

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

Lead Drafter: Eaton
Co-Drafters: Bleich, Cardona
Meeting Date: October 23, 2015

I. CURRENT CALIFORNIA RULE

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

* * * * *

(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.

* * * * *

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

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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.

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[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. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule 1-100(D) (8.5) as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 8.5 [1-100(D)] (CLEAN)

Rule 8.5 Disciplinary Authority; Choice Of 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

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- (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 section 6049.1.

IV. PROPOSED RULE 8.5 (REDLINE TO CURRENT CALIFORNIA RULE 1-100(D))

Rule ~~1-100~~ 8.5 ~~Rules of Professional Conduct, in General~~ Disciplinary Authority; Choice Of Law

* * * * *

~~(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

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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.

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Disciplinary Authority

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IV.A. PROPOSED RULE 8.5 (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.

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- (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~~ 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~~ lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the ~~lawyer's~~ lawyer's conduct will occur.

COMMENT

Disciplinary Authority

~~[1] It is longstanding law that the~~ The conduct of a lawyer admitted to practice in ~~this jurisdiction~~ California is subject to the disciplinary authority of ~~this jurisdiction~~ California. See Business and Professions Code §§ 6077, 6100. Extension of the disciplinary authority of ~~this jurisdiction~~ California to other lawyers who provide or offer to provide legal services in ~~this jurisdiction~~ California is for the protection of the ~~citizens~~ residents 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~~ California. A lawyer ~~who is subject to the~~ disciplined by a 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~~ another jurisdiction may be ~~a factor~~ subject to discipline in ~~determining whether personal jurisdiction may be asserted over the lawyer~~ California for ~~civil matters~~ the same conduct. See e.g., Business and Professions Code § 6049.1.

Choice of Law

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

~~[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the~~

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~~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.~~

~~[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. PUBLIC COMMENTS SUMMARY

None.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 09/29/15:**

1. Please see OCTC's April 2015 Comment on rule 1-100(D). Additionally, any discussion regarding adopting the "choice of law" language found in Model Rule 8.5 should consider potential conflicts with Business and Professions Code section 6049.1. That section 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.

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- **JAYNE KIM, OCTC, 4/20/15:**

2. The definitional section of rule 1-100, subsection (B), should be clarified or expanded to expressly state that 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.)

Further on this thought, rule 1-100(D) does not expressly address whether all non-members authorized to practice law in California are subject to discipline by California under California's rules. This is likely due to the fact that many of the rules authorizing non-members to practice law in California did not exist in 1992 when the current rule 1-100(D) was last amended.² Be that as it may, OCTC notes that Model Rule 8.5(a) provides that a lawyer not admitted to practice law in a particular jurisdiction is subject to the disciplinary authority of that jurisdiction in some situations.³ OCTC is not suggesting that Model Rule 8.5 be adopted in whole, but rather that the Commission consider the concepts captured in the Model Rule.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

OCTC agrees with the policy behind this rule, but still has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

2. OCTC finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We would recommend striking all the comments except for the last two sentences of Comment 1.

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

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VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Ohio Rule 8.5** is identical to Model Rule 8.5:

Ohio Rule 8.5 Disciplinary Authority; Choice of Law

(a) **Disciplinary Authority.** A lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Ohio is also subject to the disciplinary authority of Ohio if the lawyer provides or offers to provide any legal services in Ohio. A lawyer may be subject to the disciplinary authority of both Ohio and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of Ohio, 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;

(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.

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

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_5.pdf

- Twenty-four states have adopted Model Rule 8.5 verbatim.¹ Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5.² Nine states have adopted a version

¹ The twenty-four states 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.

² 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.

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of the rule that is substantially different to Model Rule 8.5.”³ One state has not adopted a version of Model Rule 8.5.⁴

VIII. 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.” 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 9.40 et. seq.) The drafting team’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: section 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.

³ The nine states are: California, Georgia, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Texas.

⁴ The one states is: Alabama.

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B. Concepts Rejected (Pros and Cons):

1. Include all of the Model Rule 8.5 comments
 - Pros: The drafting team 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.

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

1. See Section I.A above re 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 I.A above.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

- (1) The drafting team has not flagged any open issues for full Commission consideration.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Eaton

- [Date]: Email Comment

Bleich

- [Date]: Email Comment

Cardona

- [Date]: Email Comment

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XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 1-100(D) [8.5] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1-100(D) [8.5] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)



THE STATE BAR OF CALIFORNIA

Date: September 29, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for October 2015 meeting

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- II. Points for Consideration, as calendared
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 - C. Model Rules 6.1, 6.2, 6.3, 6.4, and 6.5 [Public Service]
 - D. Rule 1-700: Member as Candidate for Judicial Office
 - E. Rule 1-710: Member as Temporary Judge, Referee, or Court-Appointed Arbitrator
- III. Closing Comment

I.

OPENING COMMENT

The following comments address the rules to be considered at the Commission's October 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

II.

POINTS FOR CONSIDERATION

A. Rule 1-100(D): Geographic Scope of Rules and Model Rule 8.5

1. Please see OCTC's April 2015 Comment on rule 1-100(D). Additionally, any discussion regarding adopting the "choice of law" language found in Model Rule 8.5 should consider potential conflicts with Business and Professions Code section 6049.1. That section 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.

[TEXT OMITTED]

III.

CLOSING COMMENT

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

CURRENT CALIFORNIA RULE 1-100(D)
“Rules of Professional Conduct, in General – Geographic Scope of the Rules”

I. Text of Current Rule:

* * * * *

(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.

* * * * *

II. Background/Purpose:

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

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.

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 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. (See below.)

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.

² See Reports 201B and 20C, available at: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commision_on_multijurisdictional_practice.html [Last visited 7/16/15].

In fact, as part of its comprehensive review of the California Rules, the first Commission recommended that Model Rule 8.5(a) [Disciplinary Authority], with some non-substantive revisions, be adopted by the Board and approved by the Supreme Court. However, the first Commission recommended that only subparagraph (1) of Model Rule 8.5(b) [Choice of Law] be adopted and, in place of subparagraph (b)(2) of the Model Rule, that a provision similar to current rule 1-100(D)(1) be substituted to provide more of a bright-line standard.³ Although the Board approved the first Commission's proposed rule, it had not been submitted to the Supreme Court when the Supreme Court requested the appointment of a second Commission. The first Commission's proposed rule, along with supporting materials (public comment, etc.), is provided with this memo.

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. Jayne Kim (OCTC), _____, 2015:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. Russell Weiner (OCTC), June 15, 2010:

Rule 8.5. Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but still has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that

³ The first Commission explained its rejection of Model Rule 8.5(b)(2):

Proposed 8.5(b)(2) deletes most of Model Rule 8.5(b)(2) and substitutes language derived from current rule 1-100(D)(1) as a model to create a brighter line and to provide that these rules remain the standards of professional conduct for all conduct over which California has disciplinary jurisdiction except where an admitted lawyer is lawfully practicing in another jurisdiction which specifically requires a different standard of conduct.

This rule deletes the MR concept of "predominant effect" because the concept is ambiguous, over broad and undefinable for the lawyers seeking to comply with the rules and for application by disciplinary prosecutors and adjudicators.

The rule also deletes the "safe harbor" provision (providing that a lawyer is not subject to any discipline if the lawyer reasonably believes that he or she was bound by a different set of disciplinary rules) on public protection grounds, since a violation of these rules is generally a "willful" standard, without any intent requirement. The reasonable belief of the lawyer may properly be considered as a mitigating factor rather than a complete defense.

See First Commission, *Rule & Comment Explanation Comparison Chart*, XDFT5.1 (12/10/10), at page 2.

discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

2. OCTC finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We would recommend striking all the comments except for the last two sentences of Comment 1.

C. Mike Nisperos (OCTC), September 27, 2001:

None.

IV. Potential Deficiencies in the Current Rule:

A. See above input from OCTC, i.e., OCTC's concern that RRC1's proposed Rule 8.5 might conflict with Business and Professions Code § 6049.1(b)(2). The first Commission's response to this point can be found in the Public Comment Chart provided with this memo.⁴

B. Other potential deficiencies:

1. In not tracking the Model Rule's disciplinary authority/choice of law rule (Model Rule 8.5), current rule 1-100(D) creates ambiguity regarding which jurisdiction's rules apply when either California lawyers practice law in another jurisdiction or out-of-state lawyers not admitted in California practice law in California.

⁴ The First Commission responded:

The Commission believes that OCTC has misunderstood the relation (or nonrelation) between this rule and B&P Code 6049.1. The Rule makes conduct outside California subject to discipline if the conduct violates the California rules and unless otherwise authorized. The statute authorizes California discipline based on an adjudication of professional misconduct in another jurisdiction. The Commission views the statute and the proposed rule as complimentary and sees no reason to make a change to the proposed rule amendment. (See Public Comment Chart, XDFT2 (6/22/10).)

2. As a corollary to item 1, given the extent to which out-of-state lawyers not admitted in California are authorized to practice in California, particularly those who practice temporarily in the state in either litigation or non-litigation matters, (see Rules of Court 9.47 and 9.48), current rule 1-100(D) might not provide sufficient guidance for those lawyers in understanding which jurisdiction's rules govern their conduct. It might be advantageous for California's disciplinary authority and choice of law provision to remove ambiguity by tracking the Model Rule, which has been adopted in a predominant number of jurisdictions. (See Section VI, below.)

V. California Context:

A. 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.

B. 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 section 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 section 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.])

C. 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.

VI. Approach In Other Jurisdictions (National Backdrop):

A. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 8.5: Disciplinary Authority; Choice of Law,” revised May 4, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_5.pdf [Last visited 7/16/15]

- Twenty-four jurisdictions have adopted Model Rule 8.5 verbatim.⁵ Seventeen jurisdictions have adopted a slightly modified version of Model Rule 8.5.⁶ Ten jurisdictions have adopted a version of the rule that is substantially different from Model Rule 8.5.⁷

⁵ 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.

⁶ 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.

⁷ The ten jurisdictions are: Alabama, California, Georgia, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Texas. Of those jurisdictions, several (Alabama, Kansas, Nevada) take a minimalist approach in their rules and have retained Model Rule 8.5 as originally adopted by the ABA in 1983.

For example, Alabama Rule 8.5 provides:

Rule 8.5 Jurisdiction.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, although engaged in practice elsewhere.

Although the blackletter does not address choice of law, the comment to the rule addresses the concept, noting:

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Other jurisdictions include the same provision as the first sentence of their rule but add other concepts (Mississippi, New Mexico, North Dakota), in essence Model Rule 8.5(a). Each of these states, however, do not have a black letter provision that addresses choice of law, nor do any of these jurisdictions address that concept in a comment. For example, New Mexico Rule 16-805 provides:

Rule 16-805. 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

VII. Public Comment Received by the First Commission:

The clean text of a proposed new rule 8.5 drafted by the first Commission and adopted by the Board to replace rule 1-100(D) is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 1-100(D), the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 1-100(D) is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior

jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

Two non-California jurisdictions have rules that address both disciplinary authority and choice of law in the black letter but use language not employed in other jurisdictions. (See attached PDF file named RRC2 - [1-100(D)][8.5] - Rule 8.5 - Substantially Different Jurisdictions (2015).pdf)

The last non-California jurisdiction, Texas, includes a paragraph (a) that addresses disciplinary authority and paragraph (b), which explains that lawyers admitted in Texas are also subject to Texas disciplinary authority if they violate the advertising or solicitation rules. (See *id.*)

public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether to revise the long-arm/choice of law language (stating the extraterritorial reach of rules to State Bar member conduct occurring outside of California) to be consistent with language used by other jurisdictions (compare ABA MR 8.5(a) [long arm] and (b) [choice of law].)

IX. Research Resources:

- Although the California Supreme Court Advisory Task Force on MJP did not recommend changes to rule 1-100(D), its consideration of MJP can provide good background for understanding the extent of the MJP issues regarding disciplinary authority and rule choice that rule 8.5 is intended to resolve.
 - The Task Force's Final Report (1/7/2002) is found here: http://calbar.ca.gov/Portals/0/documents/reports/2002_MJP-Report.pdf
 - Report of the California Supreme Court Multijurisdictional Practice Implementation Committee (3/10/2004), is found here: <http://www.courts.ca.gov/documents/mjpfinalrept.pdf>
- On August 12, 2002, the ABA House of Delegates adopted the Report of the ABA's MJP Commission, which included extensive revisions to MR 8.5.
 - The report is available here: http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_1_21702_1.doc (Word)
 - Or here: http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_1_21702_2.pdf (PDF)
 - The home page for the ABA MJP Commission is found here: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html
- *Emslie v. State Bar* (1974) 11 Cal.3d 210, 113 Cal.Rptr. 175 (State Bar had jurisdiction where lawyer's misconduct occurred in another jurisdiction).
- *In the Matter of Respondent V* (Review Dept.1995) 3 Cal. State Bar Ct. Rptr. 442, 447 ("Although the State Bar has discretion whether to pursue allegations of alleged misconduct in other states, there is simply no jurisdictional requirement that the alleged misconduct must occur in this state in order to be prosecuted by the State Bar of California.")
- *Bankruptcy of Mortgage & Realty Trust* (C.D. Cal. 1996) 195 B.R. 740 [1996 WL 238695] (Under rule 1-100(D), the determination that a lawyer's conduct is governed by the standards of professional conduct applicable to California lawyers does not end the inquiry because in certain circumstances the standards of professional conduct of another state may provide the substantive rules governing the conduct at issue.
- *In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250 (Lawyer found culpable for misconduct committed by practicing law in violation of professional regulations in other jurisdictions.)

- *In Matter of Shea for Virgin Islands Bar* (2013) 59 V.I. 552 [2013 WL 4679943] (In dicta, the choice of law standard in rule 8.5 is construed as selecting the California rule governing sexual relations with client where a member of the Virgin Island's Bar resided in California, represented a California client and engaged in sexual relations with that client in California.)