

**McCurdy, Lauren**

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**From:** Ellen R. Peck [pecklaw@prodigy.net]  
**Sent:** Wednesday, August 12, 2009 12:52 PM  
**To:** McCurdy, Lauren; Kurt Melchior (E-mail); Stan Lamport (E-mail); Difuntorum, Randall; 'Kevin Mohr'; 'Harry Sondheim'; Mark L. Tuft (E-mail); Paul W. Vapnek (E-mail)  
**Subject:** Agenda material for 8.5 [100(D)]  
**Attachments:** RRC -1-100(D)[8-5] - Rule - DFT2 CLEAN.doc; RRC -1-100(D)[8-5] - Rule - DFT2 (08-07-09) - Cf. to DFT2.doc; RRC - 8-5 - Compare - Introduction-2.rtf; RRC - 8-5 - Compare - RuleComment-2.doc

With apologies to Kurt and Stan, who have not had an opportunity to review the changes to the comments and the attached charts, here are (1) a draft redline memo re changes to the rule, (2) a chart showing the changes from the ABA MR, (3) an introduction (which still needs work and may change after the Commission decides what to do) and (4) a clean draft of the memo regarding the rule. The staff may put the papers in any form it deems appropriate.

All the best from Lake Tahoe, Ellen

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## McCurdy, Lauren

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**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Wednesday, August 12, 2009 9:32 PM  
**To:** McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi  
**Cc:** Kevin Mohr G  
**Subject:** RRC - 1-100 [8.5] - Meeting Materials  
**Attachments:** RRC - 1-100 [8-5] - Compare - Rule & Comment Explanation - DFT2 (08-12-09).doc

Greetings:

I retrieved the materials Ellen sent earlier. I've attached a reformatted Introduction and Rule/Comment Comparison Chart.

Same problem as before with the Introduction. I can't get the the text boxes from pages 2 on to cooperate. They run off the page and float. I'll send you the Introduction template I've been using.

In addition, I've added a footer to both of the attached, w/ file name and page numbers. If possible, please insert at least the auto-updated filename in the footers of the templates you send out to the drafters. It's very difficult to figure out what draft of the charts we reviewed and when if there is no footer, something I've discovered in the last couple of days as I try to find the latest versions of the charts for Mimi.

As usual, please let me know if you have any questions. Thanks,

Kevin

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1 **Rule 8.5 Disciplinary Authority; Choice Of Law**

2  
3 (a) **Disciplinary Authority.**<sup>1</sup> A lawyer admitted to practice in ~~this jurisdiction~~  
4 California<sup>2</sup> is subject to the disciplinary authority of ~~this jurisdiction~~ California,  
5 regardless of where the lawyer's conduct occurs. A lawyer not admitted in  
6 ~~this jurisdiction~~ California is also subject to the disciplinary authority of ~~this~~  
7 ~~jurisdiction~~ California if the lawyer provides or offers to provide any legal  
8 services in ~~this jurisdiction~~ California. A lawyer may be subject to the  
9 disciplinary authority of both ~~this jurisdiction~~ California and another  
10 jurisdiction for the same conduct.

11  
12 (b) **Choice of Law.** In any exercise of the disciplinary authority of ~~this~~  
13 ~~jurisdiction~~ California, the rules of professional conduct to be applied shall  
14 be as follows:<sup>3</sup>

15  
16 (1) for conduct in connection with a matter pending before a tribunal,<sup>4</sup> the  
17 rules of the jurisdiction in which the tribunal sits, unless the rules of the  
18 tribunal provide otherwise; and

19  
20 (2) these rules apply to any other conduct in and outside this state<sup>5</sup>, except  
21 where a lawyer admitted to practice in California, is lawfully practicing

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<sup>1</sup> **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 10-3-0 to recommend adoption of MR 8.5(a), subject to substitution of "California" for "jurisdiction." See 7/24/09 KEM Meeting Notes, III.H., at ¶. 2A. See also fn. 2.

<sup>2</sup> **RRC Action:** At the 7/24-25/09 meeting, the substitution of "California" instead of "this jurisdiction" was deemed approved for the entire rule. See 7/24/09 KEM Meeting Notes, III.H., at ¶. 2A (2).

<sup>3</sup> **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 10-3-0 to recommend adoption of MR 8.5(b)(1), subject to substitution of "California" for "jurisdiction." See 7/24/09 KEM Meeting Notes, III.H., at ¶. 4A. See also fn. 2, *supra*.

<sup>4</sup> **Drafters Comment:**

<sup>5</sup> **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 12-0-0 to have no safe harbor provision such as in MR 8.5(b)(2) in proposed 8.5(b)(2). See 7/24/09 KEM Meeting Notes, III.H., at ¶ 6. The drafter's proposed rule was deemed approved. See 7/24/09 KEM Meeting Notes, III.H., at ¶ 6. See 7/24/09 KEM Meeting Notes, III.H., at ¶ 7. The effect of this approval was to change the following MR 8.5(b)(2) language: "to" was substituted for "for" and the proposal deleted "~~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~~"

22 ~~outside this state~~ in another jurisdiction,<sup>6</sup> may be specifically required by  
23 a jurisdiction in which he or she is practicing to follow ~~r~~Rules of  
24 ~~P~~professional ~~C~~conduct different from these rules.

25  
26 **Comment**

27  
28 **Disciplinary Authority**

29  
30 [1] It is longstanding law that the conduct of a lawyer admitted to practice in  
31 ~~this jurisdiction~~California is subject to the disciplinary authority of ~~this~~  
32 ~~jurisdiction~~California. Extension of the disciplinary authority of ~~this~~  
33 ~~jurisdiction~~California to other lawyers who provide or offer to provide legal  
34 services in ~~this jurisdiction~~California is for the protection of the citizens and  
35 residents of ~~this jurisdiction~~California. (See e.g., CRC 9.40-9.48.)<sup>7</sup> ~~Reciprocal~~  
36 ~~enforcement of a jurisdiction's disciplinary findings and sanctions will further~~  
37 ~~advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for~~  
38 ~~Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary~~  
39 ~~authority of this jurisdiction under Rule 8.5(a) appoints an official to be~~  
40 ~~designated by this Court to receive service of process in this jurisdiction. The fact~~  
41 ~~that the lawyer is subject to the disciplinary authority of this jurisdiction may be a~~  
42 ~~factor in determining whether personal jurisdiction may be asserted over the~~  
43 ~~lawyer for civil matters.~~<sup>8</sup> A lawyer disciplined by a disciplinary authority in another  
44 jurisdiction, may be subject to discipline for the same conduct in California. (See  
45 e.g., Bus. & Prof. C., §6049.1.)

46  
47 **Choice of Law**

48  
49 [2] A lawyer may be potentially subject to more than one set of rules of  
50 professional conduct which impose different obligations. The lawyer may be  
51 licensed to practice in more than one jurisdiction with differing rules, or may be  
52 admitted to practice before a particular court with rules that differ from those of  
53 the jurisdiction or jurisdictions in which the lawyer is licensed to practice.  
54 Additionally, the lawyer's conduct may involve significant contacts with more than  
55 one jurisdiction.

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<sup>6</sup> **Drafter's Note:** Because it is possible to be in California and practicing in another jurisdiction (e.g., practicing before the Patent and Trademark Office), "in another jurisdiction" was substituted for "outside this state."

<sup>7</sup> Drafter's note: The Supreme Court's rules (which contain authority) for regulation of non-members of the California State Bar are cited here.

<sup>8</sup> Drafter's note: The language about reciprocal discipline has been deleted because California has not adopted the ABA provisions. The reference to California's statute regarding discipline of an attorney who has been disciplined by another jurisdiction has been added instead.

RRC – Rule 8.5 [1-100(D)]  
Rule Draft 2 (8/12/09) – COMPARED TO DFT1 (7/25/09)  
August 28-29, 2009 Meeting; Agenda Item III.E.

56  
57 [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that  
58 minimizing conflicts between rules, as well as uncertainty about which rules are  
59 applicable, is in the best interest of both clients and the profession (as well as the  
60 bodies having authority to regulate the profession). Accordingly, it takes the  
61 approach of (i) providing that any particular conduct of a lawyer shall be subject  
62 to only one set of rules of professional conduct, and (ii) making the determination  
63 of which set of rules applies to particular conduct as straightforward as possible,  
64 consistent with recognition of appropriate regulatory interests of relevant  
65 jurisdictions, ~~and (iii) providing protection from discipline for lawyers who act~~  
66 ~~reasonably in the face of uncertainty.~~<sup>9</sup>  
67

68 [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a  
69 proceeding pending before a tribunal, the lawyer shall be subject only to the rules  
70 of the jurisdiction in which the tribunal sits unless the rules of the tribunal,  
71 including its choice of law rule, provide otherwise. As to all other conduct,  
72 including conduct in anticipation of a proceeding not yet pending before a  
73 tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the se rules,  
74 unless a lawyer admitted in California is lawfully practicing in another jurisdiction,  
75 and may be specifically required by a jurisdiction in which he or she is practicing  
76 to follow rules of professional conduct different from these rules.<sup>10</sup> ~~of the~~  
77 ~~jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of~~  
78 ~~the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied~~  
79 ~~to the conduct.~~ In the case of conduct in anticipation of a proceeding that is likely  
80 to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in  
81 which the lawyer is lawfully practicing and that jurisdiction requires different  
82 conduct. ~~the predominant effect of such conduct could be where the conduct~~  
83 ~~occurred, where the tribunal sits or in another jurisdiction.~~  
84

85 ~~[5] When a lawyer's conduct involves significant contacts with more than one~~  
86 ~~jurisdiction, it may not be clear whether the predominant effect of the lawyer's~~  
87 ~~conduct will occur in a jurisdiction other than the one in which the conduct~~  
88 ~~occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction~~  
89 ~~in which the lawyer reasonably believes the predominant effect will occur, the~~  
90 ~~lawyer shall not be subject to discipline under this Rule.~~<sup>11</sup>

<sup>9</sup> Drafter's note: The language referring to the black letter "safe harbor" has been deleted to conform to the Commission's action to delete the "safe harbor" provisions. See fn. 5 above.

<sup>10</sup> 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.

<sup>11</sup> Drafter's note: This comment has been deleted because it refers exclusively to the safe harbor language which was deleted from the rule. See fn. 5 above.

RRC – Rule 8.5 [1-100(D)]  
Rule Draft 2 (8/12/09) – COMPARED TO DFT1 (7/25/09)  
August 28-29, 2009 Meeting; Agenda Item III.E.

91 |  
92 | ~~[6] If two admitting jurisdictions were to proceed against a lawyer for the~~  
93 | ~~same conduct, they should, applying this rule, identify the same governing ethics~~  
94 | ~~rules. They should take all appropriate steps to see that they do apply the same~~  
95 | ~~rule to the same conduct, and in all events should avoid proceeding against a~~  
96 | ~~lawyer on the basis of two inconsistent rules.~~<sup>12</sup>  
97 |  
98 | ~~[7]~~[5] The choice of law provision applies to lawyers engaged in transactional  
99 | practice, unless international law, treaties or other agreements between  
100 | competent regulatory authorities in the affected jurisdictions preempt these  
101 | rules.~~provide otherwise.~~<sup>13</sup>  
102 |

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<sup>12</sup> Drafter's note: 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.

<sup>13</sup> Drafter's note: The words "provide otherwise" have been deleted and the words "preempt these rules" have been added consistent with the Commission's decision 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 produce "require other conduct."

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 8.5 Disciplinary Authority; Choice Of Law</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 8.5 Disciplinary Authority; Choice Of Law</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) <b>Disciplinary Authority.</b> 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) <b>Disciplinary Authority.</b> A lawyer admitted to practice in <del>this jurisdiction</del>California is subject to the disciplinary authority of <del>this jurisdiction</del>California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in <del>this jurisdiction</del>California is also subject to the disciplinary authority of <del>this jurisdiction</del>California if the lawyer provides or offers to provide any legal services in <del>this jurisdiction</del>California. A lawyer may be subject to the disciplinary authority of both <del>this jurisdiction</del>California 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) <b>Choice of Law.</b> 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) <b>Choice of Law.</b> In any exercise of the disciplinary authority of <del>this jurisdiction</del>California, 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, unless the rules of the tribunal provide otherwise; and</p>	<p>Paragraph (b)(1) is identical to Model Rule 8.5(b)(1).</p>

\* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 8.5 Disciplinary Authority; Choice Of Law</p>	<p align="center"><u>Commission's Proposed Rule*</u> 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) <del>these rules apply to</del> for any other conduct, <del>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.</del> <del>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, lawfully practicing in another jurisdiction, may be specifically required to follow rules of professional conduct different from these rules.</del></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>

<u>ABA Model Rule</u> <b>Rule 8.5 Disciplinary Authority; Choice Of Law Comment</b>	<u>Commission's Proposed Rule</u> <b>Rule 8.5 Disciplinary Authority; Choice Of Law Comment</b>	<u>Explanation of Changes to the ABA Model Rule</u>
<p><b>Disciplinary Authority</b></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><b>Disciplinary Authority</b></p> <p>[1] It is longstanding law that the conduct of a lawyer admitted to practice in <del>this jurisdiction</del> <a href="#">California</a> is subject to the disciplinary authority of <del>this jurisdiction</del> <a href="#">California</a>. Extension of the disciplinary authority of <del>this jurisdiction</del> <a href="#">California</a> to other lawyers who provide or offer to provide legal services in <del>this jurisdiction</del> <a href="#">California</a> is for the protection of the citizens of <del>this jurisdiction</del> <a href="#">California</a>. <del>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.</del> <a href="#">A lawyer disciplined by a disciplinary authority in another jurisdiction, may be subject to discipline for the same conduct in California. (See e.g., Bus. &amp; Prof. C., §6049.1.)</a></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, it 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.</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>

<b>ABA Model Rule</b> <b>Rule 8.5 Disciplinary Authority; Choice Of Law</b> <b>Comment</b>	<b>Commission's Proposed Rule</b> <b>Rule 8.5 Disciplinary Authority; Choice Of Law</b> <b>Comment</b>	<b>Explanation of Changes to the ABA Model Rule</b>
<p><b>Choice of Law</b></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><b>Choice of Law</b></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>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, <del>and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.</del></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>

<b>ABA Model Rule</b> <b>Rule 8.5 Disciplinary Authority; Choice Of Law</b> <b>Comment</b>	<b>Commission's Proposed Rule</b> <b>Rule 8.5 Disciplinary Authority; Choice Of Law</b> <b>Comment</b>	<b>Explanation of Changes to the ABA Model Rule</b>
<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 <u>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.</u><sup>1</sup> <del>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.</del> In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, <u>these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires different conduct.</u> <del>the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.</del></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 before 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.</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>

<sup>1</sup> 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.

<b>ABA Model Rule</b> <b>Rule 8.5 Disciplinary Authority; Choice Of Law</b> <b>Comment</b>	<b>Commission's Proposed Rule</b> <b>Rule 8.5 Disciplinary Authority; Choice Of Law</b> <b>Comment</b>	<b>Explanation of Changes to the ABA Model Rule</b>
<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><del>[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.</del></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><del>[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.</del></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. &amp; 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><del>[7]</del><sup>[5]</sup> 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 <del>provide otherwise</del> <a href="#">preempt these rules</a>.</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>

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 8.5 Disciplinary Authority; Choice of Law

August 28-29, 2009

(Draft rule revised following consideration of public comment.)

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 proposed rules or California law.



1 **Rule 8.5 Disciplinary Authority; Choice Of Law**  
2

- 3 (a) **Disciplinary Authority.**<sup>1</sup> A lawyer admitted to practice in California<sup>2</sup> is  
4 subject to the disciplinary authority of California, regardless of where the  
5 lawyer's conduct occurs. A lawyer not admitted in California is also subject  
6 to the disciplinary authority of California if the lawyer provides or offers to  
7 provide any legal services in California. A lawyer may be subject to the  
8 disciplinary authority of both California and another jurisdiction for the same  
9 conduct.  
10
- 11 (b) **Choice of Law.** In any exercise of the disciplinary authority of California, the  
12 rules of professional conduct to be applied shall be as follows:<sup>3</sup>  
13
- 14 (1) for conduct in connection with a matter pending before a tribunal,<sup>4</sup> the  
15 rules of the jurisdiction in which the tribunal sits, unless the rules of the  
16 tribunal provide otherwise; and  
17
- 18 (2) these rules apply to any other conduct in and outside this state<sup>5</sup>, except  
19 where a lawyer admitted to practice in California, is lawfully practicing in  
20 another jurisdiction,<sup>6</sup> may be specifically required by a jurisdiction in

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<sup>1</sup> **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 10-3-0 to recommend adoption of MR 8.5(a), subject to substitution of "California" for "jurisdiction." See 7/24/09 KEM Meeting Notes, III.H., at ¶. 2A. See also fn. 2.

<sup>2</sup> **RRC Action:** At the 7/24-25/09 meeting, the substitution of "California" instead of "this jurisdiction" was deemed approved for the entire rule. See 7/24/09 KEM Meeting Notes, III.H., at ¶. 2A (2).

<sup>3</sup> **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 10-3-0 to recommend adoption of MR 8.5(b)(1), subject to substitution of "California" for "jurisdiction." See 7/24/09 KEM Meeting Notes, III.H., at ¶. 4A. See also fn. 2, *supra*.

<sup>4</sup> **Drafters Comment:**

<sup>5</sup> **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 12-0-0 to have no safe harbor provision such as in MR 8.5(b)(2) in proposed 8.5(b)(2). See 7/24/09 KEM Meeting Notes, III.H., at ¶ 6. The drafter's proposed rule was deemed approved. See 7/24/09 KEM Meeting Notes, III.H., at ¶ 6. See 7/24/09 KEM Meeting Notes, III.H., at ¶ 7. The effect of this approval was to change the following MR 8.5(b)(2) language: "to" was substituted for "for" and the proposal deleted "**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**"

<sup>6</sup> **Drafter's Note:** Because it is possible to be in California and practicing in another jurisdiction (e.g., practicing before the Patent and Trademark Office), "in another jurisdiction" was substituted for "outside this state."

21 which he or she is practicing to follow rules of professional conduct  
22 different from these rules.

23  
24 **Comment**

25  
26 **Disciplinary Authority**

27  
28 [1] It is longstanding law that the conduct of a lawyer admitted to practice in  
29 California is subject to the disciplinary authority of California. Extension of the  
30 disciplinary authority of California to other lawyers who provide or offer to provide  
31 legal services in California is for the protection of the citizens and residents of  
32 California. (See e.g., CRC 9.40-9.48.)<sup>7</sup> .<sup>8</sup>A lawyer disciplined by a disciplinary  
33 authority in another jurisdiction, may be subject to discipline for the same conduct  
34 in California. (See e.g., Bus. & Prof. C., §6049.1.)

35 **Choice of Law**

36  
37 [2] A lawyer may be potentially subject to more than one set of rules of  
38 professional conduct which impose different obligations. The lawyer may be  
39 licensed to practice in more than one jurisdiction with differing rules, or may be  
40 admitted to practice before a particular court with rules that differ from those of  
41 the jurisdiction or jurisdictions in which the lawyer is licensed to practice.  
42 Additionally, the lawyer's conduct may involve significant contacts with more than  
43 one jurisdiction.

44  
45 [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that  
46 minimizing conflicts between rules, as well as uncertainty about which rules are  
47 applicable, is in the best interest of both clients and the profession (as well as the  
48 bodies having authority to regulate the profession). Accordingly, it takes the  
49 approach of (i) providing that any particular conduct of a lawyer shall be subject  
50 to only one set of rules of professional conduct and (ii) making the determination  
51 of which set of rules applies to particular conduct as straightforward as possible,  
52 consistent with recognition of appropriate regulatory interests of relevant  
53 jurisdictions.<sup>9</sup>

54

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<sup>7</sup> Drafter's note: The Supreme Court's rules (which contain authority) for regulation of non-members of the California State Bar are cited here.

<sup>8</sup> Drafter's note: The language about reciprocal discipline has been deleted because California has not adopted the ABA provisions. The reference to California's statute regarding discipline of an attorney who has been disciplined by another jurisdiction has been added instead.

<sup>9</sup> Drafter's note: The language referring to the black letter "safe harbor" has been deleted to conform to the Commission's action to delete the "safe harbor" provisions. See fn. 5 above.

55 [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a  
56 proceeding pending before a tribunal, the lawyer shall be subject only to the rules  
57 of the jurisdiction in which the tribunal sits unless the rules of the tribunal,  
58 including its choice of law rule, provide otherwise. As to all other conduct,  
59 including conduct in anticipation of a proceeding not yet pending before a  
60 tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules,  
61 unless a lawyer admitted in California is lawfully practicing in another jurisdiction,  
62 and may be specifically required by a jurisdiction in which he or she is practicing  
63 to follow rules of professional conduct different from these rules.<sup>10</sup> In the case of  
64 conduct in anticipation of a proceeding that is likely to be before a tribunal, these  
65 rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully  
66 practicing and that jurisdiction requires different conduct.

67  
68 11 12

69 [5] The choice of law provision applies to lawyers engaged in transactional  
70 practice, unless international law, treaties or other agreements between  
71 competent regulatory authorities in the affected jurisdictions preempt these  
72 rules.<sup>13</sup>

73

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<sup>10</sup> 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.

<sup>11</sup> Drafter's note: This comment has been deleted because it refers exclusively to the safe harbor language which was deleted from the rule. See fn. 5 above.

<sup>12</sup> Drafter's note: 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.

<sup>13</sup> Drafter's note: The words "provide otherwise" have been deleted and the words "preempt these rules" have been added consistent with the Commission's decision 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 produce "require other conduct."

**RRC – Model Rule 8.5 [1-100]  
E-mails, memos, etc. – Revised (8/24/2009)**

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**RRC – Model Rule 8.5 [1-100]  
E-mails, memos, etc. – Revised (8/24/2009)**

**August 12, 2009 Peck E-mail to McCurdy & Difuntorum, cc Drafters, Chair, Vapnek & Tuft:**

With apologies to Kurt and Stan, who have not had an opportunity to review the changes to the comments and the attached charts, here are (1) a draft redline memo re changes to the rule, (2) a chart showing the changes from the ABA MR, (3) an introduction (which still needs work and may change after the Commission decides what to do) and (4) a clean draft of the memo regarding the rule. The staff may put the papers in any form it deems appropriate.

**August 24, 2009 Sapiro E-mail to RRC List:**

1. I had difficulty reading and understanding black letter paragraph (b)(2). I think it would be easier to read and to understand if the exception phrase is changed to state: “. . . except that a lawyer admitted to practice in California and who is lawfully practicing in another jurisdiction may be specifically required . . . .”
2. At page 257 of the agenda materials, in the explanation for Comment [1], third paragraph, second line, the word “these” is misspelled.
3. At page 259 of the agenda materials, in the second paragraph of the explanation column, the word “before” appears twice in the second line. I would substitute for the first word “before” the phrase “prior to.”

## McCurdy, Lauren

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**From:** McCurdy, Lauren  
**Sent:** Tuesday, August 25, 2009 9:49 AM  
**To:** Audrey Hollins (E-mail); avoogd@stanfordalumni.org; CommissionerJ2@gmail.com; Ellen Peck (E-mail); hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; Jerome Sapiro Jr. (E-mail); kemohr@charter.net; Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Work) (E-mail); Kurt Melchior (E-mail); Lauren McCurdy; Lee, Mimi; linda.foy@jud.ca.gov; Mark L. Tuft (E-mail); martinez@lbbslaw.com; Paul W. Vapnek (E-mail); Randall Difuntorum (E-mail); rlkehr@ksclp.com; snyderlaw@charter.net; Stan Lamport (E-mail); Yen, Mary  
**Subject:** Message from the Chair Concerning Agenda Item III E -- 8.5

Commission Members:

Page 251: Fn. 4 is incomplete.

Cheers,  
Harry