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**Location, Location, Location:  
Whose Law Applies in Cross-Border Practice?**

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Over the past few years, lawyers in the Northwest have seen tremendous change in their ability to practice across state lines. Oregon, Washington and Idaho have had reciprocal admission with each other (and beyond) since 2002. All three Northwest states also adopted very similar versions of the new temporary multijurisdictional practice rule, RPC 5.5, in, respectively, 2004 for Idaho, 2005 for Oregon and 2006 for Washington. Although Oregon's version was originally adopted with a "sunset" provision, the Supreme Court made RPC 5.5 "permanent" this past Fall.

With the increase in cross-border practice, Northwest lawyers practicing temporarily in other jurisdictions also increasingly face a related question: whose law applies to their cross-border practice? Again, all three Northwest states adopted very similar rules on both regulatory authority and choice-of-law when they updated their respective Rules of Professional Conduct.

For regulatory discipline, RPC 8.5(a) as adopted in Oregon, Washington and Idaho addresses both lawyers who are admitted in those states and lawyers who are temporarily practicing in those states under RPC 5.5's multijurisdictional practice authorization. With the former, a lawyer is subject to the regulatory jurisdiction in each state in which the lawyer is licensed no matter where any

alleged misconduct occurs. In other words, an Oregon lawyer who commits professional misconduct in Washington is still subject to the regulatory authority of the Oregon Supreme Court (either directly or through reciprocal discipline). With the latter, a lawyer who is temporarily practicing in a jurisdiction under its multijurisdictional practice rule is also subject to the regulatory authority of that jurisdiction. In other words, the Oregon lawyer in the previous example would also be subject to discipline by the Washington Supreme Court.

For choice-of-law, RPC 8.5(b) as adopted in Oregon, Washington and Idaho takes a twofold approach. For conduct that occurs in the course of a case pending before a “tribunal” (either judicial or administrative) the Rules of Professional Conduct for the jurisdiction where the tribunal sits will control unless the rules of the particular tribunal provide otherwise. This approach is consistent with state and federal court rules in Oregon and elsewhere that generally apply the RPCs of the forum to litigation pending before the particular court involved (such as Oregon federal district Local Rule 83.7). For non-litigation matters, the versions of RPC 8.5(b) adopted in all three states hold that the rules of the jurisdiction with the “predominant effect” apply:

“[F]or any other conduct [*i.e.*, beyond litigation], 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.”

This is the same general approach used to assess the controlling law for lawyer civil liability outside the disciplinary context under the Oregon Court of Appeals' decision last year in *Spirit Partners, LP v. Stoel Rives LLP*, 212 Or App 295, 157 P3d 1194 (2007).

Comment 6 to the Washington and Idaho versions of RPC 8.5 express the hope that regulatory authorities in multiple states who are investigating a lawyer for a single matter will apply a similar choice-of-law analysis to avoid inconsistent results. Oregon did not adopt comments when we moved to the RPCs in 2005. In practice, however, jurisdictions vary greatly on whether they coordinate either (or both) choice-of-law and substantive analysis when running parallel investigations (or whether they will defer to a "lead" jurisdiction). This lack of coordination can often leave lawyers responding in more than one jurisdiction at the same time for the same conduct even if it occurred in a single state's court or the "predominant effect" was in a single state.

Does choice-of-law analysis matter now that all three Northwest states use professional rules that are patterned on the ABA's Model Rules of Professional Conduct? The short answer is "yes." Although the recent amendments in all three states have brought their respective RPCs into generally close alignment, important differences remain that can have significant impacts on lawyers and law firms for regulatory discipline, disqualification and civil liability.

To take two common examples, one affecting individual lawyers and one affecting firms:

- Both Oregon and Washington have similar versions of RPC 4.2, the “no contact” rule. But, they apply RPC 4.2 differently in the entity context. In Oregon under OSB Formal Ethics Opinion 2005-80, employees for whom a party seeks to hold the employer liable generally fall within the scope of the employer’s corporate representation and are “off limits” to opposing counsel. In Washington under *Wright v. Group Health Hospital*, 103 Wn2d 192, 691 P2d 564 (1984), however, the prohibition only applies in this situation if the employee qualifies as a “speaking agent” for the employer under the Washington evidence rules, which effectively makes more employees potentially “fair game” to opposing counsel. An Oregon lawyer appearing in a Washington Superior Court proceeding, therefore, might permissibly contact a corporate employee directly even though that contact would be prohibited if it occurred in an Oregon Circuit Court case.
- Both Oregon and Idaho have similar versions of RPC 1.10, the “firm unit” rule. But, Oregon RPC 1.10 includes a lateral-hire screening mechanism that does not impute a lateral-hire’s conflict to the firm as a whole if the new lawyer is “screened off” from the work that

otherwise would create a disqualifying conflict. When Idaho updated its RPCs in 2004, it did not adopt a similar screening mechanism. Law firms with Portland and Boise offices, therefore, may face starkly contrasting results if they are considering hiring a lawyer who is on the other side of them in a long-running case or business matter depending on where the new-hire is located.

In an era where reciprocal licensing and the new multijurisdictional practice rule make cross-border practice much more common, RPC 8.5's choice-of-law rule offers a very practical counterpart to determining which state's law of lawyering will apply.

#### **ABOUT THE AUTHOR**

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