Committee Draft Report on Proposed Changes to Rule 8.5 (Disciplinary Authority; Choice of Law)[1]

The Rules of Professional Conduct Review Committee ("Rules Committee" or "Committee") of the D.C. Bar proposes to: 1) amend Rule 8.5(a) to reflect the fact that D.C. lawyers practicing in other jurisdictions may be subject to the disciplinary authority of those jurisdictions; 2) amend Rule 8.5(b) to include a safe harbor provision that protects lawyers making reasonable decisions about which jurisdiction's Rules of Professional Conduct applies to their conduct.

I. Background

Rule 8.5 is the rule that describes the reach of the disciplinary authority of a jurisdiction's Office of Disciplinary Counsel (sometimes known as Bar Counsel) and explains how the applicable Rules of Professional Conduct will be identified when the rules of multiple jurisdictions are potentially applicable to a lawyer's conduct.

At its February 2013 meeting, the ABA House of Delegates approved the addition of a sentence to Comment [5] to Model Rule 8.5. The new sentence provides that for purposes of conflicts of interests, written agreements between clients and lawyers that reasonably specify that the rules of a particular jurisdiction will govern the lawyer's ethical conduct may be considered in determining a lawyer's "reasonable belief of the jurisdiction in which the predominant effect of the lawyer's conduct will occur" for the purposes of Model Rule 8.5(b)(2), which is the choice-of-law provision applicable to matters not "pending before a tribunal."

In anticipation of the House of Delegates action, in January 2013 the Rules Review Committee appointed a subcommittee to study the ABA proposal. In connection with the question of addressing the ABA amendment, the Committee directed the subcommittee to consider whether the Court should amend D.C.'s Rule 8.5(b)(2)—which differs materially from Model Rule 8.5(b)(2)—to broaden the possibility of the application of the rules of another jurisdiction in which a lawyer's conduct occurs or has its predominant effect.[2] The subcommittee spent many months considering various options and proposals, which were then discussed and debated at length in meetings of the full Committee.

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[1] The Rule 8.5 subcommittee was chaired by Rules Review Committee member John Townsend Rich, who authored a substantial report on the subcommittee's work. That report greatly assisted the Committee in understanding and deliberating on various issues arising under this Rule. This report is a condensation of Mr. Rich's subcommittee report. This report, for example, does not include some of the subcommittee proposals that were considered and rejected by the full committee.

[2] On May 2, 2013, Albert W. Turnbull, chair of the D.C. Bar Legal Ethics Committee, wrote to Alison Doyle, then chair of this committee, concerning a request for an informal opinion about Rule 8.5(b) that the ethics committee had received. His letter proposed adopting Model Rule 8.5(b)(2), so that D.C. lawyers could be assured of being governed by the rules of a foreign jurisdiction and not by D.C. rules when engaged in conduct that would have a predominant affect in that foreign jurisdiction.

Ultimately, on October 20, 2015, the Committee voted: (1) to reject a proposal to conform D.C. Rule 8.5(b)(2) to the ABA Model Rule; [3] (2) to add clarifying language to Rule 8.5(a) and to the Comments to Rule 8.5 to warn District lawyers of the possibility of disciplinary action against them by other states (in addition to this jurisdiction) when they practice in other jurisdictions or engage in conduct that has a predominant effect in another jurisdiction; (3) to add a new subparagraph (3) to Rule 8.5(b) to provide a "safe harbor" provision: a defense for a lawyer who acts under the reasonable belief that his or her conduct is governed by the rules of another jurisdiction; and (4) to amend the Comments to reflect the changes and provide additional clarifications. The Committee approved amendments to the Comments in June 2016.

On October 2, 2018, shortly before the Committee was planning to circulate for comments its proposal on Rule 8.5, the Committee received a memorandum from the Office of Disciplinary Counsel recommending various changes to the Rules of Professional Conduct. Two proposals related to Rule 8.5, and one of those was directly related to an analysis the Committee had previously undertaken and which ultimately resulted in no recommended action. For this reason, the subcommittee was reconvened to revisit its work on Rule 8.5(b)(1) and other aspects of Rule 8.5. The subcommittee's recommendations, as approved by the full Committee, are set forth below.[4]

II. Rule 8.5(a) Should Not Be Amended To Expand The Jurisdiction Of The D.C. Disciplinary Authorities But Should Be Amended To Reflect That D.C. Lawyers Practicing In Other Jurisdictions May Be Subject To The Disciplinary Authority Of Those Jurisdictions.

Prior to 2002, D.C.'s disciplinary authority provision mirrored that of the Model Rules. In 2002, the ABA adopted a substantial change to Model Rule 8.5(a) that would subject lawyers who provide legal services in a jurisdiction to the disciplinary authority of that jurisdiction, even if the lawyer is not admitted there. Model Rule 8.5(a) was also modified to "warn" lawyers that they could potentially be subject to the disciplinary authority of multiple jurisdictions for the same conduct.

Since 2002, a large majority of states have adopted the current version of the ABA jurisdictional rule in Model Rule 8.5(a), which subjects any lawyer (including a D.C. Bar member)

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[3] The primary arguments for adopting ABA MR 8.5(b)(2) are articulated in a separate Alternate Proposal to Adopt ABA Model Rule 8.5(b)(2) ("Alternate Proposal") by subcommittee member Stacy Ludwig.

[4] Between June 2016 and October 2018, the Committee was also working on several other potential Rule amendments, including Comment [1] to Rule 3.8; reconsideration of ABA Model Rule 3.8(g) and (h) and D.C. Rule 3.8; and potential amendments to D.C. Rule 9.1 and 8.4(d) in light of the ABA's adoption of Model Rule 8.4(g). At the time, it was anticipated that the Committee's recommendations for Rule 8.5 would be published in a consolidated Report with a large group of proposed D.C. Rule amendments, including the Committee's recommendations on the ABA's Ethics 2020 amendments, that would then be circulated for public comment. That Draft Report and its recommendations was almost ready for publication at the same time the Committee received the proposals related to Rule 8.5 from Disciplinary Counsel. Rather than delay the entire Report, the Committee removed its Rule 8.5 recommendations and published the Draft Report and Recommendations on the other proposed D.C. Rule amendments in February 2019.

who engages in conduct in any of those states to the respective state disciplinary authorities.[5] In contrast, D.C. has elected to subject only members of the D.C. Bar (or those lawyers who otherwise fall under the jurisdiction of the Office of Disciplinary Counsel ("ODC"), such as lawyers who submit a *pro hac vice* application to a court of the District of Columbia) to the disciplinary authority of the D.C. Office of Disciplinary Counsel. This issue was reviewed over a decade ago by this Committee, the D.C. Bar Multi-Jurisdictional Practice Committee and the D.C. Bar's Disciplinary System Study Committee. The result of that process was a decision not to expand the jurisdiction of the D.C. disciplinary system under Rule XI, Section 1(a) and not to modify Rule 8.5(a) per the ABA changes. A change to Rule 8.5(a) without a change to Rule XI, Section 1(a) would lead to confusion at a minimum and would likely be ineffective. The Committee declines to recommend the adoption of the expansion of disciplinary jurisdiction proposed by the ABA in Model Rule 8.5(a). The Committee does recommend changes in D.C. Rule 8.5(a) to put D.C. Bar members on notice that other jurisdictions may exercise disciplinary jurisdiction over District lawyers who are not barred in the other jurisdiction.

D.C.'s Rule 8.5(a) currently provides:

> (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 may be subject to the disciplinary authority of <u>both this jurisdiction and another jurisdiction where the lawyer is admitted</u> for the same conduct. [Emphasis added.]

As it stands, D.C.'s Rule 8.5(a) does not alert D.C. Bar members that other jurisdictions may exercise disciplinary authority over lawyers irrespective of their admission status in that jurisdiction. As a result, the Committee proposes that the 8.5(a) be modified as follows (with proposed language underlined and in bold):

> (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 may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction, <u>**such as another jurisdiction**</u> where the lawyer is admitted <u>**or where the lawyer provides or offers to provide legal services**</u>, for the same conduct."

In addition, Comment [1] to Rule 8.5 should be changed. It currently reads: "Paragraph (a) restates long-standing law." We recommend that those words be omitted and that the comment be amended to alert the lawyer to the possibility that he or she may be subject to the disciplinary authorities of other jurisdictions. Such other jurisdictions may include another jurisdiction in which the lawyer is admitted to practice, either generally or before a particular tribunal, another jurisdiction that authorizes multi-jurisdictional practice, such as practice under the ABA's widely

[5] Thirty-one jurisdictions have adopted MR 8.5(a) unchanged; eight have adopted it without significant changes (such as substituting the name of the state for "this jurisdiction" or without asserting jurisdiction over out-of-state lawyers practicing in the state (Florida and New York)). CA substantially adopted the Model Rule effective November 1, 2018.

adopted Model Rule 5.5, or another jurisdiction where a lawyer is deemed to have provided or offered to provide legal services whether authorized or not. The Committee's proposed language is in the proposed rule and comment changes marked in Appendix B. Some minor clarifications have been proposed to other comments. The Committee recommends omitting the language in existing Comment [5] on the ground that having different jurisdictions apply the same rules to a lawyer's conduct may no longer be a feasible goal.[6]

III. Rule 8.5(b) Should Not Be Amended To Require Use Of The D.C. Rules Unless Other Potentially Applicable Rules From Other Jurisdictions "Conflict" Or Are "Materially Different" From Their D.C. Counterpart.

The ABA adopted Rule 8.5(b) in 2002. D.C. Rule 8.5(b), which has always been identical to the Model Rule, provides an introduction for the various choice of law provisions found in subparts (b)(1) and (b)(2), which guide lawyers as to which jurisdiction's rules will apply in various circumstances. Rule 8.5(b) currently reads as follows:

> (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:

In October 2018, Disciplinary Counsel suggested in a memo to the Rules Review Committee a new framework for Rule 8.5(b) that diverges from the standard rule. Instead, Disciplinary Counsel would create a new paradigm in which the D.C. Rules presumptively apply, subject to certain exceptions. The proposed rule reads as follows (proposed Disciplinary Counsel language underlined):

> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, <u>the Rules of Professional Conduct of this jurisdiction shall be applied unless the rule relevant to the conduct conflicts with or is materially different from that of a tribunal or other jurisdiction in which the lawyer has been admitted to practice</u>.
> . . .

Disciplinary Counsel states that this change will reduce the expenditure of resources by Disciplinary Counsel and the Board on Professional Responsibility ("BPR") in determining which jurisdiction's rules apply even when there is no conflict between the choices. Disciplinary Counsel recommends that the D.C. Rules of Professional Conduct should apply to D.C. lawyers unless there is a conflict or other material difference between the rules.

In considering this proposal, the subcommittee observed that the proposed rule exchanges one challenge (the determination of what rules apply) for another (the determination of whether a conflict exists or whether there is a "material difference" between the rules). The analysis of what is a "conflict" or a "material difference" will spawn new litigation and new disputes that will

[6] The proposed new language in Comment 5 relates to the addition of new subparagraph (b)(3), which we address below.

continue indefinitely as D.C. and other jurisdictions modify and amend their rules in the future, creating new differences that have to be assessed for their materiality. Similarly, the decisional law of a jurisdiction would likely have to be considered in the analysis, further complicating the process of assessing whether provisions are in "conflict" or are "materially different."

In addition, it is unclear whether the change advocated by Disciplinary Counsel hinges simply on the text of the rule. If that were the case, then many D.C. Rules are "materially different" in various respects from their ABA Model Rule-based counterparts in other jurisdictions. *See, e.g.*, Rules 1.6, 1.7. 1.11, 1.17, 3.3, 3.6, 3.8, 4.2, 4.4(b), 5.4 and D.C. Rule 7.1(b (solicitation) vis-à-vis ABA Model Rules 1.6, 1.7, 1.11, 1.17. 3.3, 3.6, 3.8. 4.2. 4.4(b), 5.4 and 7.3 (solicitation). Similarly, it is unclear from the Disciplinary Counsel proposal how "material differences" in the Comments are to be considered. The differences in the Comments between the D.C. Rules and the ABA Models Rules are too numerous to list. Just to give one example, D.C. Rule 1.6 has 40 Comments, while ABA Model Rule 1.6 has 20. If the Disciplinary Counsel proposal means nothing more than analyzing the competing Rules, Comments and decisional law to determine whether a "material difference" exists then the proposal seemingly adds new layers of analysis that would otherwise be unnecessary. The Committee is of the view that it is more efficient and straightforward to first determine the applicable rules and then analyze their reach and effect in a given situation than it is to engage in the analysis proposed by Disciplinary Counsel.

Lawyers are already familiar with the choice of law analysis, and the Court and other parts of the disciplinary system have worked within this framework for decades. While it may pose difficulties in some matters, the Committee sees no reason to replace the existing rule for a new one that is no less complex and will not benefit from decisional law in other jurisdictions. The existing rule is grounded in the Model Rule, which the proposed rule lacks. The Committee is not aware of any other jurisdiction that has adopted an approach similar to the one proposed by Disciplinary Counsel.

Finally, Disciplinary Counsel's proposal does not, in the Committee's view, account for one of the basic functions and purpose of the Rules. The Rules exist not simply to form the basis of disciplinary investigations and prosecutions but also to guide lawyers who seek to represent their clients competently, zealously and diligently, within the Rules. Disciplinary Counsel's proposal would complicate things for lawyers who seek to comply with the Rules and make inquiry as to how the Rules apply in a particular situation. Rather than simply being able to identify the Rules that are applicable to their conduct under Rule 8.5(b), they would have to engage in a comparative analysis as to whether those Rules are "materially different" from their D.C. counterparts. Under the current Rules, if a D.C. lawyer litigates before a Michigan court, the D.C. lawyer need only analyze the Michigan Rules to determine what conduct is permitted and what conduct is prohibited. Under the ODC proposal, the lawyer would need also to analyze whether the Michigan Rules were "materially different" in any relevant respects from their D.C. counterparts. The Committee does not recommend the ODC proposal.

IV. Rule 8.5(b)(1) Should Not Be Amended To Come Into Effect "After A Case is Filed" And To Remain Applicable "Until The Case Is Finally Resolved."

The ABA has not amended Model Rule 8.5(b)(1) since 2002. The District of Columbia amended its Rule 8.5(b)(1) to conform to the ABA Model Rule in 2007. The changes made in 2007 were "relatively minor changes" made in order to "promote[] uniformity and permit D.C. Courts to benefit from decisions in other jurisdictions interpreting this Model Rule." Both the Model Rule and D.C. Rule 8.5(b)(1) provide that in the exercise of the disciplinary authority of a jurisdiction, the rules of professional conduct to be applied for conduct in connection with "a matter before a tribunal" shall be "the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise." This language has been adopted by nearly every jurisdiction in the country.

Disciplinary Counsel, in his October 2018 memo to the Committee, also proposed a change to paragraph (b)(1). The recommended change stems from the concern that the current rule is unclear as to whether a lawyer is subject to the rules of the jurisdiction in which the *intended* tribunal sits prior to actually filing a case. The current version of the rule reads as follows:

> (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and . . .[7]

The recommended rule from Disciplinary Counsel is as follows:

> (1) For conduct <u>occurring after a case is filed</u> before a tribunal, <u>and until the case is finally resolved</u>, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and . . .

The Committee's view is that the rule as written is both consistent with the Model Rule and sufficiently clear: Rule 8.5(b)(1) applies only when a matter is actually "pending before a tribunal," and a case cannot be "pending" until it has been filed. Nearly every jurisdiction in the country has adopted the Model Rule or a version that is, for all practical purposes, identical.

Absent an argument that lawyers in D.C. should be subject to a different rule due to the unique aspects of D.C. practice or that the language of a proposed rule is superior to that of the Model Rule, the Rules Committee believes that there are advantages to uniformity in the rules among the various jurisdictions.

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[7] For purposes of comparison, Model Rule 8.5(b)(1) is nearly identical to our current rule:

> (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 . . .

Finally, the Committee notes that the addition of the recommended safe harbor provision to Rule 8.5 will hopefully have the effect of reducing guesswork by both attorneys and the Office of Disciplinary Counsel as to which rules should apply to a lawyer's conduct when multiple jurisdictions are in play.

V. Rule 8.5(b)(2) Should Not Be Amended To Adopt The ABA Version Of The Predominant Effect Test.

In 2002, the ABA adopted Model Rule 8.5(b)(2), which dictates the choice of law analysis for conduct not in connection with a matter before a tribunal:

> (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 [5] to Model Rule 8.5 provides additional guidance on the "safe harbor" provision of Model Rule 8.5(b)(2), with the February 2013 added language underlined:

> [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. <u>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.</u>

Model Rule 8.5(b) does not limit the rules to be applied outside of litigation to the rules of a jurisdiction in which the lawyer is admitted. Instead, based on the "predominant effect" test, the lawyer in theory could be subject to the rules of any jurisdiction where the predominant effect of the lawyer's conduct occurred.

By contrast, D.C. has long preferred to require lawyers to conform their professional conduct to the rules of a jurisdiction in which they are licensed. To that end, D.C. Rule 8.5(b)(2) provides that in the exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied for conduct not in connection with a matter pending before a tribunal shall be as follows:

> (i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and
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> (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Comment [4] elaborates on D.C. Rule 8.5(b)(2) as follows:

> . . . . As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. . . .

Most jurisdictions have either adopted the current version of the ABA choice-of-law rule in Model Rule 8.5(b)(2), in which "predominant effect" is determinative, or have adopted it without significant change.

New York and Wisconsin have adhered to the same approach as D.C. in their versions of Rule 8.5(b)(2). Thus, for a lawyer admitted only in one of those three states, that state's rules of professional conduct follow him or her wherever the lawyer practices law.[8] At present, D.C., New York, and Wisconsin disciplinary authorities will apply only their respective rules or the rules of another admitting jurisdiction.

However, if a D.C. lawyer provides legal services in any of the states that subject out-of-state lawyers to the disciplinary authorities of that state, his or her non-litigation conduct is subject either to (1) to the rules of professional conduct of that state if the conduct has its predominant effect in that state under its Rule 8.5(b)(2) or if the conduct occurs in one of the states that applies its rules to any conduct in that state, or (2) to the rules of professional conduct of any other state where the disciplining state's Rule 8.5(b)(2) points to another state where the predominant effect of the conduct occurred.

This Committee studied this issue at length in connection with the 2007 amendments to the D.C. Rules. It concluded that "the new Model Rule would subject lawyers to substantial burden in trying to determine (a) where the predominant effect of the lawyer's conduct occurs and (b) whether and how that jurisdiction's ethics rules differ from the D.C. Rules of Professional

[8] Six states do not have a paragraph (b) in their Rule 8.5 and thus lack any express choice-of-law rule: Alabama, Kansas, Mississippi, Nevada, New Mexico, and Wyoming. We have not tried to determine if these jurisdictions apply the general choice-of-law rules in the state—which would probably lead to choices similar to ABA Model Rule 8.5(b)(2)—or apply their own rules to the conduct of their own lawyers when engaged in out-of-state conduct.

Conduct, and that any countervailing benefits [e.g., uniformity with the ABA] do not outweigh this burden." In its most recent review of Rule 8.5, the Committee revisited these conclusions and found that they are still valid today. There is often a benefit to uniformity between the D.C. Rules and the ABA Model Rules, particularly where, as here, the ABA Model Rule at issue has gained considerable acceptance. In theory, a lawyer in an ABA Model Rule jurisdiction should be able to predict which jurisdiction's rules would be applied to the lawyer's conduct. The predominant effect analysis can be quite clear – handling a transaction for a Minnesota client to acquire a business in Minnesota from the current owners in Minnesota is not a difficult question with respect to the predominant effect. Under the current D.C. Rule, the predominant effect of the lawyer's conduct might be in a jurisdiction to which the lawyer was not admitted. In this circumstance, the lawyer could be subject to different Rules – one set of Rules dictated under D.C. Rule 8.5(b)(2) and a different set dictated under a jurisdiction following the Model Rules. Ultimately, however, the Committee was persuaded that the D.C. Rule should be retained.

The Committee's reasons for retaining the current D.C. Rule 8.5(b)(2) are generally as follows:

a. **The Model Rule's Predominant Effect Test Is Ill-Suited To Many Areas Of Practice Common In The District Of Columbia**.

Many District of Columbia lawyers and law firms have large regulatory practices. Because of the federal government, the impact of the matters that they handle are nationwide in scope. For example, over the years, various administrations have attempted to modify fuel efficiency standards for new cars and trucks through rule-making proceedings. Under the current D.C. Rules, a lawyer admitted to practice in the District and submitting comments on behalf of a client in that rule-making would almost certainly be governed by the D.C. Rules. Under the Model Rules, the lawyer would have to consider whether the predominant effect of the lawyer's conduct is outside of the District of Columbia, and if so, the jurisdiction of the predominant effect. Is the predominant effect in a regulatory matter in the District of Columbia because that is where the agency handling the matter is located or is the predominant effect elsewhere – where the regulation will have the most effect? The jurisdiction with the most cars or the jurisdiction which manufacturers the most cars or some other jurisdiction?

There are other examples of regulatory matters that have a nationwide reach: the FDA in approving a new drug or in authorizing a generic version of a brand; the SEC in addressing disclosure requirements and accounting standards; EPA regulations under the Clean Air Act; the FDIC in regulating banks; FCC regulation of the internet and of national telecommunications carriers; FCC spectrum sales; Department of the Interior leasing of offshore tracts for oil drilling and exploration and changes to safety regulations imposed in the wake of the Deepwater Horizon explosion and spill. Some of the matters involve a particular party seeking government action, e.g., the FDA approval of a new drug. Others involve setting standards or regulations of nationwide effect, such as EPA Clean Air regulations. [9]

[9] Some federal agencies have their own ethics code (e.g., the USPTO, the IRS), but many simply have vague regulations that do not address many of the ethics issues that routinely arise, particularly conflicts of interests.

The drafters of the Model Rules recognized the problem raised by conduct that has effects in multiple jurisdictions and acknowledged that the predominant effect analysis could be "unclear." Comment [5] to ABA Model Rule states: "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."

In regulatory practices, as elsewhere, it is important to have clarity and consistency as to the ethics rules that govern, particularly in the conflicts area. Analysis of conflicts under the current D.C. Rules are difficult in many lobbying or regulatory settings. If law firms engaged in regulatory practices in the District of Columbia are subject to the predominant effect test, then they would first need to identify the predominant effect jurisdiction and address that matter under the rules of such jurisdiction. One drug approval matter before the FDA might be governed by the Texas Rules; another by the California Rules. One offshore leasing matter might be governed by the Florida Rules and another by the Virginia Rules. All of these various Rules would have to be assessed by lawyers who may not be admitted to practice in the jurisdiction whose Rules are being applied and where they may not have offices or lawyers familiar with those rules.

Finally, none of the cases cited by our colleague's Alternate Proposal to Adopt ABA Model Rule 8.5(b)(2) ("Alternate Proposal") for the proposition that the predominant effect rule is a workable standard addresses the types of matters frequently handled in this jurisdiction. Alternate Proposal at 4-5. "[C]ommon principles such as location of client, location of dispute, and location of harm," are not helpful in determining the "predominant effect" of a matter involving FDA approval of a new drug to be sold nationwide or fuel efficiency standards applicable to every new car and truck sold in America. Alternate Proposal at 4.

b. **The Adoption Of ABA Model Rule 8.5(b)(2) Would Undermine The Studied And Deliberate Policy Choices Of The District Of Columbia And Would Substitute The Policy Choices Of Other Jurisdictions That The District Of Columbia Has Long Rejected.**

The drafters of the District of Columbia Rules have time and time again differed from the ABA Model Rules and the Rules of other states after careful study and consideration. Adoption of ABA Model Rule 8.5(b)(2) would nullify these policy choices and impose upon D.C.-admitted and D.C.–located lawyers in D.C. disciplinary proceedings a hodge-podge of policy choices made by other jurisdictions. District of Columbia lawyers practicing in D.C. could be disciplined by the D.C. disciplinary authorities for conduct violative of another jurisdiction's rules that are inconsistent with the substantive D.C. Rules, even where the D.C. Rules themselves reflected studied and deliberate policy choices to differ from the ABA Model Rules or the Rules of other states.

The areas in which the District of Columbia's view of an issue differs from the ABA's (and the many states that have adopted the Model Rules without substantial modification) include:

- D.C. Rule 1.6(b). The District of Columbia has a different definition of what information is protected by Rule 1.6. D.C. Rule 1.6 protects information subject to the attorney-client privilege and "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." D.C. Rule 1.6(b). Model Rule 1.6 protects "information relating to the representation of a client," a standard that the District of Columbia rejected in drafting the D.C. Rules. *Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the Board of Governors of the District of Columbia Bar* at 52 (November 19, 1986).

- D.C. Rule 1.6(e)(3). The "self-defense" exception under D.C. Rule 1.6(e) differs from and is more protective of clients than the Model Rule. For example, the D.C. Rules do not allow for disclosures in order to establish a claim against a client. *Compare* D.C. Rule 1.6(e)(3) with Model Rule 1.6(b)(5). *See* D.C. Legal Ethics Opinions 363 and 364 (outlining differences between Model Rule and D.C. Rule self-defense exceptions).

- D.C. Rule 1.7(b)(1). D.C.'s rule on general conflicts of interest exempts lobbying activities from the basic conflict rule that a lawyer cannot be adverse to a current client even on an unrelated matter. *See* D.C. Legal Ethics Opinion 344. This provision is unique and is not reflected in the Model Rules or in the rules of any other jurisdiction.

- D.C. Rule 1.7(d). D.C.'s general conflicts rule also takes a unique approach that allows a lawyer, in certain circumstances, to continue to represent both clients when an unforeseeable conflict arises after the outset of the representation (Thrust Upon Conflict).

- D.C. Rule 1.11. D.C.'s conflict rule that applies to former government officials is different from Model Rule 1.11. The D.C. Rule is not waivable. Comment [3] to D.C. Rule 1.11. The ABA Model Rule is waivable. ABA Model Rule 1.11(a)(2). The regulation of "revolving door" situations involving lawyers is an area of significant interest and concern to the D.C. Bar, given the presence of the federal government.

- D.C. Rule 1.13. D.C. has not adopted the "reporting out" portion of Model Rule 1.13(c). This rejection of the Model Rule provision is further evidence of D.C.'s protective stance with respect to client secrets and confidences.

- D.C. Rule 1.15(e). D.C. adopted a provision to Rule 1.15 which allows lawyers to place unearned client funds in an operating account with informed consent from the client. The Model Rule contains no such provision.

- D.C. Rule 4.2(b). D.C. permits a much broader scope of permissible contacts with nonparty employees under D.C. Rule 4.2(b) than the Model Rule, which has been widely adopted.

- D.C. Rule 4.2(d). D.C. has a clearly stated exception to Rule 4.2 with respect to contacts with government officials. *See* D.C. Rule 4.2(d). The ABA Model Rules have an ambiguous comment. Comment [5] to ABA Model Rule 4.2.

- D.C. Rule 5.4(b). D.C. has a unique provision in Rule 5.4 permitting non-lawyer partners, a provision that has been severely criticized elsewhere and not been adopted in any other jurisdiction.

- D.C. Rule 7.1. Unlike almost all other jurisdictions, D.C. hews to the basic notion that lawyer advertising simply must not be false or misleading. Contrast the D.C. approach with the complex schemes of other states which require preservation of ad content and submission of such content to the Bar, restrict solicitation to former clients and family members, etc. On solicitation, the D.C. Rules allow contacting potential clients so long as the contact does not involve coercion, harassment, or duress. D.C. Rule 7.1(b). The ABA, like most states, restricts solicitation to other lawyers or close personal friends or those with whom the lawyer has a prior business relationship.

c. **<u>There Is An Inconsistency Between ABA Model Rule 8.5(b)(2) And The Rules Governing Reciprocal Discipline In The District.</u>**

The District of Columbia has a long-standing policy of not disciplining lawyers for conduct that does not violate the D.C. Rules, even if they are disciplined elsewhere. Rule XI, Section 11 of the Rules of the District of Columbia Court of Appeals addresses reciprocal discipline and provides in most situations for a streamlined process that results in the imposition of like discipline without a new hearing or fact-finding. One exception that forecloses the imposition of reciprocal discipline, however, is where "the misconduct elsewhere does not constitute misconduct in the District of Columbia." Rule XI, Section 11(c)(5). The disciplinary system and Rule XI have been the subject of study and revision over the years and the exception to reciprocal discipline described above has remained through the various changes and revisions to Rule XI. To be consistent, adoption of ABA Model Rule 8.5(b)(2) would mean that the rules for reciprocal discipline would have to be changed. The outcome of a disciplinary matter should not depend on which jurisdiction went first or on whether D.C. Disciplinary Counsel elected to pursue a matter as an "original" case or as a reciprocal matter.

The Alternate Proposal states that D.C.'s policy of not disciplining lawyers for conduct not in violation of the D.C. Rules would hold even with the adoption of the Model Rule. Alternate Proposal at 5. If this prediction is accurate, then the adoption of Model Rule 8.5(b)(2) would accomplish nothing, and the D.C. Rules would suffice. More realistically, the effect of the adoption of ABA Model Rule 8.5(b)(2) by the District of Columbia would be to force the D.C. disciplinary authorities to apply the rules of the predominant effect jurisdiction even if those rules were at variance with the substantive ethics rules of the District. The Alternate Proposal's confidence that

this would not occur leads to the question of what the purpose of adopting ABA Model Rule 8.5(b)(2) would be. If, after ABA Model Rule 8.5(b)(2) is adopted by the District, there will never be any prosecution in the District except for one based on the substantive D.C. Rules themselves, then the proposed new provision will be a nullity that serves no purpose.

The Alternate Proposal also asserts that the current D.C. Rule is inconsistent with its stated principle that the process of determining which rules apply should be as "straightforward as possible." Alternate Proposal at 1-2. The Committee acknowledges that no choice of law provision is perfect but does not agree that the Model Rule standard provides any greater clarity than the current D.C. Rule. As explained above, the application of the predominant effect standard to many of the types of practices prevalent in the District of Columbia will lead to no clear result, but confusion.

The Alternate Proposal asserts that nationwide uniformity is best. This argument has surface appeal but is fundamentally inconsistent with the District of Columbia's long history of deciding for itself what its ethics rules should be. The Alternate Proposal cites the problem of subjecting a lawyer to different sets of rules but does not address the costs of uniformity to the particular policy choices and decisions that have shaped the D.C. Rules since their initial enactment in 1991. (And indeed before – the redline version of the 1986 Jordan Report shows how the District was unwilling to simply adopt the ABA Rules as promulgated by the ABA.) The District should not outsource the standards by which D.C. lawyers practicing in the District are disciplined by D.C. disciplinary authorities to other jurisdictions. If another jurisdiction decides to discipline a D.C. lawyer for conduct that would not violate the D.C. Rules, the District should not compound that deviation from its own policies and rules by simply following along. It would be preferable for the District instead to uphold the conduct of the lawyer disciplined elsewhere if the conduct was consistent with the District's own Rules. This principle is reflected in the rules governing reciprocal discipline and it would be odd to observe them in that context but not in the context of an original proceeding.

VI. Rule 8.5(b) Should Be Amended To Include A Safe Harbor Provision That Protects Lawyers Making Reasonable Decisions About Which Jurisdiction's Rules of Professional Conduct Applies To Their Conduct.

Model Rule 8.5(b)(2) has long contained a safe harbor providing:

> 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.

This provision was thought important to the ABA rule, because the ABA rule makes it possible for the disciplinary authorities of the state to apply *any* state's rules to the lawyers' conduct, so long as the authority determines that the "predominant effect" of the conduct was in that state, and the ABA understood that it is often very difficult to determine whether conduct has a "predominant effect" in one jurisdiction or another. In 2013, the ABA took further steps to address lawyers' uncertainty about the applicable rules under the predominant effect test by adding

a sentence to comment [5] allowing lawyers and clients to specify (so long as the choice of law is reasonable) the jurisdiction whose rules will govern conflicts of interest in certain circumstances.[10]

"Predominant effect" has a much more limited role in D.C. Rule 8.5(b)(2), because it affects the choice of rule only between jurisdictions in which the lawyer is admitted to practice. A substantial number of D.C. lawyers are admitted elsewhere, because of the liberal waive-in provision for D.C. and many lawyers' desire to be admitted in another state in which they have substantial connections or in which they can foresee wanting to practice in the future. Nonetheless, not every case of conduct with a predominant effect elsewhere will be in the other jurisdiction in which the lawyer is admitted. Many will be in still another jurisdiction, and under the D.C.'s Rule 8.5(b)(2), the D.C. disciplinary authorities will not apply the rules of such a third jurisdiction (that is, a jurisdiction in which the lawyer is not admitted).

Further, the D.C. rule already provides some protection for lawyers who may have to make a difficult judgment about which jurisdiction's rule apply: the rules of the jurisdiction of "predominant effect" will be applied only if the lawyer's conduct "clearly" has its predominant effect" in the other jurisdiction in which the lawyer is licensed to practice.

While the Committee is not aware of complaints from lawyers that the protection provided by the word "clearly" is inadequate, D.C. lawyers may occasionally face uncertainty in predicting the application of D.C. Rule 8.5(b)(2) for non-litigation conduct and the application of D.C. Rule 8.5(b)(1) for litigation conduct. For lawyers practicing in organizations with lawyers admitted in many different jurisdictions (as well as D.C.) or in organizations with offices in more than one jurisdiction, the identification of "the admitting jurisdiction in which the lawyer principally practices" will leave room for considerable uncertainty: lawyers admitted in different jurisdictions and lawyers from different offices, admitted in and practicing in those different jurisdictions, may work on the same case. Thus, it may not be clear which lawyer's conduct predominates so as to make a particular jurisdiction's rules presumptively applicable. And because conflict of interest rules principally operate to bar representations by lawyers in a law firm (because of the Rule 1.10 imputation principles), uncertainly about the application of Rule 8.5(b)(2) is possible.

For these reasons, the Committee voted unanimously to address the problem of lawyer uncertainty in a new subparagraph of Rule 8.5(b). New subparagraph (b)(3) would read:

> (3) So long as the lawyer's conduct conforms to the rules of a jurisdiction that the lawyer reasonably believes will be applicable to his or her conduct under paragraph (b)(1) or (b)(2), the lawyer shall not be subject to discipline.

[10] The last sentence of Model Rule 8.5 comment [5] reads as follows:

> 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.

New language explaining this provision is also proposed for comment [5], along with the deletion of language that misleadingly suggest that a lawyer could never be subject to inconsistent rules in the event that multiple jurisdictions proceed against the lawyer.

Appendix A

Existing Rule 8.5 and Comments

D.C. Bar Rules of Professional Conduct

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 may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted 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 to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and

(2) For any other conduct,

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

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

Comment

Disciplinary Authority

[1] Paragraph (a) restates long-standing law.

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. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

[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 an attorney shall be subject to only one set of rules of professional conduct, and (ii) making the

determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a matter pending before a tribunal the lawyer shall be subject only to the rules of professional conduct of that tribunal. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

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

[6] 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.

Appendix B

Recommended Amendments to Rule 8.5 and Comments
With Changes Marked

Subcommittee Proposed Changes to Rule 8.5, With Changes Marked

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 may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction, such as another jurisdiction where the lawyer is admitted or where the lawyer provides or offers to provide legal services, 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 to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and

(2) For any other conduct,

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

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

(3) So long as the lawyer's conduct conforms to the rules of a jurisdiction that the lawyer reasonably believes will be applicable to his or her conduct under paragraph (b)(1) or (b)(2), the lawyer shall not be subject to discipline.

Comment

Disciplinary Authority

[1] ~~Paragraph (a) restates long-standing law.~~A lawyer may be subject to more than one jurisdiction's disciplinary authority, regardless of what set of rules of professional conduct those authorities may apply. The lawyer may be licensed to practice in more than one jurisdiction, may be admitted to practice before a particular court or tribunal, or may be authorized to practice in another jurisdiction under that jurisdiction's practice rules, which may include a version of the ABA's widely adopted Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). Many jurisdictions have adopted a variation of the ABA's Model Rule 8.5(a), which provides, in part, "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." Although paragraph (a) subjects a lawyer admitted in the District of Columbia to D.C. disciplinary authorities regardless of where the lawyer's conduct occurs, the permissibility of the conduct in the other jurisdiction is a factor that the D.C. disciplinary authorities shall take

into account in deciding whether to take action under these rules. In addition, the Rules of the D.C. Court of Appeals provide that reciprocal discipline for a violation of another state's rules of professional conduct will not be applied if "[t]he misconduct elsewhere does not constitute misconduct in the District of Columbia."

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, 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, or may be entitled to practice temporarily in another jurisdiction that conditions such practice on compliance with the rules of professional conduct of that jurisdiction. Many states that exercise disciplinary authority over out-of-state non-litigating lawyers have adopted the ABA's Model Rule 8.5(b)(2), and thus will apply "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." ~~In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.~~

[3] Paragraph (b) seeks to resolve ~~such~~ potential conflicts concerning the ~~applicable~~ rule that D.C. disciplinary authorities will apply. 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 an attorney shall be subject to only one set of rules of professional conduct for litigation conduct, and only one set of rules of professional conduct of a jurisdiction in which the lawyer is admitted to practice for nonlitigation conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a matter pending before a tribunal the lawyer shall be subject only to the rules of professional conduct of the jurisdiction in which the~~that~~ tribunal sits, unless the rules of the tribunal provide otherwise. As to all other conduct, paragraph (b)(2) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction in which he or she is admitted, it may not be clear where the predominant effect of the lawyer's conduct will occur. Moreover, it may not be clear what conduct is "in connection with a matter pending before" a particular tribunal and thus subject to the rules of the jurisdiction in which the tribunal sits or of the tribunal. Under paragraph (b)(3), so long as the lawyer conforms his or her conduct to the rules of the jurisdiction that he or she reasonably believes will be applicable, the lawyer will not be subject to discipline in this jurisdiction.~~If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.~~

[6] 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.

Appendix C

Recommended Amendments to Rule 8.5 and Comments
With Changes Incorporated and Not Marked

Subcommittee Proposed Changes to Rule 8.5
(With Changes Incorporated and Not Marked)

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 may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction, such as another jurisdiction where the lawyer is admitted or where the lawyer provides or offers to provide legal services, 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 to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and

(2) For any other conduct,

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

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

(3) If the lawyer's conduct conforms to the rules of a jurisdiction that the lawyer reasonably believes will be applicable to his or her conduct under paragraph (b)(1) or (b)(2), the lawyer shall not be subject to discipline.

Comment

Disciplinary Authority

[1] A lawyer may be subject to more than one jurisdiction's disciplinary authority, regardless of what set of rules of professional conduct those authorities may apply. The lawyer may be licensed to practice in more than one jurisdiction, may be admitted to practice before a particular court or tribunal, or may be authorized to practice in another jurisdiction under that jurisdiction's practice rules, which may include a version of the ABA's widely adopted Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). Many jurisdictions have adopted a variation of the ABA's Model Rule 8.5(a), which provides, in part, "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." Although paragraph (a) subjects a lawyer admitted in the District of Columbia to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs, the permissibility of the conduct in

the other jurisdiction is a factor that the D.C. disciplinary authorities shall take into account in deciding whether to take action under these rules. In addition, Rule XI, Section 11(c)(5) of the Rules Governing the District of Columbia Bar provides that reciprocal discipline for a violation of another state's rules of professional conduct will not be applied if "[t]he misconduct elsewhere does not constitute misconduct in the District of Columbia."

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, 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, or may be entitled to practice temporarily in another jurisdiction that conditions such practice on compliance with the rules of professional conduct of that jurisdiction. Many states that exercise disciplinary authority over out-of-state non-litigating lawyers have adopted the ABA's Model Rule 8.5(b)(2), and thus will apply "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."

[3] Paragraph (b) seeks to resolve potential conflicts concerning the rule that D.C. disciplinary authorities will apply. Its premise is that minimizing uncertainty about which rules the D.C. disciplinary authorities will apply 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 an attorney shall be subject to only one set of rules of professional conduct for litigation conduct, and only one set of rules of professional conduct of a jurisdiction in which the lawyer is admitted to practice for nonlitigation conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a matter pending before a tribunal the lawyer shall be subject only to the rules of professional conduct of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise. As to all other conduct, paragraph (b)(2) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction in which he or she is admitted, it may not be clear where the predominant effect of the lawyer's

conduct will occur. Moreover, it may not be clear what conduct is "in connection with a matter pending before" a particular tribunal and thus subject to the rules of the jurisdiction in which the tribunal sits or of the tribunal. Under paragraph (b)(3), so long as the lawyer conforms his or her conduct to the rules of the jurisdiction that he or she reasonably believes will be applicable, the lawyer will not be subject to discipline in this jurisdiction.

[6] 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.