October 29, 2012
For immediate release:

ABA Commission on Ethics 20/20 Will Refer Fee Division Issues to the Standing Committee on Ethics and Professional Responsibility Rather Than Propose Changes to ABA Model Rule 1.5.

The ABA Commission on Ethics 20/20 has made a referral to the Standing Committee on Ethics and Professional Responsibility rather than propose changes to ABA Model Rule 1.5 (e). The proposal would have addressed a narrow and technical issue -- whether a lawyer in a jurisdiction that prohibits nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers may divide a fee with a lawyer in a different firm in which such ownership or fee sharing occurs and is permitted by the Rules applicable to that firm.

Co-Chairs Jamie S. Gorelick and Michael Traynor said, “Having been asked to look at the effects of globalization on the practice of law in the United States, we carefully studied the increasing number of jurisdictions that permit nonlawyer ownership and fee sharing with nonlawyers. After we decided in April 2012 that a case had not been made to permit a limited form of nonlawyer ownership, we were left with two choice of law questions arising from inconsistencies among jurisdictions with regard to the permissibility of nonlawyer owners and partners.”

The first question concerned the permissibility of fee-sharing among lawyers in a single firm where the rules applicable to one of the firm’s offices permit nonlawyer owners and the rules applicable to another of the firm’s offices do not. The second question related to the inter-firm fee division issue under Model Rule 1.5(e). In September 2012, the Commission referred the first issue to the ABA Standing Committee on Ethics and Professional Responsibility so that it could address the choice of law issues under Model Rule 8.5 (Choice of Law).

At its October 25 and 26 meeting, the consensus of the Commission was that, subject to the prohibition of Rule 5.4 (Professional Independence of a Lawyer), the authority to divide fees between lawyers in two independent firms currently exists in Model Rule 1.5. It became clear that there would be very few occasions for lawyers to make use of that authority, as in most instances, the two firms can simply send separate invoices to the client for their work in the matter. As a result, according to Co-Chair Traynor, “we believe that the Ethics Committee is in the best position to address the fee division question too, as it is in many ways subsumed in consideration of the choice of law and intra-firm fee sharing issue already referred.”
Co-Chair Jamie Gorelick said: “In deciding which proposals to bring to the House of Delegates, we have considered the importance of the issue to the profession, whether there is confusion as to the application of the rules that we can helpfully address, and whether a change in the rules is necessary and helpful to address changes in the legal environment. Thus, while we decided to proceed with proposals on outsourcing, the use of technology in marketing, the impact of technology on confidentiality, lawyer mobility, choice of law and conflicts of interest, foreign lawyers serving as in-house counsel, and foreign lawyers' admission pro hac vice, we have not proceeded with proposals on alternative litigation financing, law firm ranking services and alternative business structures.

We have used our best judgment as to which issues are worthy of debate and consideration in the House and capable of making a difference for the profession. Given the time and energy that will be appropriate for the House and for Commissioners to spend on the important issues before the House in February 2013, the Commission has decided to refer this narrow question to the Ethics Committee rather than recommend a change to Rule 1.5.”

The Commission members include judges, law professors who specialize in legal ethics, practitioners (including former ABA, state bar, and local bar presidents), and liaison members from the ABA Board of Governors, Center for Professional Responsibility, Task Force on International Trade in Legal Services, Standing Committee on Ethics and Professional Responsibility, and Young Lawyers Division.