

Rule 8.5 Disciplinary Authority; Choice of Law
(Commission's Proposed Rule Adopted on October 23, 2015 – 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, unless the rules of the tribunal* provide otherwise; and

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

Comment

Disciplinary Authority

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. 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 residents 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 § 6049.1.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 8.5
(Current Rule 1-100(D))
Disciplinary Authority; Choice of Law**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 1-100(D) (Rules of Professional Conduct, in General – Geographic Scope of the Rules) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 8.5 (Disciplinary Authority; Choice of Law). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 8.5 (Disciplinary Authority; Choice of Law). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

This proposal responds to multijurisdictional practice considerations that have expanded in recent years. Proposed rule 8.5 departs from the standard in current rule 1-100(D).¹ The Commission is recommending a new rule derived from Model Rule 8.5 in order to eliminate unnecessary differences with the national standard. The Commission believes this is particularly significant for the topics of choice of law and the extraterritorial application of the rules. Twenty-four states have adopted Model Rule 8.5 verbatim.² Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5.³ Nine states have adopted a version of

¹ Current rule 1-100(D) (Geographic Scope of Rules) provides that:

(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.

² The twenty-four states are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

³ The seventeen jurisdictions are: District of Columbia, Florida, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin.

the rule that is substantially different to Model Rule 8.5.”⁴ One state has not adopted a version of Model Rule 8.5.⁵

Paragraph (a) clarifies that a lawyer who is admitted to practice in California is subject to discipline regardless of where their conduct occurs, while a lawyer who is not admitted in California is subject to California disciplinary authority if the lawyer provides or offers legal services in California. A lawyer may be subject to discipline in California and another jurisdiction for the same conduct.

Paragraph (b) clarifies the choice of law to be applied by the disciplinary authority of California. The rules of professional conduct to be applied shall be as follows:

- (1) matters pending before a tribunal shall use rules of the jurisdiction in which the tribunal sits, unless the tribunal provides otherwise;
- (2) for any other conduct, rules of the jurisdiction in which the lawyer’s conduct occurred or where the predominant effect of the conduct occurred.

The one recommended Comment to proposed rule 8.5 is derived from Comment [1] to Model Rule 8.5, but cites to relevant California statutory law. Comment [1] reaffirms that the conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. Furthermore, a lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct.

⁴ The nine states are: California, Georgia, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Texas.

⁵ The one states is: Alabama.

Rule 8.5 Disciplinary Authority; Choice of Law
(Redline Comparison of the Proposed Rule to Current ABA Model Rule)

- (a) **Disciplinary Authority.** A lawyer admitted to practice in ~~this jurisdiction~~California is subject to the disciplinary authority of ~~this jurisdiction~~California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in ~~this jurisdiction~~California is also subject to the disciplinary authority of ~~this jurisdiction~~California if the lawyer provides or offers to provide any legal services in ~~this jurisdiction~~California. A lawyer may be subject to the disciplinary authority of both ~~this jurisdiction~~California and another jurisdiction for the same conduct.
- (b) **Choice of Law.** In any exercise of the disciplinary authority of ~~this jurisdiction~~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, unless the rules of the tribunal* provide otherwise; and
 - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

~~[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) 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.~~

Choice of Law

~~[2]The conduct of 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. in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. 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 residents 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 § 6049.1.~~

~~[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.~~

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

~~[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.~~

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

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