ABA Commission on Ethics 20/20-Initial Proposal-Choice of Law and Conflicts of Interest  September 7, 2011

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.

COMMENT

General Principles

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

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

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

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

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

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse
to that client without that client’s informed consent. Thus, absent consent, a lawyer may
not act as an advocate in one matter against a person the lawyer represents in some other
matter, even when the matters are wholly unrelated. The client as to whom the
representation is directly adverse is likely to feel betrayed, and the resulting damage to
the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client
effectively. In addition, the client on whose behalf the adverse representation is
undertaken reasonably may fear that the lawyer will pursue that client’s case less
effectively out of deference to the other client, i.e., that the representation may be
materially limited by the lawyer’s interest in retaining the current client. Similarly, a
directly adverse conflict may arise when a lawyer is required to cross-examine a client
who appears as a witness in a lawsuit involving another client, as when the testimony will
be damaging to the client who is represented in the lawsuit. On the other hand,
simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

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

Identifying Conflicts of Interest: Material Limitation

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

Lawyer’s Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

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

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

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

*Interest of Person Paying for a Lawyer’s Service*

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

*Prohibited Representations*

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

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

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

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the
institutional interest in vigorous development of each client’s position when the clients
are aligned directly against each other in the same litigation or other proceeding before a
tribunal. Whether clients are aligned directly against each other within the meaning of
this paragraph requires examination of the context of the proceeding. Although this
paragraph does not preclude a lawyer’s multiple representation of adverse parties to a
mediation (because mediation is not a proceeding before a “tribunal” under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

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

Consent Confirmed in Writing

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

Revoking Consent

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

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Choice of Rule Agreements

[23] A matter may require a lawyer to perform work in multiple jurisdictions whose conflict rules differ. To ensure that a lawyer and client have the ability to reduce uncertainty and to predict which conflict rules will apply to a matter, the lawyer and client may agree that their relationship concerning the matter will be governed by the conflict rules of a specific United States or foreign jurisdiction, which may be other than the jurisdiction whose rules would apply under Rule 8.5(b) absent such agreement. Any such agreement, however, is subject to the following conditions: The client gives informed consent to the agreement, confirmed in writing; the lawyer advises the client in writing of the desirability of seeking independent counsel regarding the agreement; the client has a reasonable opportunity to consult with independent counsel regarding the agreement; the selected jurisdiction must be one in which the predominant effect of, or substantial work relating to, the matter is reasonably expected to occur; and the agreement may 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 Rules 1.7(b) and 8.5(b). Client consent under this paragraph is more likely to be effective if the client is an experienced user of legal services.

Conflicts in Litigation

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

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

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

**Nonlitigation Conflicts**

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

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

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

**Special Considerations in Common Representation**

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients’ interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client’s trade secrets to another client will not adversely affect...
358 representation involving a joint venture between the clients and agree to keep that
359 information confidential with the informed consent of both clients.
360
332] When seeking to establish or adjust a relationship between clients, the lawyer
361 should make clear that the lawyer’s role is not that of partisanship normally expected in
362 other circumstances and, thus, that the clients may be required to assume greater
363 responsibility for decisions than when each client is separately represented. Any
364 limitations on the scope of the representation made necessary as a result of the common
365 representation should be fully explained to the clients at the outset of the representation.
366 See Rule 1.2(c).
367
343] Subject to the above limitations, each client in the common representation has
368 the right to loyal and diligent representation and the protection of Rule 1.9 concerning the
369 obligations to a former client. The client also has the right to discharge the lawyer as
370 stated in Rule 1.16.
371
372 Organizational Clients
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354] A lawyer who represents a corporation or other organization does not, by
374 virtue of that representation, necessarily represent any constituent or affiliated
375 organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an
376 organization is not barred from accepting representation adverse to an affiliate in an
377 unrelated matter, unless the circumstances are such that the affiliate should also be
378 considered a client of the lawyer, there is an understanding between the lawyer and the
379 organizational client that the lawyer will avoid representation adverse to the client’s
380 affiliates, or the lawyer’s obligations to either the organizational client or the new client
381 are likely to limit materially the lawyer’s representation of the other client.
382
365] A lawyer for a corporation or other organization who is also a member of its
383 board of directors should determine whether the responsibilities of the two roles may
384 conflict. The lawyer may be called on to advise the corporation in matters involving
385 actions of the directors. Consideration should be given to the frequency with which such
386 situations may arise, the potential intensity of the conflict, the effect of the lawyer’s
387 resignation from the board and the possibility of the corporation’s obtaining legal advice
388 from another lawyer in such situations. If there is material risk that the dual role will
389 compromise the lawyer’s independence of professional judgment, the lawyer should not
390 serve as a director or should cease to act as the corporation’s lawyer when conflicts of
391 interest arise. The lawyer should advise the other members of the board that in some
392 circumstances matters discussed at board meetings while the lawyer is present in the
393 capacity of director might not be protected by the attorney-client privilege and that
394 conflict of interest considerations might require the lawyer’s recusal as a director or
395 might require the lawyer and the lawyer’s firm to decline representation of the
396 corporation in a matter.
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 heard about and studied the choice of law problems that arise when an ethics issue implicates multiple jurisdictions with inconsistent rules of professional conduct. The problems are particularly acute in jurisdictions with inconsistent conflict of interest rules. This Report describes the Commission’s proposals to address these problems.

To develop appropriate recommendations in this area, the Commission researched and studied common conflicts-related choice of law problems. To assist in these efforts, 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 made important contributions to the Working Group’s understanding of the issues and the development of the Resolutions accompanying this Report. Moreover, the Commission released an Issues Paper identifying a wide range of conflicts-related choice of law problems and received numerous responses. The Commission also heard testimony from lawyers in various practicing settings and organizations regarding these issues.

As a result of these efforts, 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 Rule 8.5(b) does not and cannot provide bright line assurance regarding this issue. The Commission concluded that an agreement to be governed by the rules of a particular jurisdiction can help provide clients and lawyers with increased certainty and reduce some of the choice of law problems that may 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, which would describe the circumstances under which such agreements are 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 Comment [23]. 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 amendment to Comment [23] to Rule 1.7, will enable lawyers,
clients, and courts to be able to predict with greater certainty which jurisdiction’s conflict rules will govern their relationships.

Proposal to Add Comment [23] to Model Rule 1.7

The Commission concluded that lawyers and clients will 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 agreements are conceptually analogous to waivers of future conflicts described in Comment [22] of Rule 1.7. In particular, 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, 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.” (Moreover, because of the analogy to Comment [22], the Commission concluded that the appropriate location for the new Comment language is immediately after Comment [22] in a new Comment [23].)

Proposed Comment [23] contains several important and necessary limitations. First, the client must give informed consent confirmed in writing and must have an opportunity to consult with counsel. These conditions are similar to those mentioned in the context of Comment [22] (which references the requirement in Rule 1.7(b)(4) regarding informed written consent), and the rationales for these conditions apply equally well to the proposed new Comment.

Second, proposed Comment [23] requires 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 frequently required when parties agree to choice of law provisions in contracts, and the Commission concluded that a nexus requirement is 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 client cannot agree to a representation that is considered to be “non-consentable” under the rules of the jurisdiction that would otherwise govern the relationship under Rule 8.5. For example, if a particular representation would normally be governed by a jurisdiction that has adopted the Model Rules, the lawyer and client cannot agree to be bound by the rules of a jurisdiction that would allow the lawyer to undertake a representation that would be “non-consentable” under

¹ See, e.g., Restatement (Second) of Conflict of Laws § 187.
Rule 1.7(b) or to which the client cannot give informed consent as that term is defined in Rule 1.0(e).

The proposed Comment concludes with the observation that these agreements are more likely to be effective if a client is an experienced user of the legal services involved. The client’s experience is a relevant factor in Comment [22] when determining whether waivers of future conflicts are effective, and the Commission concluded that it should also be a factor when determining the effectiveness of an agreement specifying which jurisdiction’s conflict rules will govern the matter.

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.