

**AMERICAN BAR ASSOCIATION**

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2012-2013

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**To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals**

**From: Jamie S. Gorelick and Michael Traynor, Co-Chairs  
ABA Commission on Ethics 20/20**

**Re: For Comment: New Drafts Regarding Choice of Rule Agreements  
for Conflicts of Interest and Choice of Law Issues Associated with  
Fee Division Between Lawyers in Different Firms**

**Date: September 18, 2012**

The Commission is releasing for comment new drafts of possible proposals that would address two issues relating to inconsistencies among jurisdictions' rules of professional conduct. These revised drafts respond to many helpful suggestions that the Commission received in response to earlier drafts. We now seek comments on the new versions.

The Commission has not decided whether it will file proposals on these subjects with the House of Delegates for consideration at the February 2013 ABA Midyear Meeting. The Commission will make that decision at its October 25 and 26, 2012 meeting after considering the comments received in response to these drafts and further research and deliberations.

The first draft for which the Commission seeks comment suggests a possible way to address inconsistencies among jurisdictions with regard to their conflict of interest rules. The second addresses the division of fees between two lawyers in different firms, where one lawyer is with a firm in a jurisdiction that prohibits nonlawyer ownership of law firms and the other lawyer works for a firm that has nonlawyer owners and is in a jurisdiction that permits it. With regard to the latter, it is important to note that nothing in the draft would alter the existing prohibition on nonlawyer ownership or fee sharing with nonlawyers set forth in Rule 5.4 of the ABA Model Rules of Professional Conduct. This does not address the sharing of fees within a law firm when lawyers in the firm are subject to different jurisdictions' rules in this regard; the Commission has decided not to make a proposal on such fee sharing.

**Model Rule 1.7 (Conflict of Interest: Current Clients).** The possible changes to Model Rule 1.7 (Conflict of Interest: Current Clients) would offer lawyers and clients the freedom to agree, subject to restrictions, that their relationship will be governed by a particular jurisdiction's conflict of interest rules. Such agreements could help lawyers and their clients predict with more accuracy than Model Rule 8.5(b) (Choice of Law) allows which jurisdiction's conflict rules would govern the lawyer's representation of a client.

In response to comments the Commission received, this draft drops the requirement that the lawyer advise the client to seek independent counsel before entering into the agreement. Model Rule 1.8(a)(2) requires lawyers to advise the client of the advisability of seeking independent counsel before the lawyer enters into a business transaction with the client, but a choice of rule agreement does not contemplate the same type of adversity of interests. Whereas business transactions with clients typically involve an ongoing relationship with a client outside of the practice of law that may involve significant financial stakes, a choice of rule agreement is much narrower in scope, is directly related to the lawyer's representation of the client, and has smaller financial implications. The view reflected in this draft is that the restrictions contained in proposed Rule 1.7(c)(1)-(4) offer sufficient client protections.

The revised draft contains new language in the black letter to explain more clearly the interaction between the Rule and the choice of law provisions in Model Rule 8.5. This draft also contains new Comment language that is designed to explain in more detail the purpose of the Rule.

**Resolution Regarding Model Rule 1.5 (Fees).** The Model Rules of Professional Conduct have long treated the division of fees between lawyers in different firms differently from the concept of fee sharing, which is addressed in Model Rule 5.4. The two concepts are not the same and should not be conflated.

This draft addresses a discrete and limited choice of law issue arising from the division of fees between lawyers in separate firms located in different jurisdictions. The issue is whether a lawyer in a jurisdiction that prohibits nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers may divide a fee with a lawyer in a different firm in which such ownership or fee sharing is permitted by the Rules of the jurisdiction applicable to that firm. As noted above, the draft does not propose any change to the existing prohibition in Model Rule 5.4 against nonlawyer ownership of law firms or the sharing of fees with nonlawyers. Nor would the approach set forth in the draft have the effect of altering that prohibition indirectly. No jurisdiction could override another jurisdiction's prohibition of fee-sharing or nonlawyer ownership.

As noted above, the Commission has decided to reject a proposal to permit the sharing of fees among lawyers within a law firm who are governed by different rules regarding fee-sharing with nonlawyers. Because law firms today frequently have offices in multiple jurisdictions, domestically and internationally, a prior draft proposal had addressed a second and distinct choice of law issue relating to intra-firm fee sharing when one of a firm's offices is in a jurisdiction prohibiting nonlawyer ownership and fee sharing and another of the firm's offices is located in a jurisdiction permitting it. The Commission considered and rejected a proposal to permit fee-sharing among lawyers in a single firm where the rules applicable to one of the firm's offices permit nonlawyer partners and the rules applicable to another of the firm's offices do not, because that would leave open the possibility that a nonlawyer in the first jurisdiction could influence lawyers' decisions in the second jurisdiction. The Commission concluded that these issues should be referred to the Standing Committee on Ethics and Professional

Responsibility, which first addressed this issue twenty years ago in ABA Formal Opinion 91-360.

As set forth above, the Commission has made no decision regarding the nature and substance of any Resolutions on these subjects. The decision to file any such Resolutions will be made at the Commission's October 2012 meeting. In the meantime, the Commission requests that any comments on these new drafts be sent to Natalia Vera at [natalia.vera@americanbar.org](mailto:natalia.vera@americanbar.org) by October 19, 2012.