

Proposed Rule 8.5 [RPC 1-100(D)]

“Disciplinary Authority; Choice of Law”

(Draft #4, 2/26/10)

Summary: This amended rule states the territorial and extra-territorial reach of the California Rules of Professional Conduct. It also addresses conflicts of law with regard to professional conduct rules by setting a choice of law standard.

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

RPC 1-100(D); Rules 9.40 - 9.48 of the California Rules of Court

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 10
Opposed Rule as Recommended for Adoption 0
Abstain 1

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction and the explanation of paragraph (b) of the proposed rule in the Model Rule comparison chart.

Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.5* Disciplinary Authority; Choice of Law

August 2009

(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed rule 8.5 is based upon Model Rule 8.5, except that proposed 8.5(b)(2) adopts the California rules as a choice of law unless an admitted lawyer, lawfully practicing in another jurisdiction, is required by the rules of another jurisdiction to engage in different conduct. The Model Rule concepts of the “predominant effect of the conduct is in a different jurisdiction” and the “safe harbor” provision (providing no discipline to a lawyer believing that the predominant effect of the rules of another jurisdiction applied) have been deleted in the interests of protecting the residents of California and in creating a brighter line for application by practicing lawyers, disciplinary prosecutors and disciplinary adjudicators.

Most of the Model Rule 8.5 comments have been retained and used as a basis for the comments to the proposed rule, except where the comments have been inconsistent with the proposed black letter rules or California law.

* Proposed Rule 8.5, Draft 4 (2-26-10).

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.</p>	<p>(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdictionCalifornia is subject to the disciplinary authority of this jurisdictionCalifornia, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdictionCalifornia is also subject to the disciplinary authority of this jurisdictionCalifornia if the lawyer provides or offers to provide any legal services in this jurisdictionCalifornia. A lawyer may be subject to the disciplinary authority of both this jurisdictionCalifornia and another jurisdiction for the same conduct..</p>	<p>Paragraph (a) is identical to Model Rule 8.5(a), except that the word "California" has been substituted for "this jurisdiction." The intent of the Model Rules drafters and the practice of many states, when this rule is adopted by a particular jurisdiction, is to substitute the name of the jurisdiction for "this jurisdiction."</p>
<p>(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:</p>	<p>(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdictionCalifornia, the rules of professional conduct to be applied shall be as follows:</p>	<p>Paragraph (b) is identical to Model Rule 8.5(b) except that the word "California" has been substituted for "this jurisdiction." The intent of the Model Rules drafters and the practice of many states, when this rule is adopted by a particular jurisdiction, is to substitute the name of the jurisdiction for "this jurisdiction".</p>
<p>(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</p>	<p>(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits <u>apply</u>, unless the rules of the tribunal provide otherwise; and</p>	<p>A minor addition has been made to Paragraph (b)(1) to improve clarity. There is no substantive change.</p>

* Proposed Rule 8.5, Draft 4 (02/26/10). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(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. <u>these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.</u></p>	<p>Proposed 8.5(b)(2) deletes most of Model Rule 8.5(b)(2) and substitutes language derived from current rule 1-100(D)(1) as a model to create a brighter line and to provide that these rules remain the standards of professional conduct for all conduct over which California has disciplinary jurisdiction except where an admitted lawyer is lawfully practicing in another jurisdiction which specifically requires a different standard of conduct.</p> <p>This rule deletes the MR concept of "predominant effect" because the concept is ambiguous, over broad and undefineable for the lawyers seeking to comply with the rules and for application by disciplinary prosecutors and adjudicators.</p> <p>The rule also deletes the "safe harbor" provision (providing that a lawyer is not subject to any discipline if the lawyer reasonably believes that he or she was bound by a different set of disciplinary rules) on public protection grounds, since a violation of these rules is generally a "wilful" standard, without any intent requirement. The reasonable belief of the lawyer may properly be considered as a mitigating factor rather than a complete defense.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Disciplinary Authority</p> <p>[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.</p>	<p>Disciplinary Authority</p> <p>[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdictionCalifornia is subject to the disciplinary authority of this jurisdictionCalifornia. Extension of the disciplinary authority of this jurisdictionCalifornia to other lawyers who provide or offer to provide legal services in this jurisdictionCalifornia is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary EnforcementCalifornia. A lawyer who is subject to thedisciplined by a disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of thisanother jurisdiction may be a factorsubject to discipline in determining whether personal jurisdiction may be asserted over the lawyerCalifornia for civil mattersthe same conduct. See e.g., Business and Professions Code section 6049.1.</p>	<p>Comment [1] is based on Model Rule 8.5, cmt. [1] but makes three changes to conform the comment to California law.</p> <p>First, its substitutes "California" for "this jurisdiction." See explanation to proposed (a) above and the court rules for multijurisdictional practice¹, which also contain the inherent authority of the California Supreme Court over the practice of law in California.</p> <p>Second, it deletes the language regarding reciprocal discipline since California has not adopted these provisions.</p> <p>Third, it adds references to California's statutory provisions for discipline of lawyers who are disciplined in another jurisdiction.</p>

¹ **Sapiro Cmt #15:** I think something got garbled in the second sentence. Was that supposed to be a placeholder for insertion of citations of Rules of Court regarding multijurisdictional practice? I do not see any citations to those Rules of Court in my copy of proposed Comment [1].
RRC - 1-100 [8-5] - Compare - Rule & Comment Explanation - DFT5 (02-26-10)RD-ML

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Choice of Law</p> <p>[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.</p>	<p>Choice of Law</p> <p>[2] A lawyer may be potentially <u>be</u> subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.</p>	<p>Comment [2] is identical to Model Rule 8.5 comment [2].</p>
<p>[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.</p>	<p>[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; <u>and</u> (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.</p>	<p>Comment [3] is based on Model Rule 8.5, cmt. [3] except that it deletes the third provision referring to the black letter "safe harbor" to conform to proposed 8.5(b)(2). See explanation above.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.</p>	<p>[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the<u>these</u> rules of the jurisdiction, unless a lawyer admitted in which the lawyer's conduct occurred, or, if the predominant effect of the conduct<u>California is lawfully practicing</u> in another jurisdiction, the<u>and may be required specifically by a jurisdiction in which he or she is practicing to follow</u> rules of that jurisdiction shall be applied to the<u>professional</u> conduct <u>different from these rules</u>. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred<u>these rules apply, where</u><u>unless</u> the tribunal sits or is in another<u>a</u> jurisdiction <u>in which the lawyer is lawfully practicing and that jurisdiction requires different conduct</u>.</p>	<p>Comment [4] is based on Model Rule 8.5, cmt. [4] but deletes language to conform the comment to proposed rule 8.5(b)(2).</p> <p>Sentence two clarifies that these rules apply to a lawyer's conduct, including prior to the initiation of a proceeding before a tribunal [after which the rules of the tribunal would generally apply under 8.5(b)(1)], unless the lawyer is lawfully practicing in another jurisdiction that expressly requires a different standard of conduct.</p> <p>In sentence three, the same conformance to proposed rule 8.5(b)(2) has been made.</p> <p>The deleted language does not provide a bright line for lawyers engaged in multijurisdictional practice; whereas the proposed rule provides greater clarity.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.</p>	<p>[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.</p>	<p>Model Rule 8.5 comment [5] has been deleted because it refers exclusively to the safe harbor language which was deleted from proposed rule 8.5(b)(2). See explanation above.</p>
<p>[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.</p>	<p>[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.</p>	<p>This entire comment has been deleted because it is improper to discuss what another disciplinary jurisdiction should or should not do or to recommend that the California Supreme Court should limit its inherent power with this comment. Moreover, the statement is inconsistent with the operation of Bus. & Prof. C., §6049.1 [discipline of a California lawyer who has been disciplined by another jurisdiction].</p>
<p>[7] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.</p>	<p>[7]^[5] The choice of law provision applies to lawyers engaged in transnational<u>transactional</u> practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise<u>preempt these rules</u>.</p>	<p>Comment [5] is identical to Model Rule 8.5 Comment [7] except that the words "provide otherwise" have been deleted and the words "preempt these rules" have been added. This conforms the comment to the black letter rule 8.5(b)(2) that the California rules will be the default standards, unless the rules of a jurisdiction in which the lawyer is lawfully practicing require different conduct. Accordingly, only preemption by treaty, etc. would "require other conduct."</p>

Rule 8.5 Disciplinary Authority; Choice Of Law

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) Disciplinary Authority. A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.
- (b) Choice of Law. In any exercise of the disciplinary authority of California, 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 apply, unless the rules of the tribunal provide otherwise; and
 - (2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California ~~and~~, who is lawfully practicing in another jurisdiction, is **specifically** required **specifically** by **at** the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

Comment

Disciplinary Authority

- [1] It is longstanding law that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Extension of the disciplinary authority of California to other lawyers

who provide or offer to provide legal services in California is for the protection of the citizens of California. A lawyer disciplined by a disciplinary authority in another jurisdiction, may be subject to discipline in California for the same conduct ~~in California~~. (See e.g., ~~Bus. & Prof. C., §~~ Business and Professions Code section 6049.1.)

Choice of Law

- [2] A lawyer may ~~be~~ potentially **be** subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.
- [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.
- [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only

to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be **specifically** required specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.

- [5] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions preempt these rules.

Rule 1-100—Rules of Professional Conduct, in General 8.5 Disciplinary Authority; Choice Of Law

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

~~(A) Purpose and Function.~~

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

~~The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.~~

~~(b) For a willful breach Choice of Law. In any exercise of these rules the disciplinary authority of California, the Board rules of Governors has the power professional conduct to discipline members be applied shall be as provided by law. follows:~~

~~The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, §6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct.~~

~~Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.~~

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

~~These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.~~

~~(B) Definitions.~~

~~(1) "Law Firm" means:~~

~~(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or~~

~~(b) a law corporation which employs more than one lawyer; or~~

~~(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or~~

~~(d) a publicly funded entity which employs more than one lawyer to perform legal services.~~

~~(2) "Member" means a member of the State Bar of California.~~

~~(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.~~

~~(4) "Associate" means an employee or fellow employee who is employed as a lawyer.~~

~~(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.~~

~~(C) Purpose of Discussions.~~

~~Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.~~

~~(D) Geographic Scope of Rules.~~

~~(1) As to members:~~

~~(2) These these rules shall govern the activities of members apply to any other conduct, in and outside this state, except as members where a lawyer admitted to practice in California, who~~

is lawfully practicing outside this state may be specifically in another jurisdiction, is required specifically by a the jurisdiction in which they are he or she is practicing to follow rules of professional conduct different from these rules.

~~(2) As to lawyers from other jurisdictions who are not members:~~

~~These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.~~

~~(E) These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California."~~

Comment Discussion:

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the citizens of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code section 6049.1.

Choice of Law

~~The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See Ames v. State Bar (1973) 8 Cal.3d~~

~~910 [106 Cal.Rptr. 489].) The fact that a member has engaged in conduct that may be contrary to these rules does not automatically give rise to a civil cause of action. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 [231 Cal.Rptr. 355].) These rules are not intended to supercede existing law relating to members in non-disciplinary contexts. (See, e.g., *Klomm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (motion for disqualification of counsel due to a conflict of interest); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (disqualification of member appropriate remedy for improper communication with adverse party).)~~

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

~~Law firm, as defined by subparagraph (B)(1), is not intended to include an association of lawyers who do not share profits, expenses, and liabilities. The subparagraph is not intended to imply that a law firm may include a person who is not a member in violation of the law governing the unauthorized practice of law. (Amended by order of the Supreme Court, operative September 14, 1992.)~~

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the

profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.

[5] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions preempt these rules.

Rule 8.5 Disciplinary Authority; Choice Of Law
(Commission's Proposed Rule – Clean Version)

- (a) **Disciplinary Authority.** A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of California, 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 apply, unless the rules of the tribunal provide otherwise; and
 - (2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

Comment

Disciplinary Authority

- [1] It is longstanding law that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Extension of the disciplinary authority of California to other lawyers

who provide or offer to provide legal services in California is for the protection of the citizens of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code section 6049.1.

Choice of Law

- [2] A lawyer may potentially be subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.
- [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.
- [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only

to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.

- [5] The choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions preempt these rules.

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 1
Modify = 2
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Orange County Bar Association	M			<p>The proposed Rule deletes a “safe harbor” provision, which provides that a lawyer is not subject to discipline if the lawyer reasonably believes that a different jurisdiction’s rule governs. The OCBA questions whether the “safe harbor” should be deleted. The OCBA believes that, in some situation, a reasonable belief should and could serve as a complete defense. This would seem more consistent with the Commission’s approach, namely, that California’s rules govern unless another jurisdiction’s rules require otherwise.</p> <p>The Commission’s deletion of the safe harbor provision also affects the language proposed in Comment [3] to the proposed Rule, as well as comment [5] to the ABA Model Rule, which the Commission has deleted.</p> <p>The OCBA agrees with deleting comment [6] to the Model Rule.</p>	<p>The Commission has reconsidered the policy of deleting the safe harbor provision and readopted the deletion. In multijurisdictional practice, public protection from lawyer misconduct is more important than providing a safe harbor for a lawyer who is confused about which jurisdiction's standards apply.</p>
2	COPRAC	A			COPRAC has considered proposed Rule 8.5 and supports the Rule as drafted.	No response needed.
3	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response needed.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 1
Modify = 2
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Santa Clara County Bar Association	A			No comment.	No response needed.
5	Office of the Chief Trial Counsel	M			<p>OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with B&P Code section 6049.1. B&P Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed.</p> <p>Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is proposed rule 8.5 changing B&P Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.</p>	The Commission has reviewed the Comment but found no inconsistency with the statute and declined to make any change. No change in existing law is intended.

**Rule 8.5 Choice of Law.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 3**
Disagree = 1
Modify = 2
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	George S. Cardona, Acting U.S. Attorney – Central District of California	D			We request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.	<p>The detailed explanation provided in support of this Comment argues, in effect, that more uncertainty is better because it allows a clearer excuse for noncompliance in certain extremely rare situations where the actor initially has a choice between compliance with the rules of two different jurisdictions.</p> <p>The Commission disagrees with this proposal. The proposed exemption would not adequately protect the public consistent with the longstanding principle that the California rules apply to lawyer conduct outside of California except in the limited circumstances of this rule. The proposal to move to the “predominant effect” model, even in pre-litigation matters, will also create uncertainty for lawyers, because they will not know whether the California rules or those of another jurisdiction apply.</p>

Rule 8.5: Disciplinary Authority; Choice of Law

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: Rule 1-100(D), headed “Geographic Scope of Rules,” provides as follows:

(1) As to members: These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

In addition, in 2004 California Supreme Court adopted Rules 964 and 965, which permit “Registered Legal Services Attorneys” and “Registered In-House Counsel” to practice law in California without being members of the California Bar. Each requires that qualifying attorneys “[a]bide by all of the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education (MCLE) requirements.” Rules 966 and 967, respectively entitled “Attorneys Practicing Law Temporarily in California as

Part of Litigation” and “Non-Litigating Attorneys Temporarily in California to Provide Legal Services,” each contain the following language:

[Conditions] By practicing law in California pursuant to this rule, an attorney agrees that he or she is providing legal services in California subject to:

(1) The jurisdiction of the State Bar of California;

(2) The jurisdiction of the courts of this state to the same extent as is a member of the State Bar of California; and

(3) The laws of the State of California relating to the practice of law, the State Bar of Professional Conduct, the rules and regulations of the State Bar of California, and these rules.

Substantial excerpts from Rules 964 through 967 are reprinted below in our chapter on California Materials following Rule 1-300 of the California Rules of Professional Conduct.

District of Columbia: Rule 8.5(a) omits the second sentence of ABA Model Rule 8.5(a) (“A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any

legal services in this jurisdiction.”) Rule 8.5(b)(2) provides as follows:

(2) For any other conduct,

(i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) 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.

Florida: In Supreme Court Rule 3-4.6, Florida has adopted the language of Rule 8.5(b) except for the second sentence of paragraph (b)(2). In addition, Florida Rule 3-4.1 provides as follows:

Every member of The Florida Bar and every attorney of another state or foreign country who provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies under this rule and is charged with notice and held to know the provision of this rule and the standards of ethical and professional conduct prescribed by this court. Jurisdiction over an attorney of another state who is not a member of The Florida Bar shall be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in this state and the privilege in the future to practice law in the state of Florida.

When the Florida Supreme Court rejected a proposal to amend this rule in 1999, it said: “Out-of-state lawyers are not lawyers who are subject to the Rules Regulating the Florida Bar; rather, they are ‘non lawyers’ subject to chapter 10 unlicensed practice of law charges if they . . . engage in improper solicitation or advertising in Florida.” See Amendments to Rules Regulating the Florida Bar Advertising Rules, 762 So.2d 392, 393-395 (Fla. 1999).

Georgia: Rules 8.5(a) and (b) both use the phrase “Domestic and Foreign Lawyer” in place of the phrase “lawyer.” Georgia defines those terms as follows:

“Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized government body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.

“Foreign Lawyer” denotes a person authorized to practice law by the duly constituted and authorized government body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

In addition, Georgia Rule 9.4 generally tracks Rules 6 and 22 of the ABA Model Rules of Lawyer Disciplinary Enforcement (reprinted below in the Related Materials for ABA Model Rule 8.5), which govern jurisdiction and reciprocal discipline.

Illinois: Illinois Supreme Court Rules 716 and 717 (summarized above in the Related Materials following ABA Model Rule 5.5) permit in-house and legal services lawyers to engage in limited law practice in Illinois. Rules 716 and 717 both provide that all lawyers licensed under the rules “shall be

subject to the jurisdiction of the Court for disciplinary purposes to the same extent as all other lawyers licensed to practice law in this state.”

Maryland: Rule 8.5(a) explicitly extends disciplinary jurisdiction to any lawyer who “holds himself or herself out as practicing law in this State,” or who “has an obligation to supervise or control another lawyer practicing law in this State whose conduct constitutes a violation of these Rules.”

Massachusetts has not adopted Rule 8.5 (b). Comment 2 to Massachusetts Rule 8.5 explains that Rule 8.5(b) has been reserved because “study of ABA Model Rule 8.5(b) has revealed many instances in which its application seems problematic.”

Michigan: The second sentence of Rule 8.5 provides as follows: “A lawyer who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction.” Michigan has not adopted Rule 8.5(b).

Nevada: Rule 8.5 consists of only one sentence: “A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.” Also relevant is Nevada Rule 7.2(a), which states as follows: “These Rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and the advertisement is not intended primarily for broadcast or dissemination within the State of Nevada.”

New Jersey deletes the last sentence of Rule 8.5(b) (“A lawyer shall not be subject to discipline . . .”).

New York: DR 1-105 provides as follows:

A. A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

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

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state 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.

In addition, the last sentence of New York's EC 2-10 states: "A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state." Conversely, DR 2-103(K) provides that DR 2-103 (which governs solicitation) "shall apply to a lawyer or members of a law firm not admitted to practice in this State who solicit retention by residents of this State."

Oregon: Rule 8.6 designates certain entities authorized to issue advisory ethics opinions and provides that in any disciplinary matter, the tribunal "may consider any lawyer's good faith effort to comply with an opinion" in evaluating the lawyer's conduct or in mitigation of sanction.

South Carolina: S.C. Appellate Court Rule 418 requires any "unlicensed lawyer" (defined as "any person who is admitted to practice law in another jurisdiction but who is not admitted to practice law in South Carolina") to comply with South Carolina's lawyer advertising rules (Rules 7.1 through 7.5) if the unlicensed lawyer engages in any of six specified forms of advertising or solicitation.

Texas: Rule 8.05(b) provides as follows:

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority of this state for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to

secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

Virginia retains the version of ABA Model Rule 8.5 as it was amended in 1993.