

Rule 8.5 Disciplinary Authority; Choice of Law
(Proposed Rule Adopted by the Board on November 17, 2016)

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

Comment

Disciplinary Authority

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. (See Bus. & Prof. Code, §§ 6077, 6100.) Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. (See e.g., Bus. & Prof. Code, § 6049.1.)

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

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 1-100(D) (Rules of Professional Conduct, in General – Geographic Scope of the rules) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 8.5 (Disciplinary Authority; Choice of Law). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 8.5 (Disciplinary Authority; Choice of Law).

Rule As Issued For 90-day Public Comment

This proposal responds to multijurisdictional practice considerations that have expanded in recent years. Proposed rule 8.5 departs from the standard in current rule 1-100(D).¹ The Commission is recommending a new rule derived from Model Rule 8.5 in order to eliminate unnecessary differences with the national standard. The Commission believes this is particularly significant for the topics of choice of law and the extraterritorial application of the rules. Twenty-four states have adopted Model Rule 8.5 verbatim. Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5. Nine states have adopted a version of the rule that is substantially different to Model Rule 8.5.” One state has not adopted a version of Model Rule 8.5.

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

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

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

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow Rules of Professional Conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

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

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

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.5 [1-100(D)]

Commission Drafting Team Information

Lead Drafter: Daniel Eaton

Co-Drafters: Jeffrey Bleich, George Cardona

I. CURRENT CALIFORNIA RULE

Rule 1-100(D) Rules of Professional Conduct, in General – Geographic Scope of the Rules

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(D) Geographic Scope of Rules.

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

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I.A. CURRENT ABA MODEL RULE 8.5

Rule 8.5 Disciplinary Authority; Choice of Law

- (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.
- (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:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

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

Choice of Law

[2] 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, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction

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

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

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

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

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 8.5 [1-100(D)]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 8.5 [1-100(D)]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 8.5 Disciplinary Authority; Choice of Law

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- (b) **Choice of Law.** In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:
- (1) for conduct in connection with a matter pending before a tribunal,* the rules of the jurisdiction in which the tribunal* sits, unless the rules of the tribunal* provide otherwise; and
 - (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See *e.g.*, Business and Professions Code § 6049.1.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-100(D))

Rule 8.5 [1-100(D)] ~~Rules of Professional Conduct, in General~~ Disciplinary Authority; Choice of Law

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~~(D) Geographic Scope of rules.~~

~~(1) As to members:~~

~~These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.~~

~~(2) As to lawyers from other jurisdictions who are not members:~~

~~These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.~~

~~* * * * *~~

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

Comment

Disciplinary Authority

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.

IV.A. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT ABA MODEL RULE 8.5)

Rule 8.5 Disciplinary Authority; Choice Of Law

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

Comment

Disciplinary Authority

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

Choice of Law

~~[2] The conduct of a lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to~~

~~practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.~~ in California is subject to the disciplinary authority of California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See e.g., Business and Professions Code § 6049.1.

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

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

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

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

~~and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.~~

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

V. RULE HISTORY

Rule 1-100(D)(1) was adopted in 1989 to clarify that the Rules are binding upon members of the State Bar of California acting in another jurisdiction, unless the rules of the other jurisdiction require conduct different from that required or permitted by the California Rules.

Rule 1-100(D)(2), adopted at the same time, clarifies that lawyers from other jurisdictions who may be entitled to practice law in California without being members of the State Bar (e.g., lawyers out of state appearing pro hac vice) are subject to the California Rules. Thus, every rule which is applicable to a “member” would also be applicable to a “lawyer” (as defined in current rule 1-100(B)(3)¹) who, in accordance with California law, is permitted to practice law in California. During the 1989 Commission’s deliberations, several of its members opposed including (D)(2) on the ground that the authority of the Board under Business and Professions Code § 6076 does not extend to formulating or enforcing rules governing the conduct of out-of-state lawyers. However, the first Commission included paragraph (D)(2) on the ground that the authority of the Board extends to governing the conduct of lawyers who are not members of the State Bar but who are authorized to practice law in California. The Board agreed and adopted the provision, and the Supreme Court approved it, effective May 27, 1989.

Rule 1-100(D) has not been revised since 1989.

Post-1989 Events.

In 1998, the Supreme Court issued its opinion in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119, which held that lawyers who had participated in a private arbitration proceeding in California had engaged in the unauthorized practice of law. Language in *Birbrower* also indicated that under California law, a lawyer not admitted in California who took a deposition in California as part of a matter filed in another jurisdiction would be engaging in UPL. It is not an understatement to note that the *Birbrower* decision sent shockwaves through the legal

¹ Rule 1-100(B)(3) provides:

(3) “Lawyer” means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

profession. What followed was a sea change in the regulation of lawyers engaged in cross-border practice of law.

Both California and the ABA sought to address the fallout from *Birbrower*. The California Supreme Court convened an Advisory Task Force on Multijurisdictional Practice (MJP) to “assess whether and under what circumstances attorneys licensed to practice law in jurisdictions in the United States other than California should be permitted to practice law in California.” (Report of California Supreme Court Advisory Task Force On Multijurisdictional Practice (Jan. 7, 2002), at page 2. Out of the work of the MJP Task Force came current California Rules of Court 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing temporarily in California as part of litigation], and 9.48 [non-litigating attorneys temporarily in California to provide legal services]. However, unlike the ABA, there were no concomitant changes made to current rule 1-100(D) [Geographic Scope of Rules], the counterpart to Model Rule 8.5.

The ABA appointed a Multijurisdictional Practice (MJP) Commission to study how the Model Rules might be revised to authorize MJP and avoid lawyers being subject to liability for UPL. As a result of that process, both Model Rule 5.5 [Unauthorized Practice of Law; Multijurisdictional Practice of Law] and 8.5 [Disciplinary Authority; Choice of Law] were substantially revised and adopted by the ABA House of Delegates in August 2002 on the recommendation of the MJP Commission.² The revisions made by the ABA to Model Rule 5.5, which involve many of the same concepts addressed in Rules of Court 9.45 to 9.48, are beyond the purview of this Commission. However, changes made to Model Rule 8.5 are not.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC agrees with the policy behind this rule, but still has concerns that the rule, as written, is in conflict with § 6049.1. 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 OCTC enforce a rule that permits discipline based on another jurisdiction’s rules, if those rules are in conflict with California’s rules? Is Rule 8.5 intended to change § 6049.1? While this concern would not be true in all cases where the choice of law was the other jurisdiction’s law, it would occur in those cases where the other jurisdiction’s rules are in conflict with California’s rules. This needs to be discussed and addressed in this rule and its Comments.

² See Reports 201B and 201C, available at: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commi_sion_on_multijurisdictional_practice.html [Last visited 2/22/17].

Commission Response: The Commission has not made any change to the proposed Rule. The Commission disagrees that OCTC will be unable to enforce the proposed Rule. As explained in its Report and Recommendation, the Commission believes that the citation to § 6049.1 in the Comment to the Rule appropriately recognizes that section's possible effect on the bar's disciplinary authority while at the same time allowing California to move toward the national standard of Model Rule 8.5 ("A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. See, e.g., Business and Professions Code § 6049.1.")

2. OCTC supports the Comment to this rule.

Commission Response: No response required.

- **State Bar Court:** No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. One comment agreed with the proposed Rule, one comment disagreed, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Rules 9.40 [Counsel *pro hac vice*], 9.41 [Appearances by military counsel], 9.42 [Certified law students], 9.43 [Out-of-state attorney arbitration counsel], 9.44 [Registered foreign legal counsel], 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing temporarily in California as part of litigation], and 9.48 [non-litigating attorneys temporarily in California to provide legal services] of the California Rules of Court, or local rules of United States district courts in California concerning admission *pro hac vice*, all of which authorize out-of-state lawyers to practice in California, are relevant to a rule that identifies (i) which lawyers are subject to the disciplinary authority of California and (ii) which jurisdiction's rules will apply to determine whether discipline is warranted.

Business and Professions Code § 6049.1(b)(2). By statute, the State Bar may conduct an expedited disciplinary proceeding against a California State Bar member upon receipt of a certified copy of a final order determining that the member has been found culpable of professional misconduct in a proceeding in another jurisdiction. (See generally, *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349 [Under that § 6049.1, a final order of the United States, or of a sister state or territory of the United States, determining that a member of the California Bar has committed professional misconduct in that jurisdiction is conclusive evidence that the attorney is

culpable of professional misconduct in California. A respondent may challenge the imposition of discipline in California under § 6049.1 only by affirmatively showing that as a matter of law the culpability found in the other jurisdiction would not warrant discipline in California or that the proceeding in the other jurisdiction lacked fundamental constitutional protection.].)

Business and Professions Code § 6068(o)(6) provides that a member must report to the State Bar the “imposition of discipline against the attorney by a professional . . . disciplinary agency . . . whether in California or elsewhere.”

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 8.5, which is the counterpart to current rule 1-100(D), revised August 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_5.authcheckdam.pdf [Last visited 2/7/17.]
- Twenty-four jurisdictions have adopted Model Rule 8.5 verbatim.³ Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5.⁴ Nine jurisdictions have adopted a version of the rule that is substantially different to Model Rule 8.5.⁵ One jurisdiction has not adopted a version of Model Rule 8.5.⁶

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Recommend that the terms of the current rule be replaced with the standard used in jurisdictions that have adopted Model Rule 8.5 (both disciplinary authority and choice of law).
 - Pros: This area of lawyer regulation is uniquely appropriate for national uniformity and the preponderance of jurisdictions all have adopted the standard in Model Rule 8.5 or a slight variation of the Model Rule. The Commission charter includes consideration of “changes in the law.”

³ The twenty-four jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

⁴ The seventeen jurisdictions are: District of Columbia, Florida, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin.

⁵ The nine jurisdictions are: California, Georgia, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Texas.

⁶ The one jurisdiction is: Alabama.

Subsequent to the adoption of current rule 1-100(D), multi-jurisdictional practice became more common and became the subject of regulation in the California Rules of Court (see Rules of Court, rule 9.40 et. seq.) The Commission's recommendation to depart from the current rule and adopt the national standard facilitates predictable choice of law in lawyer disciplinary matters both in and outside of California.

- Cons: The Model Rule 8.5 approach is arguably ambiguous to the extent that the “predominant effect” test has never been used in California disciplinary proceedings. In addition, the standard in 8.5(b) includes a “reasonable belief” standard that arguably imports a negligence standard for disciplinary purposes.

2. Recommend only one Comment to the rule that cites relevant California statutory law.

- Pros: The one recommended Comment is derived from Comment [1] to Model Rule 8.5 but has been revised to cite relevant statutory law on the disciplinary authority of California. The citations include a State Bar Act section referred to in OCTC's September 29, 2015 comment: § 6049.1, which 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. Including this Comment supplements the Model Rule standard with law specific to California.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include all of the Model Rule 8.5 Comments.

- Pros: The Commission rejected all but Comment [1] of the Model Rule 8.5 Comments as unnecessary and repetitive.
- Cons: The “predominant effect” standard would be new in California. Including those Model Rule Comments that provide guidance on that standard, Comments [4] and [5], would promote compliance with the rule.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. See Section IX.A above regarding adoption of Model Rule 8.5 approach and rejection of the current California standard on choice of law.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

E. Alternatives Considered:

1. The primary alternative considered was to continue the current California rule. See Section IX.A above.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.5 [1-100(D)] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 8.5 [1-100(D)] in the form attached to this Report and Recommendation.