

## CHAPTER 7

### MULTI-STATE ISSUES

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#### §7.1 OVERVIEW

Conflicts of interest rules are not identical in every state. For example, in some jurisdictions, representing multiple clients with adverse interests in the same matter is flatly prohibited, regardless of the clients' consent. So whose conflicts rules apply when a business client is represented by a Washington attorney in another state, perhaps because the client resides in the other state or perhaps because the business transaction for which the client is represented takes place in the other state? Whose rules apply when a Washington attorney is also a member of and subject to the bar of another jurisdiction? If you are in a multi-state law firm, whose rules apply when more than one office is involved in an engagement? And what happens when a law firm staffs a business engagement with several attorneys when perhaps none of them share membership in the same bar? Is it possible that each attorney is governed by different conflicts rules while working on the same deal? Is it possible that more than one state's conflicts rules are applicable?

Because many business engagements transcend jurisdictional boundaries, the opportunities for running afoul of some state's ethics rules abound. It may come as a surprise to some Washington lawyers, but Washington's ethics rules may not be the only rules that govern the engagement. In fact, a lawyer may be governed by the ethics rules of more than one jurisdiction at the same time. And other lawyers in the same law firm working on the same transaction, and indeed the law firm itself, may be "governed by" different sets of ethics rules.

We care about this for at least two important reasons. First, of course, because individual attorneys are subject to disciplinary action for violation of the ethics rules of the jurisdictions in which they are admitted. And second, because law firms as well as individual attorneys may incur professional liability based on a violation of the governing rules, e.g., for an impermissible conflict of interest. The issues raised in this chapter are applicable to lawyers in Washington-only based practices who may only occasionally stray out of this state as well as to lawyers in multi-state law firms who routinely practice around the country or around the world.

## §7.1 / MULTI-STATE ISSUES

**Note:** This chapter does not discuss the myriad of issues related to the unauthorized practice of law by practicing in a state other than the state to which a lawyer may be admitted. A discussion of issues to be considered by transactional lawyers may be found in Comment (e) to §3 of the RESTATEMENT OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 2, April 6, 1998), entitled “Extra-jurisdictional practice by lawyer.”

Unfortunately, there is no clear guidance, and very little learning, to be found at this time on the subject of conflicts of interest rules in multi-jurisdictional practice. (For a general discussion of multi-state practice of law and its numerous implications, see *Symposium: Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657 (1995).) The American Bar Association, through its Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct, has begun serious study of multi-jurisdictional practice issues. See the Commission’s website at [www.abanet.org/cpr/ethics2k.html](http://www.abanet.org/cpr/ethics2k.html). But until there is a coherent national policy, the most conservative, and not necessarily welcome, advice is to analyze the conflicts of interest rules in every jurisdiction that could possibly apply—every jurisdiction where the law firm has a participating office, where it has participating attorneys licensed to practice, where the clients reside, and where the business transaction has significant contacts—and let the most restrictive rules be your guide. However, even this advice assumes that there is no irreconcilable conflict among the possibly applicable ethics rules—i.e., one state’s rules require certain conduct and another state’s rules flatly prohibit such conduct. (It may be some consolation that this dilemma is more likely to arise in the area of maintaining client confidences, for example, than in the area of conflicts of interest.)

Consider the risks associated with the following hypothetical example: A State X-resident partner of a “Seattle based” law firm with “satellite offices” in State X and the District of Columbia (each office staffed with lawyers licensed in those jurisdictions) wants to represent two State X resident clients in a new “local matter” in D.C., using associates from State X, Washington and D.C. Both are regular clients of the law firm’s State X office, and the firm has previously represented both in a series of deals in State X based upon oral conflicts waivers, as permitted in State X. (State X allows a lawyer to represent multiple clients with adverse interests with the consent of each client, which need not necessarily be written.) Can the law firm undertake the engagement for the new matter in exactly the same way it has done for previous matters, i.e., with the two clients’ oral consent? Although the answer to that question may depend on facts not presented here, it is relevant to know that Washington also allows multiple representation with consents, *but requires that the clients’ consents be in writing*. But even worse, the District of Columbia *more broadly prohibits representing multiple clients with adverse interests in the same matter* than does Washington or State X. So the State X partner, not aware of the conflicts rules in Washington or the District, may have created exposure for her law firm. Additionally, the associates in the District and in the state of Washington could also face disciplinary action.

Or consider the following hypothetical example: An attorney based in Washington represents a corporation and its two shareholders in a “friendly merger” with an LLC based in Oregon, whose sole member is one of the two shareholder-clients. The attorney has obtained written waivers of the conflict from the two shareholder-clients, from the corporation, and from the LLC, as required in Washington. Both the LLC and its member reside in Oregon, but the corporation and the other

shareholder reside in Washington. Later, relations between the two shareholder-clients disintegrate, and the shareholder/member-client—who consented in writing to the conflict—later sues the attorney, claiming that she incompetently represented the LLC and him in his capacity as its sole member, or intentionally sold them out to the corporation, all of which the attorney denies. It turns out that Oregon, the state where the unhappy shareholder/member-client resides, permits written conflict waivers *but such waiver is not effective unless the lawyer advises the client to seek independent legal advice before reaching a decision*. It may also be that Oregon has stricter conflicts rules in this situation than Washington. Is the written conflict waiver effective? Or does the attorney have exposure based on an invalidly waived conflict under the Oregon Rules of Professional Conduct?

## **§7.2 CHOICE OF CONFLICTS OF INTEREST RULES IN BUSINESS TRANSACTIONS INVOLVING MULTIPLE STATES: WASHINGTON AND MODEL RULE 8.5**

The Washington Rules of Professional Conduct (WRPC) do not address multi-jurisdictional practice other than to say a lawyer admitted in Washington is subject to Washington disciplinary authority.

### **RULE 8.5 JURISDICTION**

**A lawyer licensed or admitted for any purpose to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.**

As one can readily see, Washington rule 8.5 does not give much guidance. It states the obvious: that lawyers admitted in Washington are subject to Washington's disciplinary authority. ("Admitted" means either regularly admitted or admitted pro hac vice.) The rule does not inform the lawyer whose substantive ethics rules might be applied in a multi-jurisdictional action, and there is no implication that the Washington rules should be the lawyer's exclusive disciplinary authority either.

Washington rule 8.5, adopted in 1985, is based on the older 1983 ABA Model Rule of Professional Conduct 8.5 ("Old Model Rule 8.5"). In 1993, the American Bar Association adopted an amended Model Rule 8.5 ("New Model Rule 8.5") which deals with multi-jurisdictional practice issues.

### **ABAMODEL 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 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,**

**(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 longstanding law.

**Choice of Law**

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct that 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 a lawyer 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 proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court. 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 is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

**Model Code Comparison**

There was no counterpart to this Rule in the Model Code.

ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 603-04 (ABA 4th ed. 1999).

Because New Model Rule 8.5 has not been adopted in Washington, it has no binding authority in Washington although it might, like any other rule or secondary source, be looked to for guidance.

New Model Rule 8.5 does several things that Washington rule 8.5 does not. First, New Model Rule 8.5(a) makes clear that it does not matter where the lawyer's conduct occurs in order for the lawyer to be subject to the disciplinary *authority* of his or her home bar, and that attorneys are potentially subject to the disciplinary *authority* of more than one jurisdiction for the same conduct.

Second, New Model Rule 8.5(b) includes a provision on “choice of law.” For conduct that is not court-related, under New Model Rule 8.5(b)(2)(i), when the lawyer is admitted to only one jurisdiction, the rules of the admitting jurisdiction apply. However, under New Model Rule 8.5(b)(2)(ii), when a lawyer is admitted to more than one jurisdiction, the rules of the jurisdiction in which the lawyer (not the law firm) *principally practices* will apply, unless the conduct has its predominant effect in another jurisdiction where the lawyer is also admitted, in which case the rules of that jurisdiction will apply.

But even relying on New Model Rule 8.5 may be problematic, at least in terms of providing guidance in avoiding professional liability exposure of a law firm based on a conflict of interest. Because it relates to attorney discipline, New Model Rule 8.5 focuses on the individual attorney involved in a matter, implicitly treating the attorney as a solo practitioner. This is helpful in terms of clarifying attorney discipline jurisdiction, which inherently affects individual attorneys. But conflicts of interest rules implicate the involved law firm as well, and New Model Rule 8.5 offers little useful guidance in that respect. *See Symposium: Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657 (1995).

### **§7.3 A LAWYER COULD BE SUBJECT TO DISCIPLINE IN A STATE IN WHICH HE OR SHE IS NOT ADMITTED**

A lawyer could be subject to discipline in a state in which he or she is not licensed, if the lawyer provides legal services in that state. The Comments to both the Old and New Model Rule 8.5 are silent on the issue of a jurisdiction’s right to discipline a lawyer not admitted to its bar who renders legal services within the jurisdiction. However, a few states (Alaska, Arkansas, California, Maryland, Michigan, and North Dakota) have expressly reserved the right to discipline an attorney who is not licensed or admitted to its bar but who nonetheless renders legal services within the state. Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer At All?*, 36 S. TEX. L. REV. 715, 749 (1995).

### **§7.4 POLICY CONSIDERATIONS IN CONFLICTS OF INTEREST**

If there are no clear rules regarding the choice of conflicts of interest standards in a multi-state business engagement, courts can make a determination based on general choice of law policy considerations. The Comment to New Model Rule 8.5 states: “If the rules of professional conduct in...two jurisdictions [in which a lawyer is licensed and practices] differ, principles of conflict of laws may apply.” Although not ethics issues, the standards to which an attorney will be held in a malpractice action, *see Boyson, Inc. v. Archer & Greiner, P.C.*, 308 N.J. Super. 287, 705 A.2d 1252 (1998), or in an action regarding attorney negligence toward a non-client, *see Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996), and rules regarding contingent fee agreements, *see Mitzel v. Westinghouse Electric Corp.*, 72 F.3d 414 (3d Cir. 1995), may also be determined by analogous choice of law principles, and are not necessarily those of the attorney’s home state.

## §7.6 / MULTI-STATE ISSUES

### §7.5 CHOICE OF ETHICS RULES BY CONTRACT? PROBABLY NOT

In dealing with conflicts of interest in business transactions, it is clearly prudent (and required in states including Oregon and Washington) to get the informed consent of each party in writing. Is it possible to choose which state's ethics rules apply to multi-state engagements at the same time in the same conflict waiver document? To do so would seem to have obvious advantages for the law firm and perhaps the clients as well. See Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer At All?*, 36 S. TEX. L. REV. 715, 793 (1995), for an interesting proposal to allow choice of ethics jurisdiction by contract. Unfortunately, however, the better argument is that a lawyer cannot bargain with a client for the application of ethics rules. See Arvid E. Roach II, *The Virtues of Clarity: The ABA's New Choice of Law Rule for Legal Ethics*, 36 S. TEX. L. REV. 907, 928 (1995).

### §7.6 CARDINAL POINTS

1. Washington retains disciplinary *jurisdiction* over all members of the Washington Bar. However, in considering disciplinary action against an attorney, Washington may look to the substantive ethics rules of another state in appropriate circumstances.
2. For individual attorneys involved in business transactions, as to disciplinary matters, the rules of the bar of their home state—i.e., their principal place of practice—should apply, unless they are also a member of the bar of another jurisdiction and the transaction takes place in that other jurisdiction, in which case the rules of that other jurisdiction will probably apply.
3. The rules that apply to law firms may not be the same as those that apply to individual attorneys. Prudence dictates that for business engagements, the law firm examine the residence of all potential clients in a conflict of interest, the location of the transaction, the states of bar admission and residences of the attorneys who are likely to staff the engagement, and the states in which the firm has its offices, particularly the offices most involved in the engagement. After examining the conflicts rules of these states, the law firm should act in a way that is consistent with the most restrictive rules whenever possible.