To: Tom Mason, Chair, D.C. Bar Rules of Professional Conduct Review Committee
Members, D.C. Bar Rules of Professional Conduct Review Committee
Hope Todd, Assistant Director for Legal Ethics, D.C. Bar

From: Stacy M. Ludwig
Vice Chair, D.C. Bar Rules of Professional Conduct Review Committee

Date: May 24, 2020

Re: Alternate Proposal to Adopt ABA Model Rule 8.5(b)(2)[1]

I. Introduction

I applaud and appreciate the Committee's thorough work on the formidable task of considering the history of ABA Model Rule ("Model Rule") and D.C. Rule 8.5, and determining whether to recommend that the D.C. Rule be changed. The current version of D.C. Rule 8.5(b)(2), even with the Committee's proposed amendments, exposes members to differing ethical obligations for the same conduct, ill-serves the needs of clients of D.C. Bar members and the communities (other than D.C.) in which they practice or provide legal services, is inconsistent with most other jurisdictions' choice of law principles, and fails to take into account the realities of modern practice. Accordingly, I recommend the Committee propose adopting Model Rule 8.5(b)(2)[2] which addresses all of these concerns.

II. The Benefits of Adopting Model Rule 8.5(b)(2) Overcome the Harmful Effects of D.C. Rule 8.5(b)(2).

Maintaining the current version of D.C. Rule 8.5(b)(2) undermines the bedrock principle of choice of law analysis that only one set of laws or rules should apply to the same conduct. See D.C. Bar Op. 368 ("The intent of [D.C. Rule 8.5(b)(2)] is that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct' and that the process of determining which set applies be as 'straightforward as possible.'"). The current Rule, even as amended, contradicts this principle of the Rule. In most instances, D.C. Rule 8.5(b)(2)[3] would

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[1] I concur in the recommendation to adopt revisions to D.C. Rule 8.5(a) (see Committee Report at 2-3) and retain the current version of D.C. Rule 8.5(b)(1) (see Committee Report at 5-7).

[2] Model Rule 8.5(b)(2) provides that "for any other conduct [not in connection with a matter before a tribunal] 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."

[3] D.C. Rule 8.5(b)(2) provides:

force D.C. licensed lawyers practicing in another jurisdiction to comply with two sets of rules[4]—D.C. and the rules of the jurisdiction where their conduct occurs. Most jurisdictions have adopted Model Rule 8.5(a) and now discipline lawyers who practice in their jurisdictions even if they are licensed elsewhere. See Model Rule 8.5(a);[5] Committee Report at 3. Those jurisdictions would apply their rules to D.C. lawyers' conduct because the lawyers are practicing in that jurisdiction and the lawyers' conduct presumably occurred in that jurisdiction. As a result, D.C. lawyers have to consider two sets of rules, figure out which rules apply, and reconcile conflicting obligations where D.C. Rules are stricter or more lenient than other jurisdictions' rules. See Committee Report at 11-13 (describing situations in which D.C. Rules are more strict or lenient than other jurisdictions' rules). If D.C. adopted Model 8.5(b)(2), lawyers in most instances would be subject to one set of rules because most jurisdictions now have the ABA's predominant effect language in their rules.

The Committee acknowledges the advantages of adopting Model Rule 8.5(b)(2) and recognizes that the current version of the D.C. Rule in some circumstances subjects D.C. licensed lawyers to two sets of Rules. Id. at 9. However, the Committee expressed concern that adoption of Model Rule 8.5(b)(2) would subject D.C. lawyers to substantial burden in trying to determine: (1) where the predominant effect of the lawyer's conduct occurred and (2) whether

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> (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:
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> (2) For any other conduct,
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> > (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
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> > (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.

[4] An exception would be when the predominant effect of a D.C. licensed lawyer's conduct is in another jurisdiction where the D.C. lawyer is licensed.

[5] Model Rule 8.5(a) provides: "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."

and how that jurisdiction's ethics rules differ from the D.C. Rules of Professional Conduct. Id. at 10-13. The Committee also is concerned that adopting Model Rule 8.5(b)(2) would undermine D.C.'s deliberate policy choices in promulgating rules different from the norm; and (2) would subject D.C. lawyers to discipline in D.C. for conduct that does not violate D.C. Rules, such as in situations where another jurisdiction's rules are stricter than the D.C. Rules. Id. at 11-14.

I respectfully submit that these reasons should not be the bases for rejecting the certainty and uniformity of Model Rule 8.5(b)(2).

III. Adoption of Model Rule 8.5(b)(2) Is the Better Solution Despite Concerns about the "Predominant Effect" Standard and its Application.

The Committee states that application of the predominant effect standard might present challenges in some practice areas, such as regulatory work; however, that possible outcome of adopting Model Rule 8.5(b)(2) does not undermine the more significant benefits of adopting the Model Rule version. Because the vast majority of other jurisdictions apply the predominant effect test, D.C. licensed lawyers who are licensed in other jurisdictions already have to apply the predominant effect test in determining which professional responsibility rules will apply to their conduct and have experience in doing so. Moreover, the predominant effect language has long been in D.C. Rule 8.5(b)(2) albeit in a less prominent and less decisive role, and there was no evidence presented to the Committee that lawyers, bar counsel, or courts were unable to or particularly challenged in applying the standard. In addition, the proposal to add a safe harbor provision would address the Committee's concerns, at least to some extent, because D.C. lawyers would be insulated from discipline so long as their determination about the predominant effect of their conduct was reasonable. Id. at 14-16. Ultimately, applying the predominant effect standard would be easier for a D.C. lawyer than being governed by two sets of rules with potentially conflicting obligations.

There is a lengthy history and well-developed body of choice of law principles. Lawyers have had to grapple with concepts of "the most significant relationship test," *lex loci delicti commissi* for torts, *lex loci contractus* for contracts, and *lex situs* for property. Concepts like "jurisdiction in which the conduct occurred" or "predominant effect" are certainly no more complex, and, indeed, appear much more straightforward. For example, federal and local courts in D.C. have adopted the governmental interest and/or significant relationship tests. See, e.g., Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 842 (D.C. Cir. 2009) (explaining blend of the "government interest analysis" and "most significant relationship" test);[6] Adolph Coors Co. v.

[6] The D.C. Circuit Court explained:

> "To determine which jurisdiction's substantive law governs a dispute, District of Columbia courts blend a 'governmental interests analysis' with a 'most significant relationship' test. Under the governmental interests analysis[,] ... [a court] must

Truck Ins. Exchange, 960 A.2d 617, 620-621 (D.C. 2008) (applying governmental interests test to contract dispute); District of Columbia v. Coleman, 667 A2d 811, 816 (D.C. 1995) (applying governmental interests test to tort case, citing four factors of Restatement (Second) of Conflict of Laws § 145).

Although there is not abundant authority on where the predominant effect of a lawyer's conduct occurred, courts and disciplinary authorities seem to have little trouble applying these principles. They employ common principles such as location of client, location of dispute, and location of harm to interpreting jurisdictions' choice of law provisions based on Model Rule 8.5(b)(2). For example, some cases expressly or implicitly find that the predominant effect of the lawyer's conduct is the jurisdiction where her client is located. See, e.g., People v. Rozan, 277 P.3d 942 (Colo. P.D.J. 2011) (applying Colorado Rules to attorney with principal place of practice in Texas but licensed in Texas and Colorado who misappropriated funds from client in prison in Colorado; while "debatable" if conduct "occurred" in Colorado, predominant effect clearly was in Colorado); In re Disciplinary Proceedings Against Marks, 665 N.W.2d 836 (Wisc. 2003) (applying Wisconsin rules to attorney licensed in Michigan and Wisconsin because attorney's alleged misrepresentations to insurers affected his clients who were residents of Wisconsin). Cf. In re Rocchio, 943 N.E.2d 797 (Ind. 2011) (applying Indiana Rules to lawyer actively licensed in Michigan and inactive in Indiana because the predominant effect of his website advertising to potential clients was in Indiana).

Some cases find that the predominant effect of the lawyer's conduct is where the matters giving rise to the dispute that forms the basis of the representation occurred. See, e.g., In re Tonwe, 929 A.2d 774 (Del. Supr. 2007) (applying Delaware rules to attorney licensed in Pennsylvania because while lawyer negotiated settlements from his Pennsylvania office, clients were residents of Delaware who had been involved in car accidents in Delaware; rejecting safe harbor arguments because lawyer's belief that predominant effect was in Delaware was not reasonable). Some cases find that the predominant effect of the lawyer's conduct is where the greatest harm will be felt. See, e.g., In re Disciplinary Action Against Overboe, 745 N.W.2d 852

> evaluate the governmental policies underlying the applicable laws and determine which jurisdiction policy would be most advanced by having its law applied to the facts of the case under review. To determine which jurisdiction has the most significant relationship to a case, a court must 'consider the factors enumerated in the Restatement [(Second) of Conflict of Laws] § 145.' The four Restatement factors are: (1) 'the place where the injury occurred'; (2) 'the place where the conduct causing the injury occurred'; (3) 'the domicil[e], residence, nationality, place of incorporation and place of business of the parties'; and (4) 'the place where the relationship, if any, between the parties is centered.'"

Id.

(Minn. 2008) (applying Minnesota Rules to misrepresentations to Minnesota disciplinary authorities and North Dakota Rules to misuse of North Dakota trust account and commingling of North Dakota IOLTA account to lawyer licensed in Minnesota and North Dakota but principally practicing in Minnesota).

Although these cases do not provide a foolproof way to address every choice of law situation that may arise, they provide useful guidance covering many situations.

Finally, adopting Model Rule 8.5(b)(2) would not create a more substantial burden for D.C. licensed lawyers in determining how another jurisdiction's ethics rules differ from the D.C. Rules of Professional Conduct because they already have to engage in this analysis whenever they practice in another jurisdiction that applies its Rules to their conduct. Further, no rule comparison would be necessary because D.C.'s adoption of Model Rule 8.5(b)(2) would result in the application of one set of Rules, not both the D.C. Rules and another jurisdiction's rule--as is the case with the current version of D.C. Rule 8.5(b)(2).

IV. D.C.'s Policy Choices Won't be Undermined by Adopting Model Rule 8.5(b)(2)

Adopting Model Rule 8.5(b)(2) will not undermine D.C.'s policy choices in promulgating rules that are different in some respects from the Model Rules as the Committee Report suggests (Committee Report at 11-14) because D.C. licensed lawyers practicing elsewhere already are required to follow other jurisdictions' rules. So maintaining D.C.'s presumptively clearer version of Rule 8.5(b)(2) would not, in fact, free D.C. licensed lawyers from considering and complying with other jurisdictions' rules more frequently than they already are required to do.

One of the Committee's most significant concerns in adopting Model Rule 8.5(b)(2) is the possibility that D.C. licensed lawyers could be disciplined by D.C. authorities for conduct that does not violate the D.C. Rules, thereby purportedly undermining D.C.'s deliberate policy choices in having rules that differ from other jurisdictions' rules. Id. at 13-14. Yet, the Committee concedes, "D.C. has a longstanding policy of not disciplining lawyers even if they are disciplined elsewhere for conduct that does not violate the D.C. Rules." Id. at 13. Accordingly, given this longstanding policy, it is unclear how the adoption of Model Rule 8.5(b)(2) would undermine D.C.'s adoption of different rules from those in other jurisdictions because D.C. does not impose discipline when the D.C. Rules are more lenient in cases involving reciprocal discipline. There was no evidence presented to the Committee that if Model Rule 8.5(b)(2) were adopted: 1) this policy would change for a reciprocal matter or one in which D.C. had original jurisdiction; or 2) the Rules for reciprocal discipline would have to be changed. In fact, Disciplinary Counsel's proposal to amend D.C. Rule 8.5(b)(1) to presumptively apply the D.C. Rules more often certainly suggests that the Bar is in favor of applying the D.C. Rules whenever possible. Id. at 4-5.

Furthermore, a choice of law rule favoring the deliberate policy choices to adopt, in most cases, more lenient rules arguably provides a perverse incentive for D.C. lawyers to ignore

another jurisdiction's stricter rule and take advantage of D.C.'s more lenient version, despite the lawyer's engaging in practice where conduct occurred in the other jurisdiction or had its predominant effect in that jurisdiction. Certainly, D.C. has an interest in ensuring that members of its bar engage in the ethical practice of law even when the rules of a foreign jurisdiction apply.

Ultimately, it may have made sense for D.C. when it first adopted Rule 8.5(b) in 1993 to follow the lead of the ABA, and later in 2002 retain the simpler, more restrictive choice of law analysis for attorney conduct. But the experience with and application of the current version of D.C. Rule 8.5(b)(2) adopted in 1996 and the one incorporated in the Model Rule in 2002 demonstrates that the more narrow choice of law analysis which D.C. still employs no longer addresses the realities of modern practice.[7] Over 17 years of experience in other jurisdictions with Model Rule 8.5(b)(2) has helped demonstrate that it is better suited to modern practice and that any burden lawyers have in trying to apply the predominant effect test does not appear to be

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[7] The ABA noted:

> Paragraph (b)(2): New choice of law provision---The theory underlying the current Rule appears to be that discipline is the corollary of bar admission, i.e., it is a proceeding to take away the license the state granted because of a violation of that state's rules. Thus, the current Rule permits only an admitting jurisdiction to discipline the lawyer (paragraph (a)) and applies that jurisdiction's rules regardless of where the conduct occurred. Moreover, under the current Rule, if the lawyer is admitted in more than one jurisdiction, the rules of the admitting jurisdiction in which the lawyer principally practices apply "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." Again, even for choice of law purposes, only jurisdictions that have licensed the lawyer may expect the lawyer to follow their rules of professional conduct. Just as the Commission believes that jurisdictions other than an admitting jurisdiction ought to have the authority to discipline the lawyer (see changes to paragraph (a)), the Commission believes that the substantive rules of a jurisdiction other than an admitting jurisdiction should sometimes apply.
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> Having moved away from an undue emphasis on the rules of the admitting jurisdiction, the Commission believes that there is no single test that can be applied to determine the appropriate choice-of-law rule in each case. Rather, the Commission believes that there are two factors that are most important to the determination----the place where the conduct occurred and the place where the predominant effect of the conduct occurs. This approach is not as simple as the present Rule, but neither is it as open-ended as in other areas where conflicts of law are an issue. A lawyer who acts reasonably in the face of uncertainty about which jurisdiction's rules apply will not be subject to discipline.

ABA Ethics 2000 Commission Report 401 (2001), Ethics 2000 Commission Reporter's Explanation of Recommendation reprinted in ABA Model Rules Legislative History 1982-2005, at 829-831.

substantial. By retaining the current version of D.C. Rule 8.5(b)(2), the bar, in an area where uniformity is most valuable, untethers itself from the choice of law analysis already used in other contexts in D.C., and in most other jurisdictions without any demonstrable benefit to D.C. licensed lawyers, their clients, or the public.

V. Conclusion

For all of the foregoing reasons, I think adopting Model Rule 8.5(b)(2) is preferable to retaining D.C. Rule 8.5(b)(2).