

**RULE 8.5:
DISCIPLINARY AUTHORITY AND CHOICE OF LAW**

Executive Summary

Rule 8.5(a) announces three basic propositions: First, New York lawyers are subject to discipline in New York regardless of where their conduct occurs. Second, non-New York lawyers who offer or provide legal services in New York are subject to discipline here. Third, a lawyer may be subject to discipline in multiple jurisdictions for the same conduct. Rule 8.5(b) provides a choice of law rule for discipline within New York.

Proposed Rule 8.5 is identical to the proposed amendments to the New York Code approved by the House of Delegates of the NYSBA on June 21, 2003 and now under consideration by the Appellate Divisions.

Text of Proposed Rule with COSAC Explanation

RULE 8.5 DISCIPLINARY AUTHORITY AND CHOICE OF LAW	COSAC COMMENTARY
<p>(a) Disciplinary Authority. A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this state if the lawyer provides or offers to provide any legal services in this state. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction for the same conduct.</p> <p>(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:</p> <p>(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and</p> <p>(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</p>	<p>The proposed Rule is identical to DR 1-105 as approved by the House of Delegates of the NYSBA on June 21, 2003.</p>

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

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this state is subject to the disciplinary authority of this state. Extension of the disciplinary authority of this state to other lawyers who provide or offer to provide legal services in this state 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. The fact that the lawyer is subject to the disciplinary authority of this state may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[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. Paragraph (b) of this Rule seeks to resolve such potential conflicts. Its premise is that

COSAC COMMENTARY

The proposed Comments are identical to EC 1-19 through 1-22 as adopted by the House of Delegates of the NYSBA on June 21, 2003 (except for re-numbering of internal cross references). References given below indicate the corresponding Model Rules Comments.

See Model Rules Comment [1]

See Model Rules Comment [3].

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.

[3] [Omitted.]

[4] Paragraph (b)(1) of this Rule 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 professional conduct of that tribunal. 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. 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.

[5] [Omitted.]

See Model Rules Comment [4], [5].

<p>[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule or its counterpart, 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. 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.</p> <p>[7] [Omitted.]</p>	<p>See Model Rules Comment [6], [7].</p>
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Changes from Existing New York Code

The entire proposed Rule is identical to the proposed amendments to the New York Code approved by the House of Delegates of the NYSBA on June 21, 2003 and now under consideration by the Appellate Division (except for renumbering of internal cross references).

Reporter's Notes

The Proposed Rule is substantively the same as proposed DR 1-105. COSAC only altered the formatting to correspond with that used throughout these Proposed Rules.

Corresponding New York Disciplinary Rules

DR 1-105 Disciplinary Authority and Choice of Law.

A. A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

B. In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

1. For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

2. For any other conduct:

a. If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

b. If the lawyer is licensed to practice in this state 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.