

Conflicts in Ethics Law: *In re Summer* and New Oregon RPC 8.5(b)

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Recently, the Oregon Supreme Court discussed conflicts of law issues with respect to the application of ethics rules in *In re Summer*, 2005 WL 247665, ___ P3d ___ (February 3, 2005). Attorney Scott Summer, a member of the Idaho and Oregon Bars, was convicted in Idaho of attempted grand theft as a result of his representation of Michael White in claims arising out of two automobile accidents, one of which had occurred in Idaho and one of which had occurred in Oregon but involved an Idaho entity-defendant with a claims office in Oregon.

The court noted that the choice of which state's disciplinary rules to apply was a choice of law matter and not a matter of jurisdiction. Because both parties had briefed the case under the Oregon disciplinary rules, the court applied those rules to this case. The court also noted, however, that "It could be argued that the accused's acts had approximately equal impact in each jurisdiction," (*Id.* at *3) and at least impliedly asserted that under then-Oregon Bar Rule 1.4(b), the conclusion could have been reached that Summer's conduct had its primary impact in Idaho and that the Idaho Rules of Professional Conduct should therefore have applied.¹

We believe that the court's observation that the predominant impact of Summer's conduct may well have been in Idaho was correct. We also want to point out that a somewhat different analysis would be required under new Oregon RPC 8.5(b).

Former Oregon Bar Rule 1.4(b)(2)(B) provided:

If the attorney is licensed to practice in Oregon and another jurisdiction, the rules to be applied shall be the rules of the jurisdiction in which the attorney principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the attorney is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Summer practiced principally in Idaho, leaving the only question whether the predominate effect of his conduct occurred outside of Idaho. In our opinion, his conduct predominately affected Idaho—where his client resided, where the first accident occurred and where the legally responsible drivers from both accidents resided.

By contrast, new Oregon RPC 8.5(b)(2) provides that for matters not pending before a tribunal (in which case the applicable rules will generally be the rules of the jurisdiction in which the tribunal sits), the applicable rules will be:

*** [T]he 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

¹ The Idaho State Bar has commenced a disciplinary proceeding against the accused but, at the time of the opinion, the proceedings had not concluded. It is expected that the Idaho State Bar will apply the Idaho Rules of Professional Conduct.

the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Under this new Oregon choice of law rule, the default position is “where the conduct occurred” unless the predominant effect is in another jurisdiction. Since Summers’ conduct occurred in Idaho, the case for the application of Idaho law to these facts would have been still more clear.

Two final points are worth noting. First, Summer would not have benefited from the final sentence in new Oregon RPC 8.5(b)(2) which exonerates lawyers whose conduct conforms to the substantive rules of what they reasonably believed to be the jurisdiction in which their conduct had its predominant effect. The conduct reflected in his conviction for attempted grand theft violated both state’s rules.

Second, Oregon lawyers whose practices cross state lines should bear in mind that their conduct may subject them to the substantive disciplinary rules of other jurisdictions. The door regarding choice of law swings both ways. As the Official ABA Comment to what is now Oregon RPC 8.5(b) provides, the purpose behind the rule is to apply “only one set of rules of professional conduct” so that if two jurisdictions proceed against the same lawyer for the same conduct, “they should * * * apply the same rule to the same conduct.” ABA Model Rule 8.5 cmt. 3.