

1 The views expressed herein have not been approved by the House of Delegates or the Board
2 of Governors of the American Bar Association and, accordingly, should not be construed as
3 representing the policy of the American Bar Association.
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5 American Bar Association
6 Commission on Ethics 20/20

7 Resolution
8

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

12
13 **Rule 1.7 Conflict of Interest: Current Clients**
14

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

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

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

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

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

26 (2) the representation is not prohibited by law;

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

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

31 (c) A lawyer and client are permitted to agree that the lawyer's work on a matter will
32 be governed by the conflict of interest rules of a specific jurisdiction, but only if:

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

34 (2) the client has a reasonable opportunity to consult with independent legal counsel
35 regarding the agreement;

36 (3) the selected jurisdiction is one in which substantial work related to the matter, or
37 the predominant effect of such work, is reasonably expected to occur; and

38 (4) the agreement does not result in the application of a conflict rule that permits the
39 lawyer to undertake a representation to which informed consent is not permissible
40 under the rules of the jurisdiction whose rules would otherwise govern the lawyer's
41 work on a matter under Rule 8.5(b).

42 **COMMENT**

43 **General Principles**

44 [1] Loyalty and independent judgment are essential elements in the lawyer's relationship to
45 a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another
46 client, a former client or a third person or from the lawyer's own interests. For specific Rules
47 regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of
48 interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For
49 definitions of "informed consent" and "confirmed in writing," see Rule 1.0 (e) and (b).

50 [2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1)
51 clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide
52 whether the representation may be undertaken despite the existence of a conflict, i.e., whether the
53 conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and
54 obtain their informed consent, confirmed in writing. The clients affected under paragraph (a)
55 include both of the clients referred to in paragraph (a)(1) and the one or more clients whose
56 representation might be materially limited under paragraph (a)(2).

57 [3] A conflict of interest may exist before representation is undertaken, in which event the
58 representation must be declined, unless the lawyer obtains the informed consent of each client
59 under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer
60 should adopt reasonable procedures, appropriate for the size and type of firm and practice, to
61 determine in both litigation and non-litigation matters the persons and issues involved. See also
62 Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse
63 a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having
64 once been established, is continuing, see Comment to Rule 1.3 and Scope.

65 [4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must
66 withdraw from the representation, unless the lawyer has obtained the informed consent of the
67 client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is
68 involved, whether the lawyer may continue to represent any of the clients is determined both by
69 the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to
70 represent adequately the remaining client or clients, given the lawyer's duties to the former
71 client. See Rule 1.9. See also Comments [5] and [2930].

72 [5] Unforeseeable developments, such as changes in corporate and other organizational
73 affiliations or the addition or realignment of parties in litigation, might create conflicts in the
74 midst of a representation, as when a company sued by the lawyer on behalf of one client is
75 bought by another client represented by the lawyer in an unrelated matter. Depending on the
76 circumstances, the lawyer may have the option to withdraw from one of the representations in
77 order to avoid the conflict. The lawyer must seek court approval where necessary and take steps
78 to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the
79 confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9 (c).

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

81 [6] Loyalty to a current client prohibits undertaking representation directly adverse to that
82 client without that client's informed consent. Thus, absent consent, a lawyer may not act as an
83 advocate in one matter against a person the lawyer represents in some other matter, even when
84 the matters are wholly unrelated. The client as to whom the representation is directly adverse is
85 likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to

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

96 [7] Directly adverse conflicts can also arise in transactional matters. For example, if a
97 lawyer is asked to represent the seller of a business in negotiations with a buyer represented by
98 the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not
99 undertake the representation without the informed consent of each client.

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

101 [8] Even where there is no direct adverseness, a conflict of interest exists if there is a
102 significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course
103 of action for the client will be materially limited as a result of the lawyer's other responsibilities
104 or interests. For example, a lawyer asked to represent several individuals seeking to form a joint
105 venture is likely to be materially limited in the lawyer's ability to recommend or advocate all
106 possible positions that each might take because of the lawyer's duty of loyalty to the others. The
107 conflict in effect forecloses alternatives that would otherwise be available to the client. The mere
108 possibility of subsequent harm does not itself require disclosure and consent. The critical
109 questions are the likelihood that a difference in interests will eventuate and, if it does, whether it
110 will materially interfere with the lawyer's independent professional judgment in considering
111 alternatives or foreclose courses of action that reasonably should be pursued on behalf of the
112 client.

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

114 [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and
115 independence may be materially limited by responsibilities to former clients under Rule 1.9 or by
116 the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's
117 service as a trustee, executor or corporate director.

118 **Personal Interest Conflicts**

119 [10] The lawyer's own interests should not be permitted to have an adverse effect on
120 representation of a client. For example, if the probity of a lawyer's own conduct in a transaction
121 is in serious question, it may be difficult or impossible for the lawyer to give a client detached
122 advice. Similarly, when a lawyer has discussions concerning possible employment with an
123 opponent of the lawyer's client, or with a law firm representing the opponent, such discussions
124 could materially limit the lawyer's representation of the client. In addition, a lawyer may not
125 allow related business interests to affect representation, for example, by referring clients to an
126 enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific
127 Rules pertaining to a number of personal interest conflicts, including business transactions with
128 clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed
129 to other lawyers in a law firm).

130 [11] When lawyers representing different clients in the same matter or in substantially
131 related matters are closely related by blood or marriage, there may be a significant risk that client
132 confidences will be revealed and that the lawyer's family relationship will interfere with both
133 loyalty and independent professional judgment. As a result, each client is entitled to know of the
134 existence and implications of the relationship between the lawyers before the lawyer agrees to
135 undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child,
136 sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is
137 representing another party, unless each client gives informed consent. The disqualification
138 arising from a close family relationship is personal and ordinarily is not imputed to members of
139 firms with whom the lawyers are associated. See Rule 1.10.

140 [12] A lawyer is prohibited from engaging in sexual relationships with a client unless the
141 sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

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

143 [13] A lawyer may be paid from a source other than the client, including a coclient, if the
144 client is informed of that fact and consents and the arrangement does not compromise the
145 lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of
146 the payment from any other source presents a significant risk that the lawyer's representation of
147 the client will be materially limited by the lawyer's own interest in accommodating the person
148 paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then
149 the lawyer must comply with the requirements of paragraph (b) before accepting the
150 representation, including determining whether the conflict is consentable and, if so, that the
151 client has adequate information about the material risks of the representation.

152 **Prohibited Representations**

153 [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However,
154 as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer
155 involved cannot properly ask for such agreement or provide representation on the basis of the
156 clients consent. When the lawyer is representing more than one client, the question of
157 consentability must be resolved as to each client.

158 [15] Consentability is typically determined by considering whether the interests of the
159 clients will be adequately protected if the clients are permitted to give their informed consent to
160 representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is
161 prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be
162 able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3
163 (diligence).

164 [16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation
165 is prohibited by applicable law. For example, in some states substantive law provides that the
166 same lawyer may not represent more than one defendant in a capital case, even with the consent
167 of the clients, and under federal criminal statutes certain representations by a former government
168 lawyer are prohibited, despite the informed consent of the former client. In addition, decisional
169 law in some states limits the ability of a governmental client, such as a municipality, to consent
170 to a conflict of interest.

171 [17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional
172 interest in vigorous development of each client's position when the clients are aligned directly
173 against each other in the same litigation or other proceeding before a tribunal. Whether clients
174 are aligned directly against each other within the meaning of this paragraph requires examination

175 of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple
176 representation of adverse parties to a mediation (because mediation is not a proceeding before a
177 "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

178 **Informed Consent**

179 [18] Informed consent requires that each affected client be aware of the relevant
180 circumstances and of the material and reasonably foreseeable ways that the conflict could have
181 adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The
182 information required depends on the nature of the conflict and the nature of the risks involved.
183 When representation of multiple clients in a single matter is undertaken, the information must
184 include the implications of the common representation, including possible effects on loyalty,
185 confidentiality and the attorney-client privilege and the advantages and risks involved. See
186 Comments [3031] and [3132] (effect of common representation on confidentiality).

187 [19] Under some circumstances it may be impossible to make the disclosure necessary to
188 obtain consent. For example, when the lawyer represents different clients in related matters and
189 one of the clients refuses to consent to the disclosure necessary to permit the other client to make
190 an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the
191 alternative to common representation can be that each party may have to obtain separate
192 representation with the possibility of incurring additional costs. These costs, along with the
193 benefits of securing separate representation, are factors that may be considered by the affected
194 client in determining whether common representation is in the client's interests.

195 **Consent Confirmed in Writing**

196 [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client,
197 confirmed in writing. Such a writing may consist of a document executed by the client or one
198 that the lawyer promptly records and transmits to the client following an oral consent. See Rule
199 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to
200 obtain or transmit the writing at the time the client gives informed consent, then the lawyer must
201 obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a
202 writing does not supplant the need in most cases for the lawyer to talk with the client, to explain
203 the risks and advantages, if any, of representation burdened with a conflict of interest, as well as
204 reasonably available alternatives, and to afford the client a reasonable opportunity to consider the
205 risks and alternatives and to raise questions and concerns. Rather, the writing is required in order
206 to impress upon clients the seriousness of the decision the client is being asked to make and to
207 avoid disputes or ambiguities that might later occur in the absence of a writing.

208 **Revoking Consent**

209 [21] A client who has given consent to a conflict may revoke the consent and, like any other
210 client, may terminate the lawyer's representation at any time. Whether revoking consent to the
211 client's own representation precludes the lawyer from continuing to represent other clients
212 depends on the circumstances, including the nature of the conflict, whether the client revoked
213 consent because of a material change in circumstances, the reasonable expectations of the other
214 client and whether material detriment to the other clients or the lawyer would result.

215 **Consent to Future Conflict**

216 [22] Whether a lawyer may properly request a client to waive conflicts that might arise in
217 the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally
218 determined by the extent to which the client reasonably understands the material risks that the

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

232 **Choice of Rule Agreements**

233
234 [23] Paragraph (c) provides, with certain limitations, that a lawyer and client can agree that
235 the conflict rules of a specific jurisdiction will govern the representation. Such an agreement can
236 help lawyers and their clients to predict which jurisdiction's conflict rules will govern the
237 lawyer's representation of a client. The agreement can be helpful, whether in addition to or
238 instead of a consent to future conflicts now permitted under Comment [22], because it can
239 incorporate by reference an entire body of law on conflicts of interests. Clients, however, may
240 be less likely to understand the material risks of such an agreement than when they consent to a
241 specific possible future conflict. For this reason, Rule 1.7(c) imposes a number of requirements
242 and limitations. For example, paragraph (c)(3) requires the selected jurisdiction to be one in
243 which substantial work related to the matter, or the predominant effect of such work, is
244 reasonably expected to occur.

245 **Conflicts in Litigation**

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

258 [254] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at
259 different times on behalf of different clients. The mere fact that advocating a legal position on
260 behalf of one client might create precedent adverse to the interests of a client represented by the
261 lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists,
262 however, if there is a significant risk that a lawyer's action on behalf of one client will materially
263 limit the lawyer's effectiveness in representing another client in a different case; for example,
264 when a decision favoring one client will create a precedent likely to seriously weaken the

265 position taken on behalf of the other client. Factors relevant in determining whether the clients
266 need to be advised of the risk include: where the cases are pending, whether the issue is
267 substantive or procedural, the temporal relationship between the matters, the significance of the
268 issue to the immediate and long-term interests of the clients involved and the clients' reasonable
269 expectations in retaining the lawyer. If there is significant risk of material limitation, then absent
270 informed consent of the affected clients, the lawyer must refuse one of the representations or
271 withdraw from one or both matters.

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

279 **Nonlitigation Conflicts**

280 [276] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than
281 litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment
282 [7]. Relevant factors in determining whether there is significant potential for material limitation
283 include the duration and intimacy of the lawyer's relationship with the client or clients involved,
284 the functions being performed by the lawyer, the likelihood that disagreements will arise and the
285 likely prejudice to the client from the conflict. The question is often one of proximity and degree.
286 See Comment [8].

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

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

306 **Special Considerations in Common Representation**

307 [3029] In considering whether to represent multiple clients in the same matter, a lawyer
308 should be mindful that if the common representation fails because the potentially adverse
309 interests cannot be reconciled, the result can be additional cost, embarrassment and

310 recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the
311 clients if the common representation fails. In some situations, the risk of failure is so great that
312 multiple representation is plainly impossible. For example, a lawyer cannot undertake common
313 representation of clients where contentious litigation or negotiations between them are imminent
314 or contemplated. Moreover, because the lawyer is required to be impartial between commonly
315 represented clients, representation of multiple clients is improper when it is unlikely that
316 impartiality can be maintained. Generally, if the relationship between the parties has already
317 assumed antagonism, the possibility that the clients' interests can be adequately served by
318 common representation is not very good. Other relevant factors are whether the lawyer
319 subsequently will represent both parties on a continuing basis and whether the situation involves
320 creating or terminating a relationship between the parties.

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

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

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

348 [343] Subject to the above limitations, each client in the common representation has the
349 right to loyal and diligent representation and the protection of Rule 1.9 concerning the
350 obligations to a former client. The client also has the right to discharge the lawyer as stated in
351 Rule 1.16.

352 **Organizational Clients**

353 [354] A lawyer who represents a corporation or other organization does not, by virtue of
354 that representation, necessarily represent any constituent or affiliated organization, such as a

355 parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from
356 accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances
357 are such that the affiliate should also be considered a client of the lawyer, there is an
358 understanding between the lawyer and the organizational client that the lawyer will avoid
359 representation adverse to the client's affiliates, or the lawyer's obligations to either the
360 organizational client or the new client are likely to limit materially the lawyer's representation of
361 the other client.

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

376

377 **Rule 8.5 Disciplinary Authority; Choice Of Law**

378 **(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to**
379 **the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct**
380 **occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary**
381 **authority of this jurisdiction if the lawyer provides or offers to provide any legal services in**
382 **this jurisdiction. A lawyer may be subject to the disciplinary authority of both this**
383 **jurisdiction and another jurisdiction for the same conduct.**

384 **(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the**
385 **rules of professional conduct to be applied shall be as follows:**

386 **(1) for conduct in connection with a matter pending before a tribunal, the rules of the**
387 **jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise;**
388 **and**

389 **(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct**
390 **occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules**
391 **of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to**
392 **discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer**
393 **reasonably believes the predominant effect of the lawyer's conduct will occur.**

394

395 **COMMENT**

396 **Disciplinary Authority**

397 [1] It is longstanding law that the conduct of a lawyer admitted to practice in this
398 jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the
399 disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal
400 services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal
401 enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the
402 purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary
403 Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule
404 8.5(a) appoints an official to be designated by this Court to receive service of process in this
405 jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction
406 may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for
407 civil matters.

408 **Choice of Law**

409 [2] A lawyer may be potentially subject to more than one set of rules of professional
410 conduct which impose different obligations. The lawyer may be licensed to practice in more than
411 one jurisdiction with differing rules, or may be admitted to practice before a particular court with
412 rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to
413 practice. Additionally, the lawyer's conduct may involve significant contacts with more than one
414 jurisdiction.

415 [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing
416 conflicts between rules, as well as uncertainty about which rules are applicable, is in the best
417 interest of both clients and the profession (as well as the bodies having authority to regulate the
418 profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a
419 lawyer shall be subject to only one set of rules of professional conduct, (ii) making the
420 determination of which set of rules applies to particular conduct as straightforward as possible,
421 consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii)
422 providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

423 [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding
424 pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which
425 the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide
426 otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet
427 pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of
428 the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the
429 conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In
430 the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the
431 predominant effect of such conduct could be where the conduct occurred, where the tribunal sits
432 or in another jurisdiction.

433 [5] When a lawyer's conduct involves significant contacts with more than one
434 jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will
435 occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's
436 conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the
437 predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

438 [6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct,
439 they should, applying this rule, identify the same governing ethics rules. They should take all
440 appropriate steps to see that they do apply the same rule to the same conduct, and in all events
441 should avoid proceeding against a lawyer on the basis of two inconsistent rules.

442 [7] The choice of law provision applies to lawyers engaged in transnational practice,
443 unless international law, treaties or other agreements between competent regulatory authorities in
444 the affected jurisdictions provide otherwise.

445 [8] A lawyer and client may agree, pursuant to Rule 1.7(c), to be bound by the conflict of
446 interest rules of a specified jurisdiction. Such an agreement, however, must not result in the
447 application of a conflict rule that would permit the lawyer to undertake a representation to which
448 informed consent is not permissible under the rules of the jurisdiction that would otherwise
449 govern the lawyer's work on the matter under Rule 8.5(b). See Rule 1.7(c)(4).

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.

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 transaction. 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 U.S. 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 specific 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 is also proposing to add a new Comment to Model Rule 8.5 that would cross-reference this new authority.

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 would be most usefully clarified in a Formal Opinion rather than through changes to Rule 8.5 itself. 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 "the Ohio Rules and law on conflicts of interest will govern the lawyer's work on 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. Clients, however, may be less likely to understand the material risks of an agreement to select the conflict rules of a particular jurisdiction than when they consent to a specific possible future conflict. For this reason, the authority to enter into these agreements has been placed in the black letter of Rule 1.7(c).

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Model Rule 1.7 Conflict of Interest
September 18, 2012

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 given the opportunity to seek independent legal 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.

The Commission considered other possible restrictions as well. For example, an early draft of the Commission's proposal would have required lawyers to advise clients of the advisability of seeking independent counsel before signing the choice of rule agreement. Such a requirement would be consistent with Model Rule 1.8(a)(2), which requires lawyers to advise the client of the advisability of seeking independent counsel before the lawyer enters into a business transaction. The Commission concluded, however, that choice of rule agreements are materially different from entering into a business transaction with a client and pose less of a risk. Whereas business transactions with clients 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 Commission believes that the restrictions contained in proposed Rule 1.7(c)(1)-(4) offer sufficient client protections.

Some commenters expressed the view that the proposed Rule 1.7(c) does not provide a solution that is not already available through an informed consent to future conflicts under Comment [22]. A choice of rule agreement does not preclude an advance consent. Although choice of rule agreements are conceptually similar to advance waivers, the Commission believes that choice of rule agreements provide distinct benefits. Rather than having to spell out every aspect of an advance waiver, a choice of rule agreement can incorporate an entire body of law by reference. Because choice of rule agreements will give clients less information about the significance of what is being waived, however, more client protections need to be built into the authority than for advance waivers. For this reason, the authority for choice of rule agreements

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

appears in the black letter rather than in a Comment and contains additional restrictions that do not exist for advance waivers.

The Commission also considered the concern that the proposal requires a separate choice of rule agreement for each new matter and that such a requirement would minimize the usefulness of such agreements. But a choice of rule agreement that applies to all matters within an attorney-client relationship can result in application of the rules of a jurisdiction that has no connection with a particular matter. This would be inconsistent with the choice of rule language of Rule 8.5(b)(2), whose focus is on conduct within a *matter*. Of course, if a law firm believes it is too burdensome to obtain a new agreement for each matter, there is nothing that prevents the firm from using a more traditional consent to future conflicts under Comment [22] or to utilize Rule 1.7(c) for certain matters only. The Commission's proposal is merely intended to give law firms and clients additional options for dealing with choice of law issues, not to replace existing solutions.

The Commission also considered the view that the proposed rule too narrowly defines the jurisdictions (the "permitted jurisdictions") whose conflicts rules may be chosen (one in which the predominant effect of, or substantial work relating to, the matter is reasonably expected to occur). The jurisdictions identified in Rule 1.7(c) closely track the two bases in Rule 8.5(b)(2) for resolving differences between the rules of different jurisdictions, adjusted for the fact that a decision under the proposed rule will be made at a different time, generally at the outset of a representation.

The Commission also heard the concern that the proposal might have unintended consequences. For example, the rules of the selected jurisdiction might not recognize consents to certain concurrent conflicts of interest. If such a conflict then arises, the agreement to apply the rules of such a country might prevent consent even if the affected parties are willing to give it. The Commission believes that this is a problem that is inherent in any choice of law provision. Once lawyers and clients learn that a particular jurisdiction's rules are problematic in this regard, they will simply avoid selecting such jurisdictions in the future. Moreover, depending on the circumstances, the client and the lawyer might be able to execute a new agreement that results in the selection of a different jurisdiction's rules (as long as the selected jurisdiction is one that has the requisite connection to the representation). Indeed, in the context of advance waivers of future conflicts, a client can revoke that consent at any time, subject to certain limitations.²

Another concern that the Commission heard was that lawyers should have to disclose more information to clients about the effects of entering into a choice of rule agreement. The Rule, however, requires lawyers to obtain a client's "informed consent" to the agreement. Informed consent requires "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rule 1.0(e). The Commission believes that this "informed consent" requirement will ensure that clients obtain the information that they need.

² RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS § 122, Comment *f* (2000).

Proposal to Add Comment [8] to Model Rule 8.5

The Commission is also proposing to add a new Comment [8] to Model Rule 8.5. The purpose of the Comment is to alert lawyers to the existence of the new authority for choice of rule agreements under Rule 1.7 and to explain that, to use that authority, a lawyer will have to conduct a choice of law analysis under Model Rule 8.5 and conclude that the jurisdiction whose rules would otherwise govern the relationship in the absence of the agreement would permit client consent to conflicts of interest that the agreement would allow.

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.