McCurdy, Lauren

From: Ellen R. Peck [pecklaw@prodigy.net]
Sent: Wednesday, February 10, 2010 11:33 AM
To: Melchior, Kurt W
Cc: Difuntorum, Randall; slamport@coxcastle.com; Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net; kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu; pwvapnek@townsend.com; mtuft@cwclaw.com
Subject: Re: Rules Revision Commission Assignment: III.A. Rule 8.5 [1-100(D)]- Due Today at Noon

Randy:

Please send out all of the materials that you prepared along with the materials which Kurt prepared with the agenda. We can make any changes, if any are needed, after the agenda is sent out.

Thanks for your hard work, Ellen

Melchior, Kurt W wrote:
> I was just shutting the computer off since I am due in Stockton at 1
> pm. I sent material to Lauren earlier this morning but can't look at
> this now. Sorry.
>
> ----------
> --
> *From:* Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]
> *Sent:* Wednesday, February 10, 2010 11:04 AM
> *To:* Melchior, Kurt W; slamport@coxcastle.com; pecklaw@prodigy.net
> *Cc:* Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net;
> kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu;
> pwvapnek@townsend.com; mtuft@cwclaw.com
> *Subject:* Rules Revision Commission Assignment: III.A. Rule 8.5
> [1-100(D)]- Due Today at Noon
>
> Kurt & Rule 8.5 Drafters:
>
> Today at 12 noon is the assignment deadline for the Commission's
> February meeting. Attached are my redrafts of the materials for Rule
> 8.5. (There was no change to the Dashboard.) All I have done is taken
> the information from the e-mail compilation and updated the relevant
> documents. (E-mail compilation also is attached.) Please note that the
> only change to Rule 8.5 itself is the minor modification to Comment
> [1] recommended by Paul and supported by Bob. All the edits in all of
> the documents are marked with yellow highlights. Please let me know if
> you would like these materials used for the agenda or if you have
> already prepared a submission. Thanks. –Randy D.
>
> **********
>
> Randall Difuntorum
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> Director, Professional Competence
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>
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Proposed Rule 8.5 [RPC 1-100(D)]
"Disciplinary Authority; Choice of Law"

(**Draft #3, 8/31/09**)

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
☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☑ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ 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 _____
Opposed Rule as Recommended for Adoption _____
Abstain _____

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

February 2010
(Draft rule following consideration of 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 rules, except where the comments have been inconsistent with the proposed black letter rules or California law.

* Proposed Rule 8.5, Draft 3 (8-31-09).

ABA Model Rule **Rule 8.5 Disciplinary Authority; Choice Of Law**	**Commission's Proposed Rule*** **Rule 8.5 Disciplinary Authority; Choice Of Law**	**Explanation of Changes to the ABA Model Rule**
(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.	(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.	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."
(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:	(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:	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.".
(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	(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits applies, unless the rules of the tribunal provide otherwise; and	A minor addition has been made to Paragraph (b)(1) to improve clarity. There is no substantive change.

* Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule **Rule 8.5 Disciplinary Authority; Choice Of Law**	**Commission's Proposed Rule*** **Rule 8.5 Disciplinary Authority; Choice Of Law**	**Explanation of Changes to the ABA Model Rule**
(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.	(2) these rules apply to ~~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~~ 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 by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.	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. 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. 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.

ABA Model Rule Rule 8.5 Disciplinary Authority; Choice Of Law Comment	Commission's Proposed Rule Rule 8.5 Disciplinary Authority; Choice Of Law Comment	Explanation of Changes to the ABA Model Rule
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.	**Disciplinary Authority** [1] It is longstanding law that the conduct of a lawyer admitted to practice in ~~this jurisdiction~~California is subject to the disciplinary authority of ~~this jurisdiction~~California. Extension of the disciplinary authority of ~~this jurisdiction~~California to other lawyers who provide or offer to provide legal services in ~~this jurisdiction~~California is for the protection of the citizens of ~~this jurisdiction~~California. ~~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.~~ A lawyer disciplined by a disciplinary authority in another jurisdiction, may be subject to discipline in California for the same conduct. (See e.g., Bus. & Prof. C.,§6049.1.)	Comment [1] is based on Model Rule 8.5, cmt. [1] but makes three changes to conform the comment to California law. First, its substitutes "California" for "this jurisdiction." See explanation to proposed (a) above and cites to the court rules for multijurisdictional practice, which also contain the inherent authority of the California Supreme Court over the practice of law in California. Second, it deletes the language regarding reciprocal discipline since California has not adopted these provisions. Third, it adds references to California's statutory provisions for discipline of lawyers who are disciplined in another jurisdiction.

ABA Model Rule **Rule 8.5 Disciplinary Authority; Choice Of Law Comment**	**Commission's Proposed Rule** **Rule 8.5 Disciplinary Authority; Choice Of Law Comment**	**Explanation of Changes to the ABA Model Rule**
Choice of Law [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.	**Choice of Law** [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.	Comment [2] is identical to Model Rule 8.5 comment [2].
[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.	[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~~, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty~~.	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.

ABA Model Rule Rule 8.5 Disciplinary Authority; Choice Of Law Comment	Commission's Proposed Rule Rule 8.5 Disciplinary Authority; Choice Of Law Comment	Explanation of Changes to the ABA Model Rule
[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.	[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 by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.[1] ~~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, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct. ~~the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.~~	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). 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 requires a different standard of conduct. In sentence three, the same conformance to proposed rule 8.5(b)(2) has been made. The deleted language does not provide a bright line for lawyers engaged in multijurisdictional practice; whereas the proposed rule provides greater clarity.

[1] Drafter's note: This part of the comment has been changed to conform to the black letter rule (8.5(b)(2). See fn. 5 above.

ABA Model Rule **Rule 8.5 Disciplinary Authority; Choice Of Law Comment**	**Commission's Proposed Rule** **Rule 8.5 Disciplinary Authority; Choice Of Law Comment**	**Explanation of Changes to the ABA Model Rule**
[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.	~~[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.~~	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.
[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.	~~[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.~~	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].
[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.	~~[7]~~ [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 ~~provide otherwise~~ preempt these rules.	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."

Rule 8.5 Disciplinary Authority; Choice Of Law

(Commission's Proposed Rule – Post Public Comment Draft for 2/26&27/10 February Meeting)

(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 by a 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.,§6049.1.)[1]

Choice of Law

[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.

[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.

[1] This clarifying change is recommended by Paul and supported by Bob.

[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 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 =__ Agree = __ Disagree = __ Modify = __ NI = __
No.	**Commentator**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**	
1	Orange County Bar Association	M			The proposed Rule deletes a "safe harbor" provision, which provides that a lawyer is not subject to discipline if that 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. 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. The OCBA agrees with deleting comment [6] to the Model Rule.	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.	
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 =__ Agree = __ Disagree = __ Modify = __ NI = __
No.	**Commentator**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
4	Santa Clara County Bar Association	A			No comment.	
5	Office of the Chief Trial Counsel	M			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. B7P 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 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.	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.
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	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

Rule 8.5 Choice of Law. [Sorted by Commenter]						TOTAL =__ Agree = __ Disagree = __ Modify = __ NI = __
No.	**Commentator**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
					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.	where the actor initially has a choice between compliance with the rules of two different jurisdictions.. The Commission does not consider that to be an adequate ground for changing the proposed rule. The point developed in support of this proposed modification appears to the Commission to be too obscure to warrant any modification, or even the addition of a special Comment.

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December 14, 2009 McCurdy E-mail to Drafters (Melchior, Lamport & Peck), cc Chair, Vice-Chairs & Staff:

Rule 8.5 Drafting Team (MELCHIOR, Lamport, Peck):

This message provides the assignment background materials for Rule 8.5 on the January agenda. **The assignment deadline is Monday, January 11, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (staff prepared template)
4. introduction (text of public comment version of the introduction – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (version of chart as issued for public comment)
6. clean rule text (public comment version – <u>use this clean version to make any changes to the rule</u>, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The "RRC Response" column on the public commenter chart should be filled in with the drafting team's recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. <u>Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.</u>

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attached:
RRC - 1-100 [8-5] - Dashboard - ADOPT - DFT1.1 (09-01-09).doc
RRC - 1-100 [8-5] - Compare - Introduction - DFT3.1 (08-31-09).doc
RRC - 1-100 [8-5] - Compare - Rule & Comment Explanation - DFT 3.1 (08-31-09)2.doc
RRC - 1-100 [8-5] - Rule - DFT1 (09-02-09)2 - CLEAN LAND.doc
RRC - 1-100 [8-5] - Public Comments Complete (12-14-09).pdf
RRC - 1-100 [8-5] - Public Comment Chart - By Commenter - DFT1 (12-14-09)AT.doc
RRC - 1-100 [8-5] - State Variations (2009).pdf

December 31, 2009 Melchior E-mail to Drafters, cc Sondheim, McCurdy:

Friends: could you give me your responses to this assignment by not later than Wednesday of next week so as to meet the 1/11 deadline? It does not look like a major task from here, at least at first glance. Thanks much, and Happy New Year.

January 2, 2010 Melchior E-mail to Drafters, cc Sondheim, McCurdy:

I have looked at the two comments which object to parts of proposed Rule 8.5 and propose that we resolve them as follows:

1. OCTC claims that the draft conflicts with B&P Code 6049.1. I do not see the conflict: The relevant part of the code section provides that where discipline has been imposed on a California licensed attorney in another jurisdiction, "a certified copy of a final order [from that jurisdiction] . . . shall be conclusive evidence that [a member of the State Bar] is culpable of professional misconduct in this state," subject to stated exceptions.

Thus, 6049.1 provides a directive to discipline a CA lawyer who is found to have been found guilty in disciplinary proceedings elsewhere. In itself, that is in no way inconsistent with 8.5's proposed definition of when a lawyer subject to this rule violates CA law, Rather, it simply adds another basis for a potential CA law violation. But OCTC indirectly suggests two points worthy of consideration: should/can we define a violation of our law, as 8.5 does, where another jurisdiction may also have the right to impose its own law? And do we create an unnecessary conflict of laws if we regulate conduct of CA lawyers outside the state?

My response is that we should stand our ground. The assertion of power over conduct of our licensees, performed outside the state, is not new. Rule 100(D)(1) so provides now, and ABA Rule 8.5 does likewise. And the conflict of laws inherent in two jurisdictions' assertion of power to adjudicate the propriety of particular conduct is inherent in that situation. So the objection does not seem to address the language of our proposal but rather the concept which underlies it. Since this concept is neither new nor modified by the proposed rule, I suggest that we make no change.

How to respond in the response column without all that baggage? I propose: "The Commission has reviewed the Comment but found no inconsistency with the statute and declined to make any change." Leave out the fact that there is nothing new in our language??

2. The U.S. Attorneys' point is more subtle. They claim that in pre-filing investigations which may take place outside California or involve several states, it may not be clear whether the conduct will ultimately result in a California filing or a filing elsewhere (or perhaps no filing at all); and that therefore our rule will create conflicts between this jurisdiction and others as places to which our proposed definition of conduct not to be governed by CA rules, i.e., "specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules" may apply.

I can see that such conflicts may possibly happen; but this should be extremely rare: conduct by a California-licensed federal prosecutor in an investigation outside California which could at the time result in court filings either in this or another state, and where the investigative conduct would violate our rules but be permitted under the rules of the other jurisdiction. That should be as rare as hen's teeth, and hardly warrants the long discussion we have been provided. Thus, if the case "has no nexus to California" (letter, p. 10), the lawyer should not have to worry under our proposed language about California rules possibly applying to his/her conduct therein.

I think that our language is clearer and more easily interpreted, both by the lawyers seeking to comply and by bar prosecutors, than the ABA language, which simply invites uncertainty:"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". If I read the U.S. Attorneys' letter correctly (and though I sympathize with their concern), they argue that more uncertainty is better because it allows a clearer excuse for noncompliance in the identified but extremely rare situation.

That, to me, is not an adequate ground for changing the proposed rule. If the drafting team feels that the described situation warrants a special Comment, we could write such a Comment in response. My own view, subject to that of others, is that the point is too obscure to warrant any modification or even the addition of a Comment.

Responses, please!

January 2, 2010 Melchior E-mail to Drafters, cc Sondheim, McCurdy:

In either event, I think that we need to change the dashboard to "moderately controversial" and to identify the two letter writers as the source of controversy.

January 6, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Rule 8.5 Drafting Team (MELCHIOR, Lamport, Peck):

This message provides an updated commenter chart adding the previously omitted comment of the US Attorney's Office (George Cardona, et al.). The comment was included in the full text comment compilation provided in the earlier assignment materials, but didn't make it into the chart. If you have already completed work on the commenter chart, please copy the column for the George Cardona comment (final entry on the attached chart) into your chart and add your recommended response.

Attached:
RRC - 1-100 [8-5] - Public Comment Chart - By Commenter - DFT2 (01-06-10)AT.doc

January 8, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Please note that, in addition to those comments mentioned in my message below, the OCTC's comment was also omitted from the earlier chart. Please write an explanation for that comment as well. I've reattached the revised chart circulated below for ease of reference.

Attached:
RRC - 1-100 [8-5] - Public Comment Chart - By Commenter - DFT2 (01-06-10)AT.doc

January 8, 2010 Peck E-mail to Melchior, cc Chair, Lamport, McCurdy:

Kurt: Sorry for the delay in getting back to you. I agree with your excellent responses to the objectors and agree that you should go forward with these responses. With respect to response to OCTC, I do

think that you should state that no change in existing was intended by this change in addition to your proposed staterment.

How do you propose that we respond to the Orange County Bar Association's objection to our deletion of the ABA safe harbor? I think the deletion of the safe harbor supports enforcement of B&P Code section

6049.1. Among other reasons we deleted the safe harbor provision was to ensure that section 6049.1 would still be viable. Inclusion of the safe harbor presents the possibility of establishing uncertainty until the conflict with section 6049.1 is resolved, which might take years.

Moreover, misconduct is misconduct. I do not think there should be a pass for a lawyer to commit misconduct just because the lawyer may have been confused about which rules applied.

Would something like this be appropriate?

> "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."

Feel free to disagree, amend, delete or use the foregoing.

Let me know if I may be of further assistance, Ellen

January 11, 2010 E-mail from Melchior to Chair, Peck & McCurdy:

Since today is the due date and I am preoccupied with client matters, I am sending you two messages: this one which contains my comments in response to your request, and another from Ellen with some further suggestions. I never had any response from Stan.

I will try to coordinate my and Ellen's comments and send them to you in more formal fashion; but just in case you need to get this out before I can do so, I thought that it would be better to send you this than not to respond in time. My apologies.

January 17, 2010 Vapnek E-mail to RRC:

My comments on this Rule follow:

1. I agree with Kurt that OCTC is misreading the rule with respect to purported conflict with B & P Code Section 6049.1 I do not see any conflict, and I believe there is none. Our current rules also permit discipline of a California lawyer for acts that also may subject that lawyer to discipline in another jurisdiction. So pointing out that this may occur is not making any change in the rules. More typically, in my experience, if another jurisdiction commences proceedings against a California lawyer for acts in that other jurisdiction, OCTC will await the decision in the other jurisdiction and then use a certified copy of the decision as conclusive proof of culpability for violation of the California rule. Makes their job infinitely easier.

2. With respect to George Cardona's critique of proposed Rule 8.5(b)(2), I believe he is misapplying the Rule as his example is covered by the current rule, and there has been no problem with prosecution of DOJ people under our current rules. His example is on p. 10 of his letter, p. 683 of the agenda package. He postulates that a a DOJ lawyer who is licensed in California but based in Washington, D.C. and engaged in pre-indictment activity in Pennsylvania would be subject to the California rules under our proposed rule 8.5. But the same activity now would have the same effect under Rule 1-100 (D)(1). No change in the proposed rule or Comments 2 and 3 is required.

3. I agree with deletion of the safe harbor provision. I find it hard to conceive of a situation that might confront a prosecutor that would lead to confusion as to which set of rules applies to a particular scenario. Current discipline of prosecutors is occurring long after the acts in question, typically as result of the granting of a habeas corpus petition or a reversal of a conviction for prosecutorial misconduct. The acts of the prosecutors in the recent cases have been clearly violative of the rules in any jurisdiction, including California.

4. One minor language change would be appropriate in Comment 1. I would change the word order in that last sentence of Comment 1 to read as follows: "A lawyer disciplined by a disciplinary authority in another jurisdiction, may be subject to discipline in California for the same conduct." The sentence as I propose it has less ambiguity, the original can be read as requiring the same conduct to be performed in California in order to be subject to California discipline.

January 18, 2010 Sondheim E-mail to RRC:

Since there is no Commenters Chart for this item, I suggest we postpone its consideration until our February meeting. Those of you who want to provide the drafting team with input, can do so by e-mail as Paul has done.

January 18, 2010 Kehr E-mail to RRC:

Here are my comments on these materials:

1. In rereading paragraph (b)(2) as a result of George Cardona's letter (agenda p. 682-84), it occurs to me that there is a potential gap in our proposed language. That language, and current rule 1-100(D)(1), focus on the situation in which a lawyer practicing elsewhere is required by the local rules to act in a way that would violate the California rules. However, it also is possible that a lawyer practicing elsewhere would be permitted (but not required) to do something that the lawyer would not be permitted to do in California. As an obvious example, there are a number of situations in which a lawyer practicing outside California properly may act without obtaining a client's informed written consent, as would be required in California. If one's reaction is that no one reasonably could think that a California lawyer would be required to meet this California standard while practicing elsewhere, then isn't that tantamount to saying that the MR "predominate effect" standard is read into the California rule? And if that is true, why not say so in the rule? I ask that the Commission reconsider the MR language in light of George's letter. George suggests (in the second paragraph on agenda p. 683) as an alternative a special rule for cases investigated in anticipation of litigation in which the likely site of the tribunal

would be outside California. I don't support a special rule, nor am I certain that his suggestion draws the line appropriately. The general problem he raises applies outside of the DOJ context to which he refers, for example, with a corporate house counsel who is a member of the California Bar but is resident in another jurisdiction. Returning to George's alternative suggestion, it might be possible to expand paragraph (b)(1) so that it applies pre-filing as well as post-filing. To take George's example, there would be a higher degree of certainty if it were clear that (b)(1) applies to a member of the California Bar, who resides in Washington, and is representing a client with regard a planned filing in Pennsylvania. This also would eliminate the oddity that, as George pointed out, a lawyer might be subject to one set of rules for pre-filing work and another when the court proceeding has commenced.

2. I support Paul's suggested revision to the last sentence of Comment [1].