February 24, 2012

ABA Commission on Ethics 20/20
321 N. Clark Street
Chicago, IL 60654-7598
Attn: Natalia Vera, Senior Research Paralegal

Re: Comments on Proposed Amendments of Rules 1.5 and 5.4

Dear Commissioners:

The purpose of this letter is to suggest questions I believe you should ask in considering the amendments to Rules 1.5 and 5.4 proposed under the caption "Uniformity, Conflicts of Interest and Choice of Law" in your letter of December 28, 2011, and to express my personal views as to whether the proposed amendments should be adopted. I understand that the proposed amendment of these rules and their associated comments to permit nonlawyer fee sharing, as well as the more extensive amendments to those rules set forth in the discussion paper accompanying your letter of December 2, 2011, which would permit limited equity ownership of law firms by nonlawyers, will not be submitted to the House in August 2012. However, I am commenting at this time because the questions I pose apply to both the currently proposed amendments and those set forth in the discussion paper, on which comments are due by February 29, 2012.

While we can all agree with the three principles set forth in your December 2, 2011, letter, certain critical terms used in discussing nonlawyer fee sharing such as "ownership interest" and "fee sharing" are undefined. Indeed, the very meaning of "core values" can be, and obviously is, open to debate.

I believe it is critical that any proposed amendments to Rules 1.5 and 5.4 help practicing lawyers answer real-world questions as to whether relationships they are considering are permitted under the Model Rules. Language changes that do not either add clarity to what is already permitted or permit new relationships to be formed that are consistent with our core
values do not assist lawyers deal with these issues. Thus, I would ask the following questions in connection with any proposed amendment to the Rules or their Comments:

- Is the existing rule adequate to permit conduct the proposed amendment attempts to validate?

- Does the proposed amendment add clarity that assists the lawyer in determining whether such conduct is permitted?

- Would the proposed amendment permit new conduct that is consistent with our core values but would otherwise be prohibited?

With specific reference to the proposed amendments set forth in your December 28, 2011, letter, I would test each proposed amendment by asking these questions with respect to arrangements between lawyers and non-lawyers that lawyers are currently facing. For example, the following hypothetical situations can implicate the proposed amendments to Rule 1.5(e) and Comment 8:

- A firm wishes to be able to serve clients in multiple jurisdictions, some of which permit nonlawyer partners. To do so, it forms an LLC, which provides administrative services and centralized purchasing of equipment for its members in exchange for a percentage of each member's fee revenues. The amount received by the LLC in excess of its expenses is shared by its members, but not necessarily in proportion to the fee revenue remitted to the LLC. Assume that in each jurisdiction the firm forms a separate partnership that is a member of the LLC. Is the answer different if the firms use a common trade style such as Able & Baker (U.K.), Able & Baker (N.Y.), etc.? What if each member signifies its affiliation by including on its letterhead the statement that it is a member of Able & Baker Global?

- A firm forms parallel LLPs in two jurisdictions, one of which permits nonlawyer partners and the other doesn't. The partners in the jurisdiction that does not permit nonlawyer partners have a proportionately reduced interest in the earnings of the partnership in the jurisdiction in which it has nonlawyer partners. Is the answer different if the two partnerships operate under the same name? Is the degree to which work arising or clients located in one jurisdiction are served by lawyers admitted only in the other jurisdiction?

Similar hypothetical questions can arise under the proposed amendments to Rule 5.4(a)(5) and Comment [3] in jurisdictions that do not permit fee sharing with nonlawyers:

- A firm specializing in medical malpractice employs a nonlawyer physician to assist it in preparing its cases. The physician is an employee, but has an employment contract
that provides a formula for his annual bonus based on the firm’s revenue. Does the answer depend on the percentage of the firm’s revenue attributable to cases in which the physician provides services? Is the answer different if the bonus is paid pursuant to a plan the covers all nonlawyer employees of the firm? If there is firm-wide bonus plan for nonlawyers, can the bonus metrics be different (e.g., discretionary for employees making more than X and formulaic for all other employees)? Is the answer at all dependent on the nature of the services rendered (e.g., instead of a physician assisting in malpractice suits, an actuary or forensic accountant)? Is the answer different if the firm promotes itself to potential clients as being able to provide necessary services that competing firms, which must hire consultants to perform those services, do not provide?

- A firm has a Chief Financial Officer who is solely concerned with the expenses of the firm and has no contact with clients. Can the CFO have a bonus plan tied to the firm’s revenue or net income, even though he does not “assist the firm” in providing legal services?

Would ethics counsel advise lawyers any differently with respect to these hypothetical examples if the proposed amendments are adopted? With respect to the addition of “or law firm” to Rule 1.5(e)(1), I seriously doubt that advice would change. With respect to the proposed amendment to Rule 5.4(a)(5), those law firms that have concluded that the existing rules permit them to establish bonus or incentive compensation plans for their nonlawyer employees on the basis that such plans are not “fee sharing” within the intendment of the Rule are not likely to change their practices. However, the proposed language introduces new issues that may in fact create uncertainty with respect to current compensation arrangements. If the amendment is viewed as limiting incentive compensation plans tied to revenue or net earnings, does the reference to nonlawyers who perform “professional services that assist the firm in performing legal services” mean that non-professional employees such as messengers and mail room employees can not be included in a firm-wide employee bonus plan? What about the firm’s CFO, who is clearly rendering professional services but arguably not helping the firm perform legal services?

Under both the existing Rules and the proposed amendments, a discussion of the hypotheticals I have set forth may produce disagreements as to what is permitted. It is not possible for the Model Rules and Comments, which of necessity state broad principles, to provide clear guidance in many factual situations faced by lawyers seeking to achieve a particular result. In those situations the lawyer may have no alternative but to seek guidance from ethics counsel or a formal opinion from the Standing Committee on Ethics, both of which deal with specific facts rather than general principles.

While disagreements as to what is permitted by the Model Rules can not be avoided, no proposed change should add uncertainty or cast doubt on the validity of arrangements that in
the past have been considered proper and have been implemented by a significant number of law firms. No change should be made to address problems that in fact do not exist. I am not aware that there are any problems under the existing Rules that would be solved by adopting the specifically proposed amendments to Rules 1.5 and 5.4 and their comments.

Turning to the Discussion Paper on Alternative Law Practice Structures, the draft amendments to the Rules clearly would allow relationships to be established that would not be permitted under any interpretation of the existing Rules. The questions with respect to these proposals are therefore (1) are they necessary to permit American law firms to both serve their clients effectively and compete with law firms based in jurisdictions that permit multidisciplinary practice, and (2) are they consistent with the core values of our legal profession? American law firms can and do compete effectively on an international basis with firms based in countries that permit nonlawyer members. They have found ways to establish a presence in those countries without violating the Model Rules. They have found ways to provide incentive compensation to their nonlawyer employees that they believe are consistent with the Model Rules. They have also been able to secure the services of forensic accountants, estate planners, insurance agents and other professionals for their clients, either having the professional retained by the law firm and billed to the client as a disbursement or having the client retain the professional directly, without having to agree to share their legal fees with the professional. Thus, without addressing the question of whether multidisciplinary practice, “alternative practice systems”, or any other structure that permits equity ownership of law firms by nonlawyers is consistent with our core values, I believe the case has yet to be made that there is a problem with the ability of American law firms to deliver legal services or compete with firms that permit nonlawyer equity ownership that would justify so significant a change in what has been heretofore permitted by the Model Rules.

Sincerely,

Bruce Alan Mann

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