

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 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. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction 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 of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(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.

(c) Disciplinary Authority over Judges. Notwithstanding the provisions of Rule 8.4(m), a lawyer, while serving as a judge or justice as defined in RCW 2.64.010, shall not be subject to the disciplinary authority provided for in these Rules or the Rules for Enforcement of Lawyer Conduct for acts performed in his or her judicial capacity or as a candidate for judicial office unless judicial discipline is imposed for that conduct by the Commission on Judicial Conduct or the Supreme Court. Disciplinary authority should not be exercised for the identical conduct if the violation of the Code of Judicial Conduct pertains to the role of the judiciary and does not relate to the judge's or justice's fitness to practice law.

Comment

Disciplinary Authority

[1] 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. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

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. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[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 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.

[4] Paragraph (b)(1) 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 the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. 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.

[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.

[6] 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.

[7] 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.

[8] The Commission on Judicial Conduct is an independent agency of the judicial branch of state government. Wash. Const. Art. IV, § 31; RCW 2.64.120. The Commission has authority to receive and investigate complaints of, and conduct proceedings as to, alleged violations of rules of judicial conduct by a "judge or justice". Wash. Const. Art. IV, § 31; RCW 2.64.057. The terms "judge" and "justice" are defined to include justices of the supreme court, judges of the court of appeals, judges of the superior courts, judges of any court organized under RCW Titles 3 or 35, judges pro tempore, court commissioners, and magistrates, and the Commission's authority applies regardless of whether the judge or justice serves full time or part time. RCW 2.64.010(4).

[9] Whether an act is performed in the judge's "judicial capacity" depends on the facts and circumstances of the conduct. In general, acts are performed in the judicial capacity if they involve the making of judicial decisions, the performance of judicial duties, or the discharge of administrative responsibilities in connection with judicial office. Other factors include whether the act was performed or purported to be performed in the individual's official capacity as a judge and whether the conduct is expressly governed by the Code of Judicial Conduct. With the exception of conduct committed during a judicial campaign, see Comment [12], paragraph (c)

does not apply to conduct occurring prior to service as a judge, nor does it apply to conduct wholly outside of the judicial capacity.

[10] Paragraph (c) does not prevent the exercise of disciplinary authority over (1) a judge or justice after he or she has been disciplined for judicial misconduct by the Commission on Judicial Conduct or the Supreme Court, (2) a former judge or justice, or (3) a lawyer who serves as a pro tem or part time judge for acts performed by him or her as a lawyer and otherwise outside of his or her judicial capacity.

[11] [Reserved.]

[12] Acts performed as a candidate for judicial office are governed by paragraph (c) if performed by a judge or a justice or a successful lawyer candidate for judicial office. This rule has no application to acts performed by an unsuccessful lawyer candidate for judicial office.

[13] Paragraph (c) applies to judges and justices defined to be within the jurisdiction of the Commission on Judicial Conduct under Wash. Const. Art. IV, § 31 and RCW Title 2.64 and is not intended to apply to other lawyers in this state designated as judges, including but not limited to federal judges, administrative law judges, and tribal judges.

[Amended effective October 1, 2002; September 1, 2006; September 1, 2010.]
