

**ABA Commission on Ethics 20/20 Revised Draft Resolutions for Comment-
Model Rule 1.7
July 11, 2012**

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

**American Bar Association
Commission on Ethics 20/20**

Resolution

RESOLVED: That the American Bar Association amends Model Rule 1.7 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(c) A lawyer and client can agree that the lawyer's work on a matter will be governed by the conflict of interest rules of a particular jurisdiction, but only if:

(1) the client gives informed consent to the agreement, confirmed in writing;

(2) the lawyer advises the client in writing of the desirability of seeking independent counsel regarding the agreement;

(3) the client has a reasonable opportunity to consult with independent counsel regarding the agreement;

(4) the selected jurisdiction is one in which the predominant effect of, or substantial work relating to, the matter is reasonably expected to occur; and

(5) the agreement does not result in the application of a conflict rule to which informed client consent is not permitted under the rules of the jurisdiction whose rules would otherwise govern the matter. See Rule 8.5(b).

43 **COMMENT**

44 **General Principles**

45 [1] Loyalty and independent judgment are essential elements in the lawyer's relationship to
46 a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another
47 client, a former client or a third person or from the lawyer's own interests. For specific Rules
48 regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of
49 interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For
50 definitions of "informed consent" and "confirmed in writing," see Rule 1.0 (e) and (b).

51 [2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1)
52 clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide
53 whether the representation may be undertaken despite the existence of a conflict, i.e., whether the
54 conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and
55 obtain their informed consent, confirmed in writing. The clients affected under paragraph (a)
56 include both of the clients referred to in paragraph (a)(1) and the one or more clients whose
57 representation might be materially limited under paragraph (a)(2).

58 [3] A conflict of interest may exist before representation is undertaken, in which event the
59 representation must be declined, unless the lawyer obtains the informed consent of each client
60 under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer
61 should adopt reasonable procedures, appropriate for the size and type of firm and practice, to
62 determine in both litigation and non-litigation matters the persons and issues involved. See also
63 Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse
64 a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having
65 once been established, is continuing, see Comment to Rule 1.3 and Scope.

66 [4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must
67 withdraw from the representation, unless the lawyer has obtained the informed consent of the
68 client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is
69 involved, whether the lawyer may continue to represent any of the clients is determined both by
70 the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to
71 represent adequately the remaining client or clients, given the lawyer's duties to the former
72 client. See Rule 1.9. See also Comments [5] and [2930].

73 [5] Unforeseeable developments, such as changes in corporate and other organizational
74 affiliations or the addition or realignment of parties in litigation, might create conflicts in the
75 midst of a representation, as when a company sued by the lawyer on behalf of one client is
76 bought by another client represented by the lawyer in an unrelated matter. Depending on the
77 circumstances, the lawyer may have the option to withdraw from one of the representations in
78 order to avoid the conflict. The lawyer must seek court approval where necessary and take steps
79 to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the
80 confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9 (c).

81 **Identifying Conflicts of Interest: Directly Adverse**

82 [6] Loyalty to a current client prohibits undertaking representation directly adverse to that
83 client without that client's informed consent. Thus, absent consent, a lawyer may not act as an
84 advocate in one matter against a person the lawyer represents in some other matter, even when
85 the matters are wholly unrelated. The client as to whom the representation is directly adverse is
86 likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to
87 impair the lawyer's ability to represent the client effectively. In addition, the client on whose

88 behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue
89 that client's case less effectively out of deference to the other client, i.e., that the representation
90 may be materially limited by the lawyer's interest in retaining the current client. Similarly, a
91 directly adverse conflict may arise when a lawyer is required to cross-examine a client who
92 appears as a witness in a lawsuit involving another client, as when the testimony will be
93 damaging to the client who is represented in the lawsuit. On the other hand, simultaneous
94 representation in unrelated matters of clients whose interests are only economically adverse, such
95 as representation of competing economic enterprises in unrelated litigation, does not ordinarily
96 constitute a conflict of interest and thus may not require consent of the respective clients.

97 [7] Directly adverse conflicts can also arise in transactional matters. For example, if a
98 lawyer is asked to represent the seller of a business in negotiations with a buyer represented by
99 the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not
100 undertake the representation without the informed consent of each client.

101 **Identifying Conflicts of Interest: Material Limitation**

102 [8] Even where there is no direct adverseness, a conflict of interest exists if there is a
103 significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course
104 of action for the client will be materially limited as a result of the lawyer's other responsibilities
105 or interests. For example, a lawyer asked to represent several individuals seeking to form a joint
106 venture is likely to be materially limited in the lawyer's ability to recommend or advocate all
107 possible positions that each might take because of the lawyer's duty of loyalty to the others. The
108 conflict in effect forecloses alternatives that would otherwise be available to the client. The mere
109 possibility of subsequent harm does not itself require disclosure and consent. The critical
110 questions are the likelihood that a difference in interests will eventuate and, if it does, whether it
111 will materially interfere with the lawyer's independent professional judgment in considering
112 alternatives or foreclose courses of action that reasonably should be pursued on behalf of the
113 client.

114 **Lawyer's Responsibilities to Former Clients and Other Third Persons**

115 [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and
116 independence may be materially limited by responsibilities to former clients under Rule 1.9 or by
117 the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's
118 service as a trustee, executor or corporate director.

119 **Personal Interest Conflicts**

120 [10] The lawyer's own interests should not be permitted to have an adverse effect on
121 representation of a client. For example, if the probity of a lawyer's own conduct in a transaction
122 is in serious question, it may be difficult or impossible for the lawyer to give a client detached
123 advice. Similarly, when a lawyer has discussions concerning possible employment with an
124 opponent of the lawyer's client, or with a law firm representing the opponent, such discussions
125 could materially limit the lawyer's representation of the client. In addition, a lawyer may not
126 allow related business interests to affect representation, for example, by referring clients to an
127 enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific
128 Rules pertaining to a number of personal interest conflicts, including business transactions with
129 clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed
130 to other lawyers in a law firm).

131 [11] When lawyers representing different clients in the same matter or in substantially
132 related matters are closely related by blood or marriage, there may be a significant risk that client

133 confidences will be revealed and that the lawyer's family relationship will interfere with both
134 loyalty and independent professional judgment. As a result, each client is entitled to know of the
135 existence and implications of the relationship between the lawyers before the lawyer agrees to
136 undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child,
137 sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is
138 representing another party, unless each client gives informed consent. The disqualification
139 arising from a close family relationship is personal and ordinarily is not imputed to members of
140 firms with whom the lawyers are associated. See Rule 1.10.

141 [12] A lawyer is prohibited from engaging in sexual relationships with a client unless the
142 sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

143 **Interest of Person Paying for a Lawyer's Service**

144 [13] A lawyer may be paid from a source other than the client, including a coclient, if the
145 client is informed of that fact and consents and the arrangement does not compromise the
146 lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of
147 the payment from any other source presents a significant risk that the lawyer's representation of
148 the client will be materially limited by the lawyer's own interest in accommodating the person
149 paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then
150 the lawyer must comply with the requirements of paragraph (b) before accepting the
151 representation, including determining whether the conflict is consentable and, if so, that the
152 client has adequate information about the material risks of the representation.

153 **Prohibited Representations**

154 [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However,
155 as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer
156 involved cannot properly ask for such agreement or provide representation on the basis of the
157 clients consent. When the lawyer is representing more than one client, the question of
158 consentability must be resolved as to each client.

159 [15] Consentability is typically determined by considering whether the interests of the
160 clients will be adequately protected if the clients are permitted to give their informed consent to
161 representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is
162 prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be
163 able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3
164 (diligence).

165 [16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation
166 is prohibited by applicable law. For example, in some states substantive law provides that the
167 same lawyer may not represent more than one defendant in a capital case, even with the consent
168 of the clients, and under federal criminal statutes certain representations by a former government
169 lawyer are prohibited, despite the informed consent of the former client. In addition, decisional
170 law in some states limits the ability of a governmental client, such as a municipality, to consent
171 to a conflict of interest.

172 [17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional
173 interest in vigorous development of each client's position when the clients are aligned directly
174 against each other in the same litigation or other proceeding before a tribunal. Whether clients
175 are aligned directly against each other within the meaning of this paragraph requires examination
176 of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple

177 representation of adverse parties to a mediation (because mediation is not a proceeding before a
178 “tribunal” under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

179 **Informed Consent**

180 [18] Informed consent requires that each affected client be aware of the relevant
181 circumstances and of the material and reasonably foreseeable ways that the conflict could have
182 adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The
183 information required depends on the nature of the conflict and the nature of the risks involved.
184 When representation of multiple clients in a single matter is undertaken, the information must
185 include the implications of the common representation, including possible effects on loyalty,
186 confidentiality and the attorney-client privilege and the advantages and risks involved. See
187 Comments [3031] and [3432] (effect of common representation on confidentiality).

188 [19] Under some circumstances it may be impossible to make the disclosure necessary to
189 obtain consent. For example, when the lawyer represents different clients in related matters and
190 one of the clients refuses to consent to the disclosure necessary to permit the other client to make
191 an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the
192 alternative to common representation can be that each party may have to obtain separate
193 representation with the possibility of incurring additional costs. These costs, along with the
194 benefits of securing separate representation, are factors that may be considered by the affected
195 client in determining whether common representation is in the client’s interests.

196 **Consent Confirmed in Writing**

197 [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client,
198 confirmed in writing. Such a writing may consist of a document executed by the client or one
199 that the lawyer promptly records and transmits to the client following an oral consent. See Rule
200 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to
201 obtain or transmit the writing at the time the client gives informed consent, then the lawyer must
202 obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a
203 writing does not supplant the need in most cases for the lawyer to talk with the client, to explain
204 the risks and advantages, if any, of representation burdened with a conflict of interest, as well as
205 reasonably available alternatives, and to afford the client a reasonable opportunity to consider the
206 risks and alternatives and to raise questions and concerns. Rather, the writing is required in order
207 to impress upon clients the seriousness of the decision the client is being asked to make and to
208 avoid disputes or ambiguities that might later occur in the absence of a writing.

209 **Revoking Consent**

210 [21] A client who has given consent to a conflict may revoke the consent and, like any other
211 client, may terminate the lawyer’s representation at any time. Whether revoking consent to the
212 client’s own representation precludes the lawyer from continuing to represent other clients
213 depends on the circumstances, including the nature of the conflict, whether the client revoked
214 consent because of a material change in circumstances, the reasonable expectations of the other
215 client and whether material detriment to the other clients or the lawyer would result.

216 **Consent to Future Conflict**

217 [22] Whether a lawyer may properly request a client to waive conflicts that might arise in
218 the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally
219 determined by the extent to which the client reasonably understands the material risks that the
220 waiver entails. The more comprehensive the explanation of the types of future representations

221 that might arise and the actual and reasonably foreseeable adverse consequences of those
222 representations, the greater the likelihood that the client will have the requisite understanding.
223 Thus, if the client agrees to consent to a particular type of conflict with which the client is
224 already familiar, then the consent ordinarily will be effective with regard to that type of conflict.
225 If the consent is general and open-ended, then the consent ordinarily will be ineffective, because
226 it is not reasonably likely that the client will have understood the material risks involved. On the
227 other hand, if the client is an experienced user of the legal services involved and is reasonably
228 informed regarding the risk that a conflict may arise, such consent is more likely to be effective,
229 particularly if, e.g., the client is independently represented by other counsel in giving consent and
230 the consent is limited to future conflicts unrelated to the subject of the representation. In any
231 case, advance consent cannot be effective if the circumstances that materialize in the future are
232 such as would make the conflict nonconsentable under paragraph (b).

233 **Choice of Rule Agreements**

234
235 [23] Paragraph (c) provides, with certain limitations, that a lawyer and client can agree that
236 the conflict rules of a particular jurisdiction will govern the representation. Such an agreement
237 can help lawyers and their clients to predict – with more accuracy than Rule 8.5(b) allows –
238 which jurisdiction’s conflict rules will govern the lawyer’s representation of a client when the
239 matter involves multiple jurisdictions.

240 241 **Conflicts in Litigation**

242 [243] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation,
243 regardless of the clients’ consent. On the other hand, simultaneous representation of parties
244 whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by
245 paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties’
246 testimony, incompatibility in positions in relation to an opposing party or the fact that there are
247 substantially different possibilities of settlement of the claims or liabilities in question. Such
248 conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in
249 representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should
250 decline to represent more than one codefendant. On the other hand, common representation of
251 persons having similar interests in civil litigation is proper if the requirements of paragraph (b)
252 are met.

253 [254] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at
254 different times on behalf of different clients. The mere fact that advocating a legal position on
255 behalf of one client might create precedent adverse to the interests of a client represented by the
256 lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists,
257 however, if there is a significant risk that a lawyer’s action on behalf of one client will materially
258 limit the lawyer’s effectiveness in representing another client in a different case; for example,
259 when a decision favoring one client will create a precedent likely to seriously weaken the
260 position taken on behalf of the other client. Factors relevant in determining whether the clients
261 need to be advised of the risk include: where the cases are pending, whether the issue is
262 substantive or procedural, the temporal relationship between the matters, the significance of the
263 issue to the immediate and long-term interests of the clients involved and the clients’ reasonable
264 expectations in retaining the lawyer. If there is significant risk of material limitation, then absent
265 informed consent of the affected clients, the lawyer must refuse one of the representations or
266 withdraw from one or both matters.

267 [265] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a
268 class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of
269 the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not
270 typically need to get the consent of such a person before representing a client suing the person in
271 an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does
272 not typically need the consent of an unnamed member of the class whom the lawyer represents in
273 an unrelated matter.

274 **Nonlitigation Conflicts**

275 [276] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than
276 litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment
277 [7]. Relevant factors in determining whether there is significant potential for material limitation
278 include the duration and intimacy of the lawyer’s relationship with the client or clients involved,
279 the functions being performed by the lawyer, the likelihood that disagreements will arise and the
280 likely prejudice to the client from the conflict. The question is often one of proximity and degree.
281 See Comment [8].

282 [287] For example, conflict questions may arise in estate planning and estate administration.
283 A lawyer may be called upon to prepare wills for several family members, such as husband and
284 wife, and, depending upon the circumstances, a conflict of interest may be present. In estate
285 administration the identity of the client may be unclear under the law of a particular jurisdiction.
286 Under one view, the client is the fiduciary; under another view the client is the estate or trust,
287 including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should
288 make clear the lawyer’s relationship to the parties involved.

289 [298] Whether a conflict is consentable depends on the circumstances. For example, a
290 lawyer may not represent multiple parties to a negotiation whose interests are fundamentally
291 antagonistic to each other, but common representation is permissible where the clients are
292 generally aligned in interest even though there is some difference in interest among them. Thus,
293 a lawyer may seek to establish or adjust a relationship between clients on an amicable and
294 mutually advantageous basis; for example, in helping to organize a business in which two or
295 more clients are entrepreneurs, working out the financial reorganization of an enterprise in which
296 two or more clients have an interest or arranging a property distribution in settlement of an
297 estate. The lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual
298 interests. Otherwise, each party might have to obtain separate representation, with the possibility
299 of incurring additional cost, complication or even litigation. Given these and other relevant
300 factors, the clients may prefer that the lawyer act for all of them.

301 **Special Considerations in Common Representation**

302 [3029] In considering whether to represent multiple clients in the same matter, a lawyer
303 should be mindful that if the common representation fails because the potentially adverse
304 interests cannot be reconciled, the result can be additional cost, embarrassment and
305 recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the
306 clients if the common representation fails. In some situations, the risk of failure is so great that
307 multiple representation is plainly impossible. For example, a lawyer cannot undertake common
308 representation of clients where contentious litigation or negotiations between them are imminent
309 or contemplated. Moreover, because the lawyer is required to be impartial between commonly
310 represented clients, representation of multiple clients is improper when it is unlikely that
311 impartiality can be maintained. Generally, if the relationship between the parties has already

312 assumed antagonism, the possibility that the clients' interests can be adequately served by
313 common representation is not very good. Other relevant factors are whether the lawyer
314 subsequently will represent both parties on a continuing basis and whether the situation involves
315 creating or terminating a relationship between the parties.

316 [310] A particularly important factor in determining the appropriateness of common
317 representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With
318 regard to the attorney-client privilege, the prevailing rule is that, as between commonly
319 represented clients, the privilege does not attach. Hence, it must be assumed that if litigation
320 eventuates between the clients, the privilege will not protect any such communications, and the
321 clients should be so advised.

322 [324] As to the duty of confidentiality, continued common representation will almost
323 certainly be inadequate if one client asks the lawyer not to disclose to the other client information
324 relevant to the common representation. This is so because the lawyer has an equal duty of loyalty
325 to each client, and each client has the right to be informed of anything bearing on the
326 representation that might affect that client's interests and the right to expect that the lawyer will
327 use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the
328 common representation and as part of the process of obtaining each client's informed consent,
329 advise each client that information will be shared and that the lawyer will have to withdraw if
330 one client decides that some matter material to the representation should be kept from the other.
331 In limited circumstances, it may be appropriate for the lawyer to proceed with the representation
332 when the clients have agreed, after being properly informed, that the lawyer will keep certain
333 information confidential. For example, the lawyer may reasonably conclude that failure to
334 disclose one client's trade secrets to another client will not adversely affect representation
335 involving a joint venture between the clients and agree to keep that information confidential with
336 the informed consent of both clients.

337 [332] When seeking to establish or adjust a relationship between clients, the lawyer should
338 make clear that the lawyer's role is not that of partisanship normally expected in other
339 circumstances and, thus, that the clients may be required to assume greater responsibility for
340 decisions than when each client is separately represented. Any limitations on the scope of the
341 representation made necessary as a result of the common representation should be fully
342 explained to the clients at the outset of the representation. See Rule 1.2(c).

343 [343] Subject to the above limitations, each client in the common representation has the
344 right to loyal and diligent representation and the protection of Rule 1.9 concerning the
345 obligations to a former client. The client also has the right to discharge the lawyer as stated in
346 Rule 1.16.

347 **Organizational Clients**

348 [354] A lawyer who represents a corporation or other organization does not, by virtue of
349 that representation, necessarily represent any constituent or affiliated organization, such as a
350 parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from
351 accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances
352 are such that the affiliate should also be considered a client of the lawyer, there is an
353 understanding between the lawyer and the organizational client that the lawyer will avoid
354 representation adverse to the client's affiliates, or the lawyer's obligations to either the
355 organizational client or the new client are likely to limit materially the lawyer's representation of
356 the other client.

357 [365] A lawyer for a corporation or other organization who is also a member of its board of
358 directors should determine whether the responsibilities of the two roles may conflict. The lawyer
359 may be called on to advise the corporation in matters involving actions of the directors.
360 Consideration should be given to the frequency with which such situations may arise, the
361 potential intensity of the conflict, the effect of the lawyer's resignation from the board and the
362 possibility of the corporation's obtaining legal advice from another lawyer in such situations. If
363 there is material risk that the dual role will compromise the lawyer's independence of
364 professional judgment, the lawyer should not serve as a director or should cease to act as the
365 corporation's lawyer when conflicts of interest arise. The lawyer should advise the other
366 members of the board that in some circumstances matters discussed at board meetings while the
367 lawyer is present in the capacity of director might not be protected by the attorney-client
368 privilege and that conflict of interest considerations might require the lawyer's recusal as a
369 director or might require the lawyer and the lawyer's firm to decline representation of the
370 corporation in a matter.

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REPORT

The American Bar Association's Commission on Ethics 20/20 has studied how globalization is transforming the practice of law and giving rise to a wide range of new ethical issues. One important change arising from both globalization generally and the related growth of cross-jurisdictional matters in particular is that clients are increasingly asking their lawyers to handle matters that implicate multiple jurisdictions, both within the United States and abroad. The Commission heard from practitioners that lawyers who are retained on these matters confront a variety of ethics-related choice of law problems and that these choice of law problems are particularly acute in the conflicts of interest context. This Report describes a proposal that would help to address these conflicts-related inconsistencies.

Conflicts-related choice of law problems can arise in many situations. For example, a lawyer may work on a transaction that involves parties and commitments in several U.S. or foreign jurisdictions. The lawyer (or the lawyer's firm) may then be asked to handle an unrelated matter that is adverse to a party the lawyer is representing in the business deal. Although the new matter would give rise to a conflict of interest under Rule 1.7 of the Model Rules of Professional Conduct, the new matter may not be a conflict of interest under the rules of other jurisdictions. The problem is that, if it is not clear which jurisdiction's conflicts rules apply, the lawyer (or the lawyer's firm) cannot be certain whether a conflict of interest would arise if the new matter is accepted. Similar issues arise, for example, because of inconsistencies among jurisdictions with regard to the permissibility of conflicts screens for laterally-hired lawyers under Rule 1.10.

The Commission's proposal, if adopted, could mitigate some of the uncertainty. In developing this proposal, the Commission's Uniformity, Choice of Law, and Conflicts of Interest Working Group included participants from the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Client Protection, the Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. They all made important contributions to the Working Group's understanding of the issues and the development of the Resolutions accompanying this Report. The Commission also released an Issues Paper identifying a wide range of conflicts-related choice of law problems and received considerable helpful input in response. The Commission's proposal also was aided by testimony from lawyers in various practice settings and organizations regarding these issues.

As a result of this process, the Commission is proposing that, subject to several limitations, lawyers and clients should have the freedom to agree that their relationship will be governed by a particular jurisdiction's rules of professional conduct relating to conflicts of interest. This proposal recognizes that Model Rule 8.5(b) (concerning choice of law) does not and cannot provide bright line assurance regarding this issue. The Commission concluded that an agreement that the client and lawyer will be governed by the rules of a particular jurisdiction can help provide clients and lawyers with increased certainty and reduce some problems that may arise from inconsistencies among jurisdictions' conflict of interest rules. To this end, the

Commission is proposing to add a paragraph (c) to Model Rule 1.7 that describes the circumstances under which such agreements would be permissible.

The Commission also will recommend that the Standing Committee on Ethics and Professional Responsibility draft a Formal Opinion that would provide greater guidance on how to resolve conflicts-related inconsistencies in the absence of the kinds of agreements anticipated by proposed Model Rule 1.7(c). The Commission considered a number of methods for offering this guidance within the Model Rules of Professional Conduct itself, but ultimately determined that the resolution of conflicts-related inconsistencies requires a fact-based inquiry that is not amenable to Model Rules treatment. Although Rule 8.5 offers some guidance in this regard, the Commission concluded that the Rule contains many ambiguities that could be usefully clarified in a Formal Opinion. The Commission believes that a Formal Opinion on this topic, in combination with the proposed new Model Rule 1.7(c), will enable lawyers, clients, and courts to predict with greater certainty which jurisdiction's conflict rules apply to a particular matter.

Proposal to Add Model Rule 1.7(c) and New Comment [23]

The Commission concluded that lawyers and clients would benefit from being able to agree at the outset of a matter that the representation will be governed by a specified jurisdiction's conflict of interest rules. The Commission determined that these "choice of rule" agreements should be permissible because they are conceptually analogous to waivers of future conflicts described in Comment [22] of Rule 1.7. Comment [22] already permits clients to agree to a broad waiver of future conflicts, so the Commission concluded that clients should also be permitted to choose to be governed by the conflict rules of a named jurisdiction, with certain qualifications discussed below. For example, assuming the several conditions described below are satisfied, a lawyer and client might agree that "Rules 1.7, 1.9, and 1.10 of the Ohio Rules of Professional Conduct will govern the lawyer's work in this matter."

The Commission concluded that the authority for these "choice of rule" agreements should appear in Rule 1.7, which addresses conflicts of interest, rather than in Rule 8.5, which deals with choice of law issues. The placement of the language in Rule 1.7 is intended to make clear that, although the proposal would authorize choice of rule agreements to address inconsistencies among jurisdictions' conflict of interest rules, it would not authorize agreements to address other kinds of choice of law problems (e.g., to address inconsistencies among jurisdictions with regard to the duty of confidentiality).

The Commission also concluded that the proposed language should appear in the black letter of Rule 1.7, not in a Comment to the Rule. The Commission's initial draft of the proposal had inserted this authority only in Comment [23], reasoning that waivers of future conflicts are described only in Comment [22] and not in the black letter. The Commission ultimately determined, however, that extra protections should be afforded to clients who are affected by these "choice of rule" agreements and that the effect of these agreements may be less clear than the effect of a conflict waiver. Accordingly, the Commission concluded that the authority for (and limitations on) these agreements should be stated explicitly in the black letter of Rule 1.7.

The proposed Rule 1.7(c) contains several important and necessary limitations. First, the client must give informed consent confirmed in writing. Second, the client must be advised in writing of the desirability of seeking independent counsel and be given the opportunity to seek

independent counsel. These conditions ensure that clients fully appreciate how a choice of rule agreement will affect the resolution of possible conflicts of interest that may arise in the future.

Proposed Rule 1.7(c) also would require that the selected jurisdiction be one in which the predominant effect of, or substantial work relating to, the matter is reasonably expected to occur. This requirement is designed to ensure that there is a reasonable nexus between the selected jurisdiction and the matter. Such a nexus is sometimes required when parties agree to choice of law provisions in contracts, and the Commission concluded that a nexus requirement would be prudent in this context as well to ensure that the selected jurisdiction has a reasonable connection to the applicable representation.¹

The final requirement recognizes that, regardless of the jurisdiction that is selected, the choice of rule agreement cannot authorize a representation to which consent is impermissible under the rules of the jurisdiction that would otherwise govern the relationship under Rule 8.5. For example, an agreement to apply the rules of Jurisdiction A will be ineffective if a conflict issue later arises under the rules of Jurisdiction B, and Jurisdiction B (unlike Jurisdiction A) does not permit informed consent to the type of conflict that has arisen.

Conclusion

Conflicts-related choice of law problems are commonly encountered, but the Rules currently offer little guidance on how to resolve them. The Commission's proposal is intended to provide more predictability to clients and their lawyers by permitting them to agree in advance to be bound by the conflict rules of a particular jurisdiction. For this reason, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolution.

¹ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).