

(September 13, 2007 - as approved by the Task Force on Multijurisdictional Practice of Law)

RULE 8.5 Disciplinary Authority; Choice Of Law

(a) Disciplinary Authority. A lawyer admitted to practice in Virginia is subject to the disciplinary authority of Virginia, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing or offers to provide legal services in Virginia. By doing so, such lawyer consents to the appointment (insert here an official designated by the Supreme Court of Virginia) as his agent for purposes of notices of any disciplinary action by the Virginia State Bar. A lawyer may be subject for the same conduct to the disciplinary authority of Virginia and any other jurisdiction where the lawyer is admitted.

(b) Choice of Law. In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court, agency or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency or other tribunal sits, unless the rules of the court, agency or other tribunal provide otherwise;

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred; and

(3) notwithstanding subparagraphs (b)(1) and (b)(2), for conduct in the course of providing, holding out as providing or offering to provide legal services in Virginia, the Virginia Rules of Professional Conduct shall apply.

COMMENT

Disciplinary Authority

[1] In the past, a jurisdiction's authority to discipline a lawyer has been based upon whether the lawyer is admitted in that jurisdiction. Subparagraph (a) is a significant change in that a lawyer not admitted in Virginia is nonetheless subject to the disciplinary authority of Virginia for conduct occurring in the course of providing, holding himself out as providing or offering to provide legal services in Virginia. Subparagraph (a) adopts the scope of jurisdiction recommended by the ABA Model Rules for Lawyer Disciplinary Enforcement, as amended in 1996, by extending Virginia's disciplinary authority to any lawyer who commits misconduct within Virginia.

It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide

legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints (insert here an official designated by the Supreme Court of Virginia) to receive service of process in this jurisdiction.

Choice of Law

[2] Subparagraph (b) seeks to resolve conflicts that may arise when a lawyer is subject to the rules of more than one jurisdiction. The rules of one jurisdiction may prohibit the questioned conduct while the rules of another jurisdiction may permit it. A lawyer admitted in only one jurisdiction may also be subject to the rules of another jurisdiction in which he is not admitted to practice for conduct occurring in the course of providing, holding himself out as providing or offering to provide legal services in the non-admitting jurisdiction. Also, a lawyer admitted in one jurisdiction may be subject to the rules of another jurisdiction if he appears before a court, agency or other tribunal in that jurisdiction.

[3] If the lawyer appears before a court, agency or other tribunal in another jurisdiction, subparagraph (b)(1) applies the law of the jurisdiction in which the court, agency or other tribunal sits. In some instances, the court, agency or other tribunal may have its own lawyer conduct rules and disciplinary authority. For example, the United States Patent and Trademark Office ("PTO"), through the Office of Enrollment and Discipline, enforces its own rules of conduct and disciplines practitioners under its own procedures. A lawyer admitted in Virginia who engages in misconduct in connection with practice before the PTO is subject to the PTO rules, and in the event of a conflict between the rules of Virginia and the PTO rules with respect to the questioned conduct, the latter would control.

[4] As to other conduct, if jurisdictions have conflicting rules regarding the questioned conduct, subparagraph (b)(2) resolves the conflict by choosing the rules of the jurisdiction where the conduct occurred. The physical presence of the lawyer is not dispositive in determining where the questioned conduct occurred. Determining where the lawyer's conduct occurred in the context of transactional work, may require the appropriate disciplinary tribunal to consider other factors including the residence and place of business of any client, third person or public institution such as a court, tribunal, public body or administrative agency the interests of which are materially affected by the lawyer's actions.

PRIOR RULE COMPARISON

Virginia Rule 8.5 made no provision for disciplinary authority over a lawyer not admitted to practice in Virginia. Rather, a non-lawyer who committed misconduct in Virginia was subject to Virginia's unauthorized practice of law rules and the authority of the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law.

Under former Rule 8.5 (b)(2) if a lawyer was subject to the rules of more than one jurisdiction, the rules of the jurisdiction in which the lawyer principally practiced applied unless the conduct had its predominant effect in another jurisdiction in which the lawyer was admitted to practice. The former rule, however, did not provide clear guidance if the lawyer's conduct occurred in a jurisdiction where the lawyer was not admitted.

COMMITTEE COMMENTARY

The Committee adopted this Rule in light of the ABA recommendation that the states adopt more specific rules governing multi-jurisdictional practice. Like ABA Model Rule 8.5 (a), this rule states that for conduct occurring in the course of providing, holding oneself out as providing or offering to provide legal services in Virginia the Virginia State Bar may exercise disciplinary authority over a lawyer not admitted in Virginia. Consistent with ABA Model Rule 8.5, the Virginia rule adopts choice of law rules for circumstances in which the lawyer is subject to the professional conduct rules of more than one jurisdiction and they conflict. The Virginia rule adopts verbatim ABA Model Rule 8.5 (b)(1), applying the rules of the jurisdiction in which the court, agency or other tribunal sits. The Committee, however, did not adopt the "predominant effect" test used in ABA Model Rule 8.5 (b)(2), favoring instead the application of the rules of the jurisdiction in which the lawyer's conduct occurred. Virginia Rule 8.5 (b)(3) is new. The Committee did not adopt *ABA Model Rule Comments 1-7*.