

Report 201C

**AMERICAN BAR ASSOCIATION
COMMISSION ON MULTIJURISDICTIONAL PRACTICE
REPORT TO THE HOUSE OF DELEGATES**

RECOMMENDATION

1 RESOLVED, that the American Bar Association adopts the proposed amendments, dated August
2 2002, to Rule 8.5 of the ABA *Model Rules of Professional Conduct* as follows:
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4 **RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW**
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6 (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to
7 the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A
8 lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this
9 jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A
10 lawyer may be subject to the disciplinary authority of both this jurisdiction and another
11 jurisdiction ~~where the lawyer is admitted~~ for the same conduct.

12 (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the
13 rules of professional conduct to be applied shall be as follows:

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

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

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

26 (ii) ~~if the lawyer is licensed to practice in this and another jurisdiction, the rules to~~
27 ~~be applied shall be the rules of the admitting jurisdiction in which the lawyer principally~~
28 ~~practices; provided, however, that if particular conduct clearly has its predominant effect~~
29 ~~in another jurisdiction in which the lawyer is licensed to practice, the rules of that~~
30 ~~jurisdiction shall be applied to that conduct.~~

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32 **Comment**
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34 *Disciplinary Authority*

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36 [1] ~~Paragraph (a) restates~~ It is longstanding law that the conduct of a lawyer
37 admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction.
38 Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer
39 to provide legal services in this jurisdiction is for the protection of the citizens of this
40 jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will
41 further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer
42 Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this
43 jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive
44 service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary
45 authority of this jurisdiction may be a factor in determining whether personal jurisdiction may
46 be asserted over the lawyer for civil matters.

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48
49 *Choice of Law*

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51 [2] A lawyer may be potentially subject to more than one set of rules of professional
52 conduct which impose different obligations. The lawyer may be licensed to practice in more than
53 one jurisdiction with differing rules, or may be admitted to practice before a particular court with
54 rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to
55 practice. ~~In the past, decisions have not developed clear or consistent guidance as to which rules~~
56 ~~apply in such circumstances.~~ Additionally, the lawyer's conduct may involve significant contacts
57 with more than one jurisdiction.

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

66 [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding ~~in~~
67 ~~pending before a court before which the lawyer is admitted to practice (either generally or pro~~
68 ~~haec vice) tribunal,~~ the lawyer shall be subject only to the rules of ~~professional conduct of that~~
69 ~~court~~ the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its
70 choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation
71 of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer
72 ~~licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct~~
73 ~~of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the~~
74 ~~rules of the jurisdiction where he or she (as an individual, not his or her firm) principally~~
75 ~~practices, but with one exception: if particular conduct clearly has its predominant effect in~~
76 ~~another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is~~
77 ~~for the latter exception to be a narrow one. It would be appropriately applied, for example, to a~~
78 ~~situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted~~
79 ~~in State B, handled an acquisition by a company whose headquarters and operations were in~~
80 ~~State B of another, similar such company. The exception would not appropriately be applied, on~~

81 ~~the other hand, if the lawyer handled an acquisition by a company whose headquarters and~~
82 ~~operations were in State A of a company whose headquarters and main operations were in State~~
83 ~~A, but which also had some operations in State B shall be subject to the rules of the jurisdiction~~
84 ~~in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another~~
85 ~~jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in~~
86 ~~anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such~~
87 ~~conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.~~

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

93 ~~[5]~~ [6] If two admitting jurisdictions were to proceed against a lawyer for the same
94 conduct, they should, applying this rule, identify the same governing ethics rules. They should
95 take all appropriate steps to see that they do apply the same rule to the same conduct, and in all
96 events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

97 ~~[6]~~ [7] The choice of law provision ~~is not intended to apply to~~ applies to lawyers engaged
98 in transnational practice, unless international law, treaties or other agreements between
99 competent regulatory authorities in the affected jurisdictions provide otherwise. Choice of law in
100 ~~this context should be the subject of agreements between jurisdictions or of appropriate~~
101 ~~international law.~~

REPORT

It is important that state regulatory authorities acknowledge the increasing prevalence of cross-border law practice and respond appropriately. Allowances must be made for effectively regulating lawyers who practice law outside the states in which they are licensed. Sanctions must be available both against lawyers who do unauthorized work outside their home states and against those who violate rules of professional conduct when they engage in otherwise permissible multijurisdictional law practice.

The Ethics 2000 Commission proposed amending Rule 8.5(a) (Disciplinary Authority) to make clear that a jurisdiction in which a lawyer engages in disciplinary misconduct may sanction the lawyer regardless of whether the lawyer is licensed to practice law in that jurisdiction. Most significantly, a sentence would be added to provide that: "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."¹ The proposal is consistent with existing ABA policy, as embodied in Rule 6 of the *ABA Model Rules for Lawyer Disciplinary Enforcement*. As the Ethics 2000 Commission noted, "this is an appropriate Rule to adopt in the *Model Rules of Professional Conduct*, given that a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct." As a further enhancement to this Rule, the MJP Commission recommends that the following statement be added to the end of Comment [1]: "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*."

Additionally, the Ethics 2000 Commission proposed amending Rule 8.5(b) (Choice of Law) in two principal respects. First, a number of changes would clarify the choice of law rule applicable to lawyers participating in adjudications. It would provide that a lawyer who participates in a formal adjudication before any "tribunal"—and not only a "court"—is bound by the rules of professional conduct of the jurisdiction in which the tribunal sits or by the rules of the tribunal itself if they provide otherwise.

Second, the Ethics 2000 Commission proposed changing the choice of law rule applicable to legal work outside the context of adjudications. The current rule provides that a lawyer is governed by the rules of professional conduct of the jurisdiction in which the lawyer is licensed. When a lawyer is licensed in multiple jurisdictions, it identifies a principle to determine which of the jurisdictions' rules apply. The proposed amendment recognizes that when lawyers engage in multijurisdictional practice, the jurisdiction in which they practice has an interest in enforcing compliance with its rules of professional conduct. Under the proposed amendment, the applicable rules would be those of the jurisdiction in which lawyer's conduct had its predominant effect or, where the conduct did not have its predominant effect in a single jurisdiction, the rules of the jurisdiction in which the conduct occurred. However, a lawyer who acts reasonably in the face of uncertainty about which jurisdiction's rules apply would not be subject to discipline. Rule 1.0 (Terminology) of the *ABA Model Rules of Professional Conduct*

¹See Commission on Evaluation of the Rules of Professional Conduct, Report 401 to the ABA House of Delegates (February 2002).

provides that reasonable, when used in reference to a lawyer's actions, denotes the conduct of a reasonably prudent and competent lawyer.

