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 Choice of Law Issues Relating to Nonlawyer Ownership Interests in Law Firms

Date: December 2, 2011

The Commission is pleased to release its initial proposals to address choice of law problems that arise as a result of jurisdictional inconsistencies, both domestically and abroad, concerning nonlawyer ownership interests in law firms. These inconsistencies exist because, although most domestic jurisdictions do not currently permit nonlawyer ownership interests in law firms, the District of Columbia, Australia, Canada, England, and other jurisdictions where U.S. lawyers and law firms regularly practice now permit some form of nonlawyer ownership or partnership in law firms. The Commission has learned that U.S.-licensed lawyers want more guidance as to their ethical obligations when they are asked to work with or within firms that have nonlawyer owners or partners in those jurisdictions. We seek your comments on the Commission’s proposals to address these issues.

First, the Commission is proposing to amend Model Rule 1.5(e) (Fees) as well as its Comment [8] to address issues relating to fee divisions between separate law firms (i.e., inter-firm divisions). Rule 1.5(e) provides that, under certain circumstances, two or more law firms may divide a legal fee that is generated from a particular legal matter. A choice of law problem arises when the fee-dividing firms are governed by different rules on nonlawyer ownership. In particular, one firm might be governed by a version of Rule 5.4 (Professional Independence of a Lawyer) that does not permit nonlawyer partners or owners, and the other firm might have nonlawyer partners or owners permitted by other applicable rules of professional conduct. The question is whether the law firm that is not permitted to have nonlawyer owners or partners can ethically divide a legal fee with a law firm that has such nonlawyer partners or owners. For the reasons explained in the accompanying Report, the Commission has concluded that such a fee division should be permissible.

Second, the Commission is proposing to amend Rule 5.4 to address a conceptually similar problem. A law firm may have offices in multiple jurisdictions, and only some of those jurisdictions may permit lawyers to share fees with nonlawyers within the same firm (i.e., intra-firm sharing). The question is whether lawyers who are licensed in a jurisdiction in which nonlawyer fee sharing is impermissible can share fees with nonlawyers in the same firm who are located in a different jurisdiction where such fee sharing is permissible. The Commission concluded that a lawyer should be
permitted to share fees with nonlawyers under these circumstances if the nonlawyer performs professional services which assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer.

The Commission believes that both of these proposed amendments will help lawyers navigate the difficult choice of law problems that arise due to inconsistencies among jurisdictions rules with regard to the division and sharing of fees with nonlawyers. The Commission concluded that these types of choice of law problems will persist, regardless of whether the ABA amends Model Rule 5.4 to permit any form of nonlawyer ownership. Even with such an amendment, some jurisdictions will not adopt the Model Rule or will do so only with modifications. Moreover, even if every U.S. jurisdiction prohibited sharing legal fees with nonlawyers (which is not the case today), many law firms with offices in the U.S. also have offices in other countries that permit fee sharing with nonlawyers, which raises the same issue. For these reasons, the Commission believes that these choice of law problems need to be addressed.

In developing the proposals that are being released today, the Commission benefitted 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 responses to these initial proposals by late January 2011 so that they can be discussed at the Commission’s February 2 – 3, 2012 meeting, and further asks that those requiring additional time submit comments by February 29, 2012. Comments may be submitted to Senior Research Paralegal, Natalia Vera at natalia.vera@americanbar.org and may be posted to the Commission’s website.

The Commission’s draft proposals can be viewed on the Commission’s website. 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 many of its proposals in May 2012, several months before the House of Delegates considers those proposals at its August 2012 Annual Meeting. The Commission anticipates that proposals that are not considered in August will be considered during the February 2013 Midyear Meeting.