

June 15, 2010 Difuntorum E-mail to RRC:

More public comments keep arriving. Here's another one that you can begin addressing. It is from the DOJ. The four rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

- 1.11 = **SAPIRO** (Kehr, Melchior, Mohr)
- 3.8 = **FOY** (Peck, Tuft)
- 8.4 = **VAPNEK/PECK** (Tuft)
- 8.5 = **MELCHIOR** (Lampont, Peck)

Attached:

- RRC - 3-310 [1-11] - 06-14-10 DOJ [Cardona] Comment.pdf
- RRC - 5-110 [3-8] - 06-14-10 DOJ [Cardona] Comment.pdf
- RRC - 1-120X [8-4] - 06-14-10 DOJ [Cardona] Comment.pdf
- RRC - 1-100 [8-5] - 06-14-10 DOJ [Cardona] Comment.pdf

June 15, 2010 Difuntorum E-mail to RRC:

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from the State Bar Law Practice Management and Technology Section. The 9 rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

- 1.1 = VAPNEK (Peck, Ruvolo)
- 1.5 = VAPNEK (Ruvolo)
- 1.16 = KEHR (Foy, Melchior)
- 5.1 = TUFT (Martinez, Peck)
- 4.4 = MARTINEZ/TUFT
- 7.3 = MOHR (Julien, Ruvolo)
- 8.3 = KEHR (Peck, Tuft, Vapnek)
- 8.4.1 = PECK (Martinez)
- 8.5 = MELCHIOR (Lampont, Peck)

Attached:

- RRC - 1-400 [7-3] - 06-15-10 LPMT [Hoffman] Comment.pdf
- RRC - [4-4] - 06-15-10 LPMT [Hoffman] Comment.pdf
- RRC - 1-310X [5-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
- RRC - 3-700 [1-16] - 06-15-10 LPMT [Hoffman] Comment.pdf
- RRC - 3-110 [1-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
- RRC - 4-200 [1-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
- RRC - 1-100 [8-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
- RRC - 2-400 [8-4-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
- RRC - 1-120 [8-3] - 06-15-10 LPMT [Hoffman] Comment.pdf

**RRC – Model Rule 8.5 [1-100]
E-mails, memos, etc. – Revised (6/21/2010)**

June 16, 2010 McCurdy E-mail to Melchior, cc Chair, Vice-Chairs & Staff re 1.8.9:

Kurt,

Comments in opposition or recommending modifications have been received for the following rules. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule> .

1.8.9 (Agenda Item III.T) – 1 Comment: OCTC (sent with Randy's 6/15/10 e-mail)

8.5 (Agenda Item III.YYY) – 2 Comments: DOJ; and Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

June 16, 2010 Melchior E-mail to Lamport & Peck, cc Difuntorum & McCurdy:

Lauren has advised me that there is a 5 pm deadline today for us as the drafting team to advise whether we recommend changes in this rule, which involves the disciplinary authority of California over CA lawyers practicing elsewhere and non-CA lawyers practicing here. Copy of Lauren's message is attached: "the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended." There are two comments to which she asks for the drafters' response.

You have the DOJ letter: it discusses for 2 single spaced pages the DoJ's special concern regarding incipient investigations whose final venue is not yet decided, which George Cardona clearly and eloquently stated to us at length during our earlier meetings. Our comment 4 addresses that concern (and is therefore also a target of the DoJ letter).

The letter clearly lays out the issues, which are well known to the Commission. I believe that the Commission fully considered Mr. Cardona's thoughtful concerns but ultimately rejected them precisely because we determined that the "predominant effects" test, which the letter again advocates, was too unspecific.

The State Bar's Law Practice Management and Technology Section (LPMT) also addresses rule 8.5(b)(2). Its concern is that a CA lawyer practicing elsewhere may be permitted to do what the

**RRC – Model Rule 8.5 [1-100]
E-mails, memos, etc. – Revised (6/21/2010)**

California rule forbid, such as, e.g., not immediately return unread a confidential communication addressed to her in error. It wishes us to amend the section and the corresponding comment to add the words "or permitted" as shown below:

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 *or permitted* specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

In my view, if the conduct is forbidden to California lawyers, there is no reason to allow it to happen unless they are required by another jurisdiction to do what California forbids. I see no policy or other reason to make this change.

And the Section also suggests deleting the last sentence of Comment 4 as redundant. That sentence explains the extent of the accommodation we provided for the Justice Dep't's uncertainties as expressed again in their current letter, which LPMT probably had no reason to know of. I do not recommend deletion.

I would therefore advise Lauren ***by 5 pm today*** that the drafting team does not propose any change or revision to this rule on account of the DoJ letter or the LPMT letter. **If you disagree, you must let me know within the next 90 minutes. Thank you.**

(By the way, though Lauren set this deadline, Randy sent this material last evening as something we "can begin addressing." However much I disagree with the Commission's work product, it is turning into a full time job..)

June 16, 2010 Lamport E-mail to Melchior, cc Peck, Difuntorum & McCurdy:

Concur.

June 17, 2010 Difuntorum E-mail to Drafters (Melchior, Lamport & Peck), cc Staff:

Kurt, Stan & Ellen:

Thanks for your great effort in reviewing the DOJ and LPMT comments on Rule 8.5. There is also an OCTC comment which is pasted below. (The complete Rule 8.5 comment compilation also is attached. This compilation includes the letters in support of the rule received from COPRAC and the San Diego County Bar.)

Please let us know if you recommend any revisions to Rule 8.5 in response to the OCTC comment.

Rule 8.5. Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but still has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions 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. 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 rule 8.5 changing Business & Professions 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.
2. OCTC finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We would recommend striking all the comments except for the last two sentences of Comment 1.

Attached:

RRC - 1-100 [8-5] - Public Comment Complete - REV (06-17-10).pdf

June 21, 2010 McCurdy E-mail to Melchior, cc Chair, Vice-Chairs & Staff:

Kurt,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 4-300 [1-8-9][1-8-12] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-100 [8-5] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

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

TOTAL = 5 Agree = 2
 Disagree =
 Modify = 3
 NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 8.5 and the Comments to the Rule.	No response required.
2	San Diego County Bar Association Legal Ethics Committee	A	Yes		We approve the new rule in its entirety.	No response needed.
3	State Bar Law Practice Management & Technology Section (LPMT)	M	Yes	(b)	<p>LPMT should like to highlight a potential difficulty present in Proposed Rule 8.5, much like CRPC 1-100(D) before it --yet a difficulty much less obvious than its analogue that existed in years past. That difficulty arises from the extraterritorial reach of the California Code of Professional Conduct. With the rise of multijurisdictional practice, such reach may easily put lawyers of good faith in a bind.</p> <p>Re: Diverse types of proscribed conduct: It may be that the difficulty increases the more the Rules of Professional Conduct diverge from what may be called acts that are <i>malum in se</i> to those that are merely <i>malum prohibitum</i>. Of course, some of the latter are critical to protect clients from the former. For example, one method of accounting for client funds may not be inherently more ethical than certain others. Nonetheless, there is an</p>	The Commission has considered this Comment and has concluded that the rule should not be changed as the LPMT section proposes. It believes that if the conduct is forbidden to California lawyers, there is no reason to permit that conduct unless the attorney is required by another jurisdiction to do what California forbids.

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 = 5 Agree = 2
 Disagree =
 Modify = 3
 NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>inherent need for a uniform method to protect clients from acts that are clearly <i>malum prohibitum</i>. Lawyers must keep their books in a specified way to shield clients from acts of fraud and theft.</p> <p>Re: Tricky conflicts between sister states' respective rules: The difficulty arises most prominently where one jurisdiction's rule is permissive but CA's is mandatory. (See full text of comment for examples).</p> <p>It is critical to emphasize that we do not speak of acts of moral turpitude or other egregious or dishonest conduct. Rather, our concern is with conduct perfectly acceptable and morally correct in one or more of our sister states.</p> <p>Re: Express Prohibition vs. Silence: An even harder case is that in which the foreign jurisdiction is silent. Should CA impose its rule on that jurisdiction, a rule to which other lawyers in that jurisdiction working on the same matter are not beholden? (See full text of comment for examples).</p> <p>We agree with the Commission's premise as stated in Comment [3] but disagree with the RRC in regard to those situations in which a</p>	

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

TOTAL = 5 Agree = 2
 Disagree =
 Modify = 3
 NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>lawyer may be <i>permitted</i> different conduct by another jurisdiction in which the lawyer is lawfully practicing. To be unable to practice as other lawyers do in that other jurisdiction would cripple the lawyer's fulfillment of his or her obligations to the client.</p> <p>Perhaps, even at this late date, may we respectfully suggest the Commission consider an additional round of review of its excellent product? In so doing, the Commission could determine if it has included any proscriptions based more on California case law interpretations of what is mostly procedural law and less on the basic tenets and intent of a set of universal rules to govern a lawyer's professional conduct?</p> <p>For the foregoing reasons, we recommend that Proposed Rule 8.5(b)(2) be amended as follows:</p> <p>(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:</p> <p>(1) for conduct in connection with a matter</p>	

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

TOTAL = 5 Agree = 2
 Disagree =
 Modify = 3
 NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and</p> <p>(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 or permitted specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.</p> <p>Additionally, we recommend that Comment [4] be similarly amended, as shown below. Moreover, the last sentence of Comment [4] (italicized below) appears redundant and should thus be deleted. If the sentence expresses a nuance that has escaped our reading, we respectfully suggest that the nuance be made more explicit. Finally, if the last sentence of Comment [4] is retained, we recommend the additional insertion of "or permits" as shown.</p> <p>Comment [4]:</p>	

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

TOTAL = 5 Agree = 2
Disagree =
Modify = 3
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<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 these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required or permitted specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules. <i>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 or permits different conduct.</i></p>	
4	Office of Chief Trial Counsel	M	Yes		OCTC agrees with the policy behind this rule, but still 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	The Commission believes that OCTC has misunderstood the relation (or nonrelation) between this rule and B&P Code 6049.1. The Rule makes conduct outside California subject to discipline if the

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

TOTAL = 5 Agree = 2
 Disagree =
 Modify = 3
 NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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. 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 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> <p>OCTC finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions.</p> <p>We would recommend striking all the Comments except for the last two sentences of Comment [1].</p>	<p>conduct violates the California rules and unless otherwise authorized. The statute authorizes California discipline based on an <i>adjudication</i> of professional misconduct in another jurisdiction. The Commission views the statute and the proposed rule as complimentary and sees no reason to make a change.</p>

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

TOTAL = 5 Agree = 2
 Disagree =
 Modify = 3
 NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	US Attorney's Office of Central, Northern, Southern, and Eastern District of California	M	Yes	8.5(b)(2) & Comment [4]	We oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Board of Governors either adopt ABA Model Rule 8.5(b)(2) and its accompanying Comment or modify Proposed Rule 8.5(b)(2) 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.	The Commission has carefully considered the United States Attorneys' position and has heard directly from them on this issue at length. It sees no reason to change its recommendation on account of this submission, which is substantially the same as what the authors presented to the Commission and that the Commission long debated.

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.