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

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

Re: For Comment: Initial Draft Proposals on Uniformity, Conflicts of Interest, and Choice of Law

Date: September 8, 2011

The Commission is pleased to release its initial proposals to address a number of ethics issues arising from the globalization of law practice and the proliferation of new technologies, including issues related to cross-border practice, lawyer mobility, and inconsistencies in jurisdictions’ rules of professional conduct. We seek your comments on them.

Model Rule on Admission by Motion; Expanding the Scope of the Existing Rule and Encouraging Adoption of the Model Rule. One of the Commission’s proposals concerns the ABA Model Rule on Admission by Motion. Initially adopted in 2002, the Model Rule permits a lawyer admitted in one U.S. jurisdiction to gain full admission in another jurisdiction without having to pass that jurisdiction’s bar examination. The lawyer, however, must satisfy several requirements, one of which is to have engaged in the active practice of law for five of the last seven years. Recognizing that lawyer mobility is important for both lawyers and their clients, the Commission is recommending an amendment to the Model Rule that would enable lawyers to qualify for admission by motion after three years of active practice instead of five. The Commission also will ask the ABA to adopt a resolution urging jurisdictions that have not adopted the Model Rule to do so and, in particular, to do so without imposing additional restrictions.

Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice); Creation of New Limited Practice Authority under Rule 5.5(d) and Clarification of the Concept of “Systematic and Continuous Presence” under Rule 5.5(b). A second proposal concerns Rule 5.5 of the ABA Model Rules of Professional Conduct and includes two distinct proposed amendments. One proposed amendment would create a new Rule 5.5(d)(3). This provision would enable lawyers qualified to practice in one jurisdiction to practice in a new jurisdiction while they diligently pursue admission through one of the procedures that the new jurisdiction authorizes, such as admission by motion or passage of that jurisdiction’s bar examination.1

1 One of the Commission’s inbound foreign lawyer proposals recommends that foreign lawyers be included within the scope of Rule 5.5 for purposes of limited practice authority. See http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_for eignlawyers.authcheckdam.pdf. The Commission’s proposed Rule 5.5(d)(3), however, does not create any new avenues for admitting those foreign lawyers beyond what the Model Rules currently allow (e.g., rules relating to foreign legal consultants and rules governing the ability of foreign lawyers to sit for a particular jurisdiction’s bar examination).
Another proposed amendment would add language to existing Comment [4] in order to elaborate on the meaning of Rule 5.5(b)(1), which prohibits lawyers from establishing “an office or other systematic and continuous presence” in a jurisdiction unless the lawyer is authorized to practice law in that jurisdiction. The Commission found that, especially in light of how technology now facilitates the practice of law, it is not always clear when a lawyer has established such a presence. Thus, the Commission is proposing an amendment to Comment [4] that would specify that a lawyer may have a systematic and continuous presence in a jurisdiction if the lawyer directs electronic or other forms of advertising to clients in the jurisdiction with the intent of representing those clients and establishing a substantial practice in the jurisdiction. The Commission wanted to make clear that, at some point, such a virtual presence can give rise to a systematic and continuous presence within the meaning of Rule 5.5(b)(1).

**Model Rule 1.6 (Duty of Confidentiality); Authorization of Limited Disclosures to Facilitate Conflict Checking.** A third proposal addresses a question that arises with greater frequency due to increased lawyer mobility: Before a lawyer becomes associated with a firm, to what extent can the lawyer disclose to the firm confidential information about current and former clients to permit the lawyer and the firm to identify possible conflicts of interest arising from the lawyer’s potential association? The Commission proposes amending the black letter of Rule 1.6 of the ABA Model Rules of Professional Conduct (Confidentiality of Information) and adding a new Comment that would more clearly explain the ethical considerations associated with these disclosures. The goal is to ensure adequate protection of client confidences while allowing a lawyer and a firm to identify potential conflicts of interest that might arise from the lawyer’s association with that firm.

**Model Rule 1.7 (Conflict of Interest; Current Clients); Describing Choice of Law Provisions in Client-Lawyer Agreements.** Finally, the Commission is proposing a new Comment to Rule 1.7 of the Model Rules of Professional Conduct that would make clear that lawyers and clients are permitted to agree that their relationship will be governed by a particular jurisdiction’s conflict of interest rules. This proposal recognizes that Rule 8.5(b) of the ABA Model Rules of Professional Conduct (Choice of Law) does not – and cannot – provide bright line assurance regarding which jurisdiction’s conflict rules will govern a representation that involves multiple jurisdictions. The Commission concluded that agreements to be governed by the conflict rules of a particular jurisdiction can provide lawyers and their clients with increased certainty about the rules that will govern their relationship and reduce some of the choice of law problems that arise due to inconsistencies among jurisdictions’ conflict of interest rules. To this end, the Commission is proposing a new Comment [23] to Rule 1.7 that would describe the circumstances under which such agreements are permissible.

In addition to seeking feedback on proposed new Comment [23], the Commission also seeks input on a related proposal that the Commission is still considering but has not yet taken a position on. That proposal would amend Rule 1.10(a) of the Model Rules of Professional Conduct to read as follows:

While lawyers are associated in a firm, none of them who are acting in a substantially related matter in this or any other jurisdiction in the United States shall knowingly represent a client when any one of them practicing alone in such a matter or jurisdiction is prohibited from doing so by Rules 1.7 or 1.9. . .

This possible proposal would address inconsistencies that currently exist between the United States and foreign jurisdictions with regard to concurrent conflicts of interest. Some have argued
that because the ethics rules of foreign jurisdictions (unlike the ethics rules in nearly all United States jurisdictions) tend to permit a representation that is adverse to existing clients in matters that are unrelated to the firm’s work for those existing clients, United States law firms with offices in foreign jurisdictions are at a competitive disadvantage relative to law firms that do not have offices in the United States. Namely, law firms that do not have offices in the United States have the freedom to accept representations that their U.S.-based counterparts are ethically obligated to refuse for conflicts-related reasons. To address this issue, the Commission has been asked to adopt the above amendment to Rule 1.10(a). The Commission has taken no position on the advisability of this proposal and thus seeks public comment on whether the proposed change would be beneficial, including from those who are most likely to be affected by it (such as general counsel).

In developing the proposals that are being released today, the Commission benefited from the input of participants from various ABA and outside entities, as well as from many people who commented on the Commission’s issues papers. The Commission is grateful to those who provided comments to date. The Commission encourages comments in response to these newest proposals by November 30, 2011. Comments may be submitted to Senior Research Paralegal, Natalia Vera at natalia.vera@americanbar.org.

The Commission has now released many of its proposals in draft form and will be releasing its remaining proposals by the end of September. The Commission also plans to release subsequent drafts of its proposals over the coming months and will solicit additional comments on those new drafts at that time. The Commission will submit to the ABA House of Delegates final versions of all proposals in May 2012, several months before the House of Delegates considers those proposals at its August 2012 Annual Meeting.