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Eilyn S. Rosen, Commission Counsel
(312) 988-5311

Marcia Kladder, Policy & Program Director
(312) 988-5326

Natalia Vera, Senior Paralegal
(312) 988-5328

Kimley Grant, CPR Paralegal
(312) 988-5319

AMERICAN BAR ASSOCIATION

ABA Commission on Ethics 20/20

321 N. Clark Street
Chicago, IL 60654-7598
Phone: (312) 988-5311
Fax: (312) 988-5280

Website: www.abanet.org/ethics2020

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: Third Draft Proposal on Choice of Rule Agreements
for Conflicts of Interest**

Date: July 11, 2012

The Commission is pleased to release a third draft of a possible proposal that is designed to address inconsistencies among jurisdictions' conflict of interest rules. This new version responds to many helpful suggestions that the Commission received after releasing the prior draft. We now seek comments on the new version.

As with the prior draft, the new draft would offer lawyers and clients the freedom to agree, subject to certain limitations, that their relationship will be governed by a particular jurisdiction's conflict of interest rules. The Commission believes that such agreements can provide more predictability than Model Rule 8.5(b) (Choice of Law) can provide with regard to the identification of the applicable jurisdiction's conflict of interest rules.

In its prior draft, the Commission had suggested that the authority for choice of rule agreements should appear in a new Comment to Rule 1.7 of the Model Rules of Professional Conduct (Conflict of Interest). In response to feedback received, the Commission concluded that the authority for these agreements should appear in the black letter of Rule 1.7, not in a Comment to the Rule. The Commission determined that, because numerous protections should be afforded to clients who are affected by "choice of rule" agreements and because the effect of these agreements may be less clear than the effect of a conflict waiver, the authority for (and limitations on) these agreements should be in the black letter of Rule 1.7.

Several commenters had suggested that the express authority for choice of rule agreements should appear in Model Rule 8.5 instead of Model Rule 1.7. The Commission felt, however, that any proposal in this area should only authorize choice of rule agreements to address inconsistencies among jurisdictions' conflict of interest rules and not other kinds of choice of law problems (e.g., inconsistencies among jurisdictions with regard to the duty of confidentiality). For this reason, the Commission believes this authority should be located in Model Rule 1.7, which relates to conflicts of interest, rather than in Model Rule 8.5, which concerns choice of law issues more generally.

The Commission has made no decision regarding the nature and substance of any Resolution on this subject that may be filed with the House. The decision to file any such Resolution will be made at the Commission's October 2012 meeting. In the meantime, the Commission requests that any comments on this new draft be sent to Natalia Vera at natalia.vera@americanbar.org by August 15, 2012.