 1(C) (obligation to follow federal constitution, United States Code, and federal regulations).
said, it remains an open question whether blocking provisions are meant to apply to federal courts sitting in diversity and applying state law. 235 And the fact is that some state initiatives aim directly at federal judges as well. A proposal in Iowa subjects federal judges to criminal penalties, 236 civil lawsuits, 237 and bar discipline 238 if they “violate” the rights of an Iowan citizen through the application of foreign law. A Montana proposal even authorizes its state legislature to nullify federal law entirely. 239

At the very least, blocking measures create a quandary for federal judges applying state law in case where the relevant rule of decision would involve foreign law. This could arise, for example, in discipline cases arising out of overseas conduct where the federal court normally applies ethics rules from the state where it sits to a member of its federal bar. It also could become an issue in malpractice cases where a lawyer resolves a question of foreign law incorrectly, or in determining whether the crime/fraud exception to the attorney-client privilege applies to foreign or international crimes.

It is unlikely that a federal court would respect state rules that purport to exclude wide swaths of substantive federal law (treaties, federal statutes incorporating international rules by

235 See, e.g., 28 U.S.C. § 1332 (diversity jurisdiction). This may turn on whether blocking laws are regarded as substantive or procedural in nature. See, e.g., Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., __ U.S. __, 130 S. Ct. 1431 (2010) (holding that state procedural rules were not binding on federal courts sitting in diversity).

236 See H.B. 575 art. 7(e)(1) (Iowa 2011) (“An official, agent, or employee of a state or federal government or an employee of a corporation providing services to state or federal government in this state who enforces or attempts to enforce a foreign law in violation of this section commits a class “D” felony.”) (emphasis added).

237 Id. art. 7(e)(2) (“A party aggrieved by a violation of this section . . . shall have a private right of action against the person who committed the violation.”).

238 Id. art. 7(b) (“A federal judge in this state who exercises jurisdiction over a sovereign citizen of this state in a case involving foreign law which results in violation of the sovereign citizen’s rights . . . is subject to sua sponte and sovereign citizen-initiated grievance proceedings before the state bar for doing so. If the exercise of jurisdiction is determined to have resulted in violation of the sovereign citizen’s rights and privileges, the judge is subject to any disciplinary sanction available to the state bar, including but not limited to suspension or disbarment.”) (emphasis added).

239 See H.B. 382 § 3 (Mont. 2011) (“If the legislature votes by simple majority to nullify a federal statute, mandate, or executive order on the grounds of constitutionality, the state and its citizens may not recognize or be obligated to obey the nullified statute, mandate, or executive order.”).
reference, and customary international law as federal common law). Federal courts independently supervise their own bar members, and it is unlikely that they will choose to limit the materials they may deem relevant to that task. As with reciprocal discipline, the serious potential for anomalous results created by the blocking initiatives (e.g., different disciplinary outcomes for identical conduct in state versus federal courts) is readily apparent (and best avoided).

VI. Concluding Thoughts – The Collective Ambivalence over Globalization

The careful balance achieved by the Model Rules is at genuine risk from legislative blocking measures that outright prohibit judicial references to foreign or international law – either in Rule 8.5 determinations, in other ethical rules, or in any other situation where “judicial decisions” are required. These initiatives drastically curtail the ability of state judiciaries to account for foreign and international law in substantive ethical regulations and to apply those ethical rules to American lawyers practicing abroad. In so doing, they directly interfere with mechanisms specifically designed to facilitate judicial control over American lawyers practicing in an increasingly mobile and globalized world. By essentially forcing state judiciaries to pretend that foreign law does not exist, blocking measures thus directly hinder efforts to craft a nuanced response to the ethical complications arising out of foreign and international practice. These many infringements on the judicial province amply justify voiding such provisions on constitutional separation of powers grounds.

240 See, e.g., Theard v. United States, 354 U.S. 278 (1957) (while determinations of state courts are entitled to respect, at the end of the day “[t]he two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers.”). See also Restatement (Lawyers) § 1 Reporter’s note cmt. c (“Federal courts have also affirmed an inherent role in regulating lawyers. That is reflected in enactment of disciplinary rules in each federal court and, often, in creation of a disciplinary apparatus.”).

241 See, e.g., In re Landerman, 7 F.Supp.2d 1202 (D. Utah 1998) (state and federal courts cannot limit each other’s autonomy to impose disciplinary sanctions that each believes are warranted).
More fundamentally, these measures leaven uncertainty within a choice of law system that was intended to clarify these critical but already confusing matters. This is especially true where blocking measures impact the substantive content of ethical rules and resurrect the “double deontology” problem that the revised Rule 8.5 sought to solve. Even in the least intrusive scenarios, blocking measures create much unnecessary confusion and add multiple analytic steps to the resolution of transnational ethical questions. They also impose direct costs in other areas – specifically by interfering with judicial participation in American reciprocal discipline and by injecting substantial confusion (if not outright conflict) into the state’s relationships with federal courts.

This is bad enough for bar regulators and courts, but it is far worse for lawyers making their own determinations of applicable law in already-complex scenarios under Rule 8.5. Transnational practitioners in blocking jurisdictions face a genuine risk of inconsistent ethical duties (not to mention variable results in disciplinary proceedings for identical conduct). Even lawyers who want to comply with all of their ethical obligations and genuinely attempt to do so now face much higher stakes if they get the choice of law question wrong. The evisceration of safe harbor protection, which prevents even the good faith defense to disciplinary sanctions, imposes further impediments to global legal practice. It also is remarkably unfair. All of this is patently undesirable from a regulatory standpoint because lawyers need to resolve these questions (and advise clients about them) in order to comply with their obligations of competence, communication, etc.

The issue is particularly important in light of the large number of lawyers already affected by such measures and the rapid growth in American legal services provided abroad. Bar regulators increasingly will need to control and discipline lawyers for conduct abroad and to
continually assess the proper role of foreign and international law in the attorney-client
relationship. Blocking measures deprive them of the full range of options available to deal with
these issues.

It is neither desirable nor necessary to honor outright bans by state legislatures that
prevent state judiciaries from effectively dealing with the reality of global legal practice. The
best approach is to oppose blocking measures becoming law in the first place. Significant
damage can be caused even by measures that ultimately are voided on constitutional grounds
because it takes time for cases testing the legality of such initiatives to progress to final
determinations in state and federal courts. They should be opposed through concerted efforts
before more initiatives reach the stage of becoming enacted. The ABA, state supreme courts,
state bar organizations, and legal practitioners all have a stake in this issue. Each should become
involved in communicating the myriad undesirable effects of the blocking provisions as well as
the fundamental absence of any true need for them.

That said, the motives lurking behind today’s blocking measures signal deeper underlying
fractures within state governments and far greater challenges in the days to come. In a very real
sense, blocking initiatives represent a more fundamental American ambivalence about
globalization itself. On the surface, the very title of Oklahoma’s “Save our State [from Foreign,
International and Sharia Law]” SQ 755 ballot initiative seems almost laughable. Save Oklahoma
from what? As noted earlier, despite being singled out for negative treatment (leading to a
federal injunction) there is no evidence of even a single instance where Sharia law was even
referenced in any Oklahoma legal proceedings, let alone used to deprive an Oklahoma citizens of
his rights.242 The “threat” to Oklahoma from Sharia law is illusory. Even the legislator who first

Oklahoma’s Sharia ban could not identify any case in which Islamic law or the precepts of other nations or cultures
introduced Oklahoma’s blocking initiative has conceded the absence of prior cases and characterized the proposed ban as a “preemptive strike.”

It would be a mistake, however, not to take seriously the fear underlying Oklahoma’s blocking measure, which by all accounts is completely genuine. Despite the total absence of any actual use of Sharia law, Oklahoma legislators felt sufficiently threatened enough to push a blocking agenda forward to the ballot box. More importantly, 70% of Oklahoma voters were sufficiently on board to enshrine blunt religious discrimination into their state constitution, even though the state’s 30,000 Muslims amount to less than 1% of Oklahoma’s total population. It is unlikely that such wide majorities can be attributed solely to “xenophobic hysteria” or similar base motives.

Apart from the absence of any actual use of Sharia law, Oklahoma legislators surely were aware that Oklahoma judges have many tools available to prohibit improper uses of foreign or international law that truly violate citizens’ rights or offend public policy. Yet they sought – and passed – an outright ban. Blocking measures (much like other jurisdiction stripping

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243 See, e.g., James C. McKinley, Judge Blocks Oklahoma’s Ban on Using Shariah Law in Court, N.Y. Times, Nov. 29, 2010, at A22.
244 The measure passed 82-10 in Oklahoma’s House of Representatives and 41-2 in the Oklahoma Senate. See Symeonides, note 41 supra, at 320 n. 109.
245 See Oklahoma State Question 755 § 1(C) (emphasis added), amending OKLA. CONST. art. 7 § 1 (2010).
247 See, e.g., Symeonides, note 41 supra, at 321.
248 See, e.g., Restatement (Foreign Relations) § 482 (detailing public policy grounds for treating foreign judgments as unenforceable).
proposals)\textsuperscript{249} thus reflect a mistrust not only of foreign and international \textit{law}, but also of the state’s \textit{own judiciary} to address globalization in a competent and sensible way.\textsuperscript{250}

This mistrust exists despite Oklahoma’s multiple levels of appellate review\textsuperscript{251} and the express obligation of Oklahoma judges to follow applicable law even where their personal viewpoints differ.\textsuperscript{252} It exists even though Oklahoma has special courts where judges can be impeached based on complaints by private citizens.\textsuperscript{253} And even though Oklahoma’s citizens control state judges through general elections of trial judges every four years and retention judges of appellate judges every six,\textsuperscript{254} those citizens still deemed it necessary to block all possible use of international, foreign, and Sharia law through an outright ban.

There is no easy resolution to this mistrust between co-equal branches of state government or to the lack of confidence by citizens in the judiciary ultimately responsible for securing their individual liberties under state and federal law. As the drum beat of global commerce becomes louder and faster, there will be winners and losers in the process. Friction is bound to occur among affected constituencies. A wider debate over the meaning of globalization at the state level is not only inevitable, but necessary.

\textsuperscript{249} An Oklahoma state legislator recently introduced a state constitutional amendment to transfer constitutional interpretation to Oklahoma’s legislature. See Oklahoma Senate Joint Resolution 84, 53rd Okla. Legis., 2nd Sess. (2012) § 4 (proposing that “The [Oklahoma] Supreme Court shall not have the power of judicial review over the constitutionality of laws enacted in this state. An Ad Hoc Court of Constitutional Review shall be created to rule on the constitutionality of such enacted laws.”).

\textsuperscript{250} See, e.g., Venetis, Venetis, note 19 supra, at 197 (“The obvious subtext of all of these provisions is a mistrust of international or foreign law. But, the less obvious subtext is a mistrust of the judiciary. SQ 755 and other provisions like it are clear attempts to limit the power of the courts.”).

\textsuperscript{251} See League of Women Voters: The Oklahoma Court System 1 (2008) (describing Oklahoma’s Supreme Court, Court of Criminal Appeals, and Court of Civil Appeals).

\textsuperscript{252} See, e.g., Okla. Code of Judicial Conduct, Rule 2.2 cmt. 2 (“Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”).


But there should be a genuine debate. The better path is to acknowledge the undeniable facts that global commerce and transnational legal practice have become inevitable (not to mention growth industries for American lawyers). A meaningful public policy on foreign and international law will recognize that each branch of state government plays a role not only in achieving the proper balance within their respective spheres of control, but also in the implementation of those policy choices on behalf of the state’s citizens.

The proper resolution of these issues will vary from state to state. An optimal solution will not include the blanket policy ultimatums or clumsy methods reflected in the blocking measures, however. Pretending that international and foreign law do not exist amounts to nothing more than misguided hope that global legal realities will, perhaps, simply go away.
Appendix A – Table of State Blocking Measures on International and Foreign Law
(as of Mar. 12, 2012) [1]

  - AL, AK, AZ, AR, FL, GA, ID, IN, IA, KS, KY, LA, ME, MI, MS, MT, MO, NB, NH, NJ, NM, NC, OK, PA, SC, SD, TN, TX, UT, VA, WV, WY

- States with Blocking Measures Currently in Effect: 5 [3]
  - AZ, ID, LA, OK, TN

- States with Blocking Measures by Type:
  - “Full” blocking: 12 [4]
    - AL, AZ, ID, IA, MO, MT, OK, SC, SD, TX, VA, WY
  - “Rights-Based” blocking: 23 [5]
    - AL, AK, AZ, AR, GA, IN, IA, LA, ME, MI, MS, MO, NH, NJ, NM, NC, PA, SC, TN, TX, VA, UT, WV
  - “Reciprocity-Based” blocking: 9 [6]
    - AZ, AR, FL, KS, MO, MS, NB, OK, SD

- Blocking Measures Structured as Constitutional Amendments: 13
  - AL, AZ, AR, GA, IN, IA, MO, NM, OK, SC, SD, TX, WY

- States with Blocking Measures Where Judiciary has not Adopted MR 8.5 cmt. 7: 13
  - AL, AZ, FL, KS, LA, MS, MT, NJ, NM, TX, VA, WV, WY

- States with Blocking Measures Where Judiciary has Adopted MR 8.5 cmt. 7: 19
  - AK, AR, GA, ID, IN, IA, KS, ME, MI, MO, NB, NC, NH, OK, PA, SC, SD, TN, UT

- States with Blocking Measures Currently in Conflict with MR 8.5 cmt. 7: 3
  - ID, OK, TN

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1 This material was compiled from a variety of sources and should be current as of the date provided above.

2 All proposals introduced from 2010 – present. Some states have multiple types of blocking measures.

3 Oklahoma’s state constitutional amendment was approved by voters on Nov. 2, 2010, but certification of the election results has been stayed. See Awad v. Ziriax, ___ F.3d __, 2012 WL 50636 (10th Cir. Jan. 10, 2012).

4 See, e.g., See Oklahoma State Question 755 § 1(C) (emphasis added), amending OKLA. CONST. art. 7 § 1 (2010) (“The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.”) (currently stayed).

5 See, e.g., Ariz. Rev. Stat. § 12-3101 (2011) (“A court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States or conflict with the laws of the United States or of this state.”).

6 See, e.g., H.B. 2087 (Kan. 2011) (“Any court, arbitration, tribunal or administrative agency ruling or decision shall violates the public policy of this state and be void and unenforceable if the court, arbitration, tribunal or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions.”).
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7 Montana’s initiative addresses itself directly to the federal government, claiming the power to block any federal law that a majority of legislators dispute, which would include foreign or international rules mandated by the federal government. See H.B. 382 § 3 (Mont. 2011) (“If the legislature votes by simple majority to nullify a federal statute, mandate, or executive order on the grounds of constitutionality, the state and its citizens may not recognize or be obligated to obey the nullified statute, mandate, or executive order.”).
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<td>Statute</td>
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8 Virginia does not recognize the predominant effect test provided in MR 8.5(b)(2). See Virginia RPC 8.5.
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