Choice of Law or Law of Choice?

N.Y. Rule 8.5

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Rule 8.5: Simply Complex

Last but not least in the New York Rules of Professional Conduct (the Rules) is Rule 8.5: Disciplinary Authority and Choice of Law. It is placed at the very end of a series of ethics rules addressing the obligations owed by lawyers and law firms to clients, courts, adverse parties, opposing counsel, colleagues and the legal system. Rule 8.5(a) functions as a disciplinary long-arm statute, in that it codifies New York’s authority to discipline a New York-admitted attorney no matter where the conduct at issue occurs. Rule 8.5(b) describes which ethics rules will apply in an exercise of the disciplinary authority of New York State, including in instances where an attorney is admitted in multiple jurisdictions.

Consider the following: a lawyer admitted to practice in New York and Texas is working on a multi-state class action litigation that has been consolidated for trial in Florida. The lawyer works in the New York office of a California-headquartered law firm approximately eight months per year, and in its Texas office during the remainder of the year. The lawyer frequently works in transit, taking advantage of time spent on trains, planes and automobiles. The firm’s clients are primarily based in California, and the majority of its revenues come from California. If, for example, a question arises as to confidentiality or conflicts of interest involving the lawyer’s handling of the class action litigation, which state’s ethics rules will, according to New York rules, apply?

This is exactly the type of complex question that Rule 8.5 is intended to resolve. In practice, however, Rule 8.5 raises just as many questions as it answers. These open questions are highly significant in light of the increasing nationalization, globalization and virtualization of the practice of law and may catch even the most diligent of lawyers by surprise. Rule 8.5 reads as follows:

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:

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

(ii) 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.

Exercise of Disciplinary Authority: Rule 8.5(a)

Rule 8.5(a) stands for the proposition that “[a] lawyer admitted to practice in [New York] is subject to the disciplinary authority of [New York], regardless of where the lawyer’s conduct occurs.” For lawyers admitted in more than one jurisdiction, Rule 8.5(a) further provides that
“[a] lawyer may be subject to the disciplinary authority of both [New York] and another jurisdiction where the lawyer is admitted for the same conduct.”

Although Rule 8.5(a) may be longstanding, it is not as clear as its framers may have anticipated. Right off the bat, the term “admitted to practice” is not defined, thus generating questions regarding to whom the Rule actually applies. It is well-established that if a lawyer is admitted in New York State — whether admitted in another jurisdiction or not — the Rule applies irrespective of where the conduct occurs. Moreover, if a lawyer is only admitted in New York State and in no other jurisdiction, conformity with the Rule will be the standard against which that lawyer’s conduct will be judged by New York disciplinary authorities.

However, to what extent does the Rule apply to a lawyer who practices before a particular New York court or tribunal for purposes of a specific proceeding, but who is not generally admitted to practice in New York? Professor Roy Simon suggests that Rule 8.5(a) should be read to apply to all of the following: (1) permanent members of the New York Bar in good standing (excluding inactive, suspended, or disbarred lawyers); (2) out-of-state or foreign lawyers admitted for purposes of a particular proceeding before a federal or state court or administrative agency located in New York State; (3) foreign legal consultants who are admitted in New York for limited purposes pursuant to 22 N.Y.C.R.R. Part 521; and (4) in-house counsel who are duly registered pursuant to 22 N.Y.C.R.R. Part 522. In addition to the above, New York State disciplinary authorities may impose discipline against lawyers who are not admitted in New York State on the basis of violating Rule 5.5, which prohibits engaging in the unauthorized practice of law.

**Choice of Law: Rule 8.5(b)**

Rule 8.5(b) governs which jurisdiction’s ethics rules will apply in an exercise of the disciplinary authority of New York State. It is designed to ensure that New York disciplinary authorities apply only one set of ethics rules to any particular conduct by a lawyer. Rule 8.5(b) distinguishes between an attorney’s conduct “in connection with a proceeding in a court,” and “any other conduct.” For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice, “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.” For all other conduct, “if the lawyer is licensed to practice only in this state the rules to be applied shall be the rules of this state.” However, if a lawyer is admitted in both New York and another jurisdiction, whether the laws of another admitting jurisdiction apply will generally depend upon (1) where the New York lawyer has been “admitted to practice” or may be deemed to have been admitted to practice; (2) where the lawyer “principally practices”; and (3) whether the predominant effect” of the lawyer’s practice will be in another admitting jurisdiction or in New York. Generally speaking, the rules to be applied to such a lawyer shall be the rules of the admitting jurisdiction in which the lawyer principally practices, unless the particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is admitted to practice.

**Conduct in Connection With a Court Proceeding**

Rule 8.5(b)(1) is notable in two respects. First, by its terms it applies only to proceedings before a “court” and seemingly does not include conduct occurring before an administrative tribunal or other quasi-judicial body. The limitation of Rule 8.5(b)(1) to conduct before a “court” as opposed to a “tribunal” was apparently deliberate, as the drafters explicitly define the term “tribunal” in the Rules and use it throughout the Rules, most notably in Rules 3.3, 3.4, 3.5 and 8.4. As noted by the N.Y. State Bar Association Committee on Professional Ethics (the Committee), “[i]n adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word ‘tribunal’ for the word ‘court.’”

In that opinion, the Committee concluded that Rule 8.5(b)(2), as opposed to Rule 8.5(b)(1), applied to determine which jurisdictions’ ethics rules apply to a New York-licensed federal government attorney appearing before the Merit Systems Protection Board, an administrative tribunal established to hear appeals by federal government employees from adverse employment actions. In formulating its opinion, the Committee “[did] not believe [it was] free to read ‘court’ in Rule 8.5(b)(1) to include administrative tribunals . . .” Likewise, in N.Y. State Bar Op. 1011 (2014), the Committee found that Rule 8.5(b)(2), rather than Rule 8.5(b)(1), is applied to establish which jurisdictions’ ethics rules apply to a New York attorney who made false representations to the Department of Labor as part of an application for a foreign-workers’ visa.

Second, Rule 8.5(b)(1) extends only to conduct “in connection with a proceeding” in a court. It is logical that “once [a] matter has been filed, the phrase ‘in connection with a proceeding’ should be read to encompass all future factual and legal investigation, drafting court papers, dealings with opposing counsel, court appearances, and all other work billed to the matter in question.” However, it is unclear whether pre-filing conduct constitutes “conduct in connection with a proceeding.” Professor Simon suggests that Rule 8.5(b)(1) does not apply to conduct until a proceeding is actually filed. Consequently, the rules governing a litigator’s conduct may change once a suit is filed. This is similar to the scenario envisioned in N.Y. State Bar Op. 1054 (2015), where the Committee opines that a lawyer admitted in New York and Pennsylvania seeking to practice in federal court in Virginia is generally subject to the ethics rules of...
Virginia when representing a client in a proceeding in a court in that state, but subject to the rules of the “admitting jurisdiction” (subject to an analysis under Rule 8.5(b)(2)) when not representing a client before a court there.

Any Other Conduct
Rule 8.5(b)(2) applies to “any other conduct” that does not occur “in connection with a proceeding in a court” and is therefore not covered by Rule 8.5(b)(1). This is not merely a distinction between litigation and non-litigation practices. Professor Simon identifies six major categories of conduct to which Rule 8.5(b)(2) applies, including
1. litigation activities in a court before which a lawyer has not been admitted, including (a) activities that occur before a lawyer is admitted pro hac vice, and (b) conduct by associates who are assisting a partner with litigation in a court where the partner is admitted, but where the associates are not and may never be admitted;
2. all legal services other than litigation, including all transactions, office practice, counseling, appearances before legislative bodies, and other advocacy not connected to court proceedings;
3. activities where a lawyer is not representing a client, such as conduct related to the business of practicing law;
4. conduct unrelated to the practice of law, such as a lawyer’s personal life;
5. alternative dispute resolution proceedings where a lawyer is representing a client; and
6. alternative dispute resolution proceedings in which a lawyer is serving as a neutral.17

The Committee has similarly observed that “all other conduct” encompasses various categories of conduct, including
1. adversarial matters (i.e., matters with an opposing party) that are pending before (a) a state or federal agency, (b) an arbitrator not annexed to a court, or (c) some other adjudicative body that is not a “court” (see Rule 1.0(w) defining “Tribunal”);
2. non-adversarial matters before a government agency, such as prosecuting patents in the U.S. Patent and Trademark Office, filing papers with the Securities and Exchange Commission, and requesting private letter rulings from the Internal Revenue Service;
3. transactional matters, such as mergers and acquisitions, contract negotiations, and formation of partnerships; and
4. counseling-only matters, such as tax advice, estate planning advice, advice on corporate by-laws, and other counseling matters involving neither a government agency nor an opposing party.18

Thus, the scope of Rule 8.5(b)(2) is enormous, and understanding its application and effect is crucial for any lawyer admitted in more than one jurisdiction and engaged in multijurisdictional practice, including temporary practice by a New York lawyer in another state pursuant to its versions of Rule 5.5 (addressing multijurisdictional practice) and Rule 8.5 of the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules).19

Subsection (i) to Rule 8.5(b)(2) provides that where “the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state.”20 For lawyers admitted in both New York and another jurisdiction, Rule 8.5(b)(2)(ii) provides that “the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if the 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” (emphasis added). Thus, the rules of the place where the conduct has its “predominant effect” will control if the lawyer is admitted there; otherwise the place of the lawyer’s principal practice will control.21

Principal Practice
Rule 8.5(b)(2)(ii) provides no guidance as to how a lawyer should determine the jurisdiction in which he or she “principally practices.” Such lack of guidance has significant practical implications for attorneys practicing in multiple jurisdictions, as one can imagine several different approaches to this issue. For instance, lawyers could determine that they “principally practice” in the jurisdiction in which their law firm has its offices, even if the firm is headquartered in a different state or foreign country. Or, they could look to the location of their clients’ business operations or residence. Where the lawyers are litigators, they could look to the state in which they most often try cases. Alternatively, they could consider some combination of these and other factors to determine where they “principally practice” and thus what jurisdiction’s rules would apply to their conduct.

With the growing trend of legal services being delivered over the Internet and the resulting decline in the significance of a “brick and mortar” office presence, where a lawyer “principally practices” is becoming increasingly unclear. Professor Simon suggests that the following five
factors are relevant in determining where a lawyer “princially practices”:
1. calendar days spent working in each jurisdiction;
2. hours billed in each jurisdiction;
3. location of clients served;
4. activities in each jurisdiction; and
5. special circumstances (such as a recent move, an extended illness, or a natural disaster).\textsuperscript{22}

Professor Simon would give dispositive weight to the first factor, calendar days spent working in each jurisdiction, in a typical case.\textsuperscript{23}

However, other factors besides time could be relevant in determining where a lawyer principally practices, depending on the facts and circumstances pertaining to that individual lawyer.\textsuperscript{24} Thus, Rule 8.5(b)(2)(ii) leaves the dual or multi-licensed lawyer with a multijurisdictional practice with no bright-line rule for determining which jurisdiction’s ethics rules would apply to his or her conduct.

**Predominant Effect**

Pursuant to Rule 8.5(b)(2)(ii), if the lawyer’s conduct clearly has its “predominant effect” in another jurisdiction, and the lawyer is licensed to practice in that jurisdiction, then the rules of that jurisdiction “shall be applied to the conduct.” Comment [5] to Rule 8.5 notes that “[f]or conduct governed by paragraph (b)(2), as long as the lawyer’s conduct conforms to the rules of the jurisdiction in which the lawyer principally practices, the lawyer should not be subject to discipline unless the predominant effect of the lawyer’s conduct will clearly occur in another admitting jurisdiction” (emphasis added). In particular, in determining where the “predominant effect” will occur, factors to be considered include (1) where the clients reside and work; (2) where any payments will be deposited; (3) where any contract will be performed; and (4) where any new or expanded business will operate.\textsuperscript{25}

To illustrate, in N.Y. State Bar Op. 1027, the Committee observed that if a lawyer principally practices in Washington, D.C. but is advising a New York client on how to draft a commercial contract among several parties, all of whom live and work in New York, and the contract will be performed entirely in New York, then the conduct “clearly has its predominant effect” in New York. The opinion added that if some of the parties to the contract work outside of New York, or if part of the contract will be performed outside New York, then the lawyer’s advice may not “clearly” have its predominant effect in New York, in which case the ethics rules applicable under Rule 8.5(b)(2)(ii) will be the rules of the jurisdiction in which the lawyer principally practices.

As Professor Simon notes, this language suggests that the “predominant effect” exception is meant to be construed narrowly.\textsuperscript{26} Moreover, the exception applies only if the predominant effect is clearly in another jurisdiction, and the lawyer is licensed to practice in that other jurisdiction. Thus, it remains only an exception that dual or multi-licensed lawyers must consider in evaluating their conduct. For example, N.Y. State Bar Op. 1027 points out that if the dual-licensed lawyer admitted in New York and D.C. principally practices in D.C., but the predominant effect will clearly be in a jurisdiction where the lawyer is not licensed to practice, then the ethics rules of Washington D.C. (the jurisdiction where the lawyer principally practices) will apply even though the predominant effect is clearly elsewhere.

Comment [5] to Rule 8.5 further notes that “it may not be clear whether the predominant effect of the lawyer’s conduct will occur in an admitting jurisdiction other than the one in which the lawyer principally practices.” In this regard, the New York rule is different from ABA Model Rule 8.5(b)(2), which would not subject a lawyer 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” (emphasis added). Rule 8.5(b)(2)(ii) provides no similar safe harbor for the lawyer who believes in good faith that his or her conduct has a “predominant effect” in a jurisdiction other than New York, and tailors the conduct to that jurisdiction’s rules of professional conduct.

**Conclusion**

Although Rule 8.5 was likely meant to provide guidance for lawyers admitted and practicing in New York and another jurisdiction, in practice it offers little in the way of a bright-line rule to guide attorney conduct. New York courts have previously rejected attempts to clarify the Rule’s ambiguities, including recommendations by the New York State Bar Association’s Committee on Standards of Attorney Conduct (COSAC).\textsuperscript{27} With no clarification on the horizon as to how to better understand, interpret and apply Rule 8.5, dual or multi-licensed lawyers with multijurisdictional practices are advised to cautiously consider the long-arm reach of Rule 8.5 in organizing their conduct. But that is not necessarily all that New York lawyers need to be concerned about. Remember, all Rule 8.5 can do is to lay out the situations in which New York may discipline a lawyer. It can only determine when it will exercise its own disciplinary authority over a lawyer’s conduct. New York cannot restrict the disciplinary authority of another state. For example, a New York lawyer permitted to appear before the Workers’ Compensation Board of another jurisdiction might be disciplined by the appropriate disciplinary authority of that jurisdiction (assuming the lawyer is subject to process there), regardless of whether Rule 8.5(b)(1) provides that the lawyer is subject to the disciplinary body of another state when appearing before an administrative tribunal. Thus, New York lawyers engaged in multijurisdictional practice should be careful to avoid the potential risk of being subject to discipline by another jurisdiction for violation of its ethics rules.

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\textsuperscript{22} Professor Simon, supra note 21.

\textsuperscript{23} Id.

\textsuperscript{24} See id.

\textsuperscript{25} See Rule 8.5(b)(2)(ii).

\textsuperscript{26} Professor Simon, supra note 21.

\textsuperscript{27} 42 N.Y.S.2d 321 (N.Y. Sup. Ct. 1999).

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5. Rule 8.5(b)(1).
6. Rule 8.5(b)(2).
7. Rule 8.5(b)(1).
10. Id.
11. Rule 1.0(w) provides that tribunal denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party’s interests in a particular matter.
13. Id.
15. Id. at p. 1893.
16. Id.
19. New York has not adopted the multijurisdictional practice rules in ABA Model Rule 5.5, which, among other things, allows a lawyer admitted in a state to temporarily practice law in another state where the lawyer is not admitted, with certain conditions and limitations.
20. Interestingly, Rule 8.5(b)(1) speaks of “admitted to practice” whereas Rule 8.5(b)(2) speaks of “licensed to practice.” Just as Rule 8.5 does not define “admitted to practice,” it also does not specify what exactly it means by “licensed to practice in this state.” Professor Simon suggests that it has the same meaning as “admitted to practice . . . generally” in Rule 8.5(b)(1), but does not include lawyers admitted pro hac vice. Simon at 1898. He further suggests that it should apply to registered in-house counsel and lawyers who are admitted to practice in New York by virtue of their status as foreign legal consultants. Id. Some ethics opinions in New York have concluded that if a New York lawyer is permitted to engage in conduct in a foreign jurisdiction without being formally admitted there, even though such conduct would constitute the practice of law in New York, the lawyer should be deemed to be “licensed to practice” in the foreign jurisdiction. N.Y. State Bar Op. 1042 (2014); N.Y. State Bar Op. 815 (2007).
22. Simon at pp. 1901–03.
23. Id.
24. See N.Y. State Bar Op. 1027 (2014) (noting that with the decrease in the importance of a lawyer’s physical location, the jurisdiction in which a lawyer “principally practices” is becoming less certain); N.Y. State Bar Op. 1041 (2014) (noting that where a practice is “based” is a significant factor, but ultimately such determination is a question of fact).
27. COSAC’s December 23, 2014 Proposed Amendments to the New York Rules of Professional Conduct and Related Comments based on its review of the changes to the ABA Model Rules resulting from the work of the ABA Commission on Ethics 20/20, and COSAC’s March 25, 2015 Summary of Revisions Based on Public Comments thereto, recommended no changes to Rule 8.5 or its Comment.