

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 Rule 1.5 of the *ABA Model Rules of Professional Conduct* as follows (insertions underlined, deletions ~~struck through~~):**

**Rule 1.5 Fees**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the

lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm or between law firms may be made only if:

(1) the division is in proportion to the services performed by each lawyer or law firm or each lawyer or firm assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer or law firm will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

## COMMENT

### Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

### Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and

whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

#### **Terms of Payment**

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

#### **Prohibited Contingent Fees**

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

#### **Division of Fee**

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed

by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) permits the division of a fee with a law firm in which a nonlawyer is a partner or has an ownership interest. But see Rule 8.4(a) (prohibiting a lawyer from “knowingly assist[ing]” another to violate the Rule of Professional Conduct). The Rule does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

### **Disputes over Fees**

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer’s fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

**FURTHER RESOLVED: That the American Bar Association amends Model Rule 5.4 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):**

### **Rule 5.4 Professional Independence of a Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(5) a lawyer may share legal fees with a nonlawyer in the lawyer’s firm in a manner that is not otherwise permissible under this Rule, but only if the nonlawyer performs

professional services that 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. See Rule 8.5(b).

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

#### **Comment**

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3] Paragraph (a)(5) recognizes that the Rule regarding fee sharing with nonlawyers varies among jurisdictions, both within and outside the United States. As a result, a lawyer may be asked to share fees with nonlawyers in the same firm when that form of fee sharing is not permitted under the rules of the jurisdiction that apply to that lawyer, but permitted under the rules of the jurisdiction that apply to the permissibility of fee sharing with the nonlawyer. Under these circumstances, Rule 8.5(b)(2) (Choice of Law) states that the Rule to be applied is the Rule of the jurisdiction where "the lawyer's conduct occurred" or had its "predominant effect," even if the lawyer is not admitted in that jurisdiction. Under this test, if a nonlawyer works exclusively with lawyers and serves clients in an office located in a jurisdiction that permits nonlawyer partnership or ownership interests, Rule 8.5(b)(2) ordinarily permits the firm's lawyers,

191 including those lawyers located in jurisdictions that do not permit such partnerships or ownership  
192 interests, to share fees with the nonlawyer because the predominant effect of the fee sharing will  
193 be in the jurisdiction that allows it. To determine whether a lawyer can divide fees with a  
194 different firm in which a nonlawyer is a partner or has an ownership interest, see Rule 1.5,  
195 Comment [8].

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## REPORT

The American Bar Association Commission on Ethics 20/20 has examined the choice of law problems that arise when ethics issues implicate multiple jurisdictions with inconsistent rules of professional conduct. This Report describes the Commission's proposals to address the particular 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, England, Australia, Canada and other countries where U.S. lawyers and law firms regularly practice now permit some form of nonlawyer ownership or partnership in law firms.<sup>1</sup> 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.

To develop appropriate recommendations in this area, 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 choice of law problems and received numerous responses. The Commission also heard testimony from lawyers in various practicing settings and organizations regarding these issues. Based on responses to the Issues Paper and other comments received, it became clear to the Commission that additional guidance to lawyers regarding this subject is needed. As a result, the Commission is proposing two amendments to the Model Rules of Professional Conduct.

First, the Commission is proposing to amend Model Rule 1.5(e) (Fees) as well as its Comment [8]. 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 if the fee-dividing firms are governed by different rules regarding the permissibility of nonlawyer ownership. In particular, one firm might be governed by a version of Model Rule 5.4 (Professional Independence of a Lawyer) that does not permit nonlawyer partners or owners, and

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<sup>1</sup> See, e.g., D.C. RULES OF PROF'L CONDUCT R. 5.4 (2007); Legal Profession Act 2004, [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/lpa2004179/](http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/), (hereinafter "LPA 2004"); Legal Profession Regulation 2005, [http://www.austlii.edu.au/au/legis/nsw/consol\\_reg/lpr2005270/](http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/); Law Society of British Columbia, Law Society Rules, Multi-Disciplinary practice, Section 2-23.3(2)(a)(i), available at [http://www.lawsociety.bc.ca/publications\\_forms/rules/rules\\_part02.html#2-23-3](http://www.lawsociety.bc.ca/publications_forms/rules/rules_part02.html#2-23-3); <http://www.sra.org.uk/sra/legal-services-act/faqs/ABS-faqs.page>; and <http://www.sra.org.uk/sra/legal-services-act/lisa-glossary.page>. For additional detail, see ABA Commission on Ethics 20/20, Issues Paper Concerning Alternative Business Structures, April 5, 2011, at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/abs\\_issues\\_paper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf).

the other firm might be permitted to have nonlawyer partners or owners under its 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. Based upon the realities of interstate and international law practice, and for the reasons explained in this Report, the Commission concluded that the fee division should be permissible.

Second, the Commission is proposing to amend Model 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 fee sharing). The question is whether the lawyers who are practicing in an office where 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, but only if the nonlawyer performs professional services that 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 amendments will help lawyers navigate the difficult choice of law problems that are arising due to increasingly inconsistent rules worldwide regarding the sharing of fees with nonlawyers, particularly due to developments abroad. 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 some form of nonlawyer ownership.<sup>2</sup> Even with such an amendment to the Model Rules to permit some form of nonlawyer ownership in law firms, 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 (this is currently not the case, as noted above), many law firms with offices in the U.S. have offices in other countries that permit fee sharing with nonlawyers, thus raising the same issue. For these reasons, the Commission believes that these choice of law problems need to be addressed.

#### **I. Rule 1.5 Proposal to Address Choice of Law Issues Associated with Inter-Firm Fee Divisions**

Rule 1.5(e) provides that two or more law firms may divide a legal fee that is generated from a particular legal matter, assuming certain requirements are satisfied. The Commission's proposal is designed to address a particular choice of law problem that has arisen due to inconsistencies among jurisdictions with regard to nonlawyer ownership.

The problem can be understood through the following example. A law firm located in the District of Columbia may have nonlawyer owners, as is permitted under Rule 5.4 of the District of Columbia Rules of Professional Conduct. In accordance with the best interests of the client, that firm may refer a legal matter to a second law firm, which is located in a jurisdiction (e.g., New York) that does not currently permit nonlawyer fee sharing. Under current Model

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<sup>2</sup> ABA Commission on Ethics 20/20, Discussion Draft on Alternative Law Practice Structures, December 2, 2011, at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111202-ethics2020-discussion\\_draft-alps.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.pdf).

Rule 1.5, the New York and District of Columbia firms may divide the legal fees that result from the District of Columbia firm's referral, assuming the District of Columbia firm retains joint responsibility for the matter, the client agrees in writing to the arrangement, and the overall fee is reasonable. The question is whether the New York firm violates New York's version of Rule 5.4, which prohibits fee sharing with nonlawyers, if the firm divides the fee with the District of Columbia firm, given that the District of Columbia firm has nonlawyer owners.

The Commission concluded that the New York firm should be permitted to divide fees with the District of Columbia firm under these circumstances, because the concerns underlying the prohibition in Rule 5.4 are not implicated in this context. In particular, Model Rule 5.4 is designed to insulate lawyers from the influence of nonlawyers,<sup>3</sup> but there is no plausible reason to believe that the nonlawyers in the District of Columbia firm are in a position to influence the New York lawyers, who not only are in a different jurisdiction, but also practice in an entirely different firm. Thus, the Commission proposes to clarify in Comment [8] to Rule 1.5 that one law firm can divide a fee with another law firm that has nonlawyer partners or owners.<sup>4</sup>

The proposed new sentence to Comment [8] ends with a cross-reference to Rule 8.4(a), which prohibits lawyers from "knowingly assist[ing]" another lawyer or firm in violating the Rules of Professional Conduct. This cross-reference is intended to remind lawyers that they cannot divide fees with another firm under circumstances that would constitute "knowingly assist[ing]" the other firm in violating the rules that apply to the permissibility of that firm's fee sharing.

## **II. Rule 5.4 Proposal to Address Choice of Law Issues Associated with Intra-Firm Fee Sharing**

The second choice of law problem concerns *intra-firm fee sharing*. A law firm may have offices in multiple jurisdictions within the U.S. or within the U.S. and internationally, and only some of those jurisdictions may permit lawyers to share fees with nonlawyers within the same firm. The question is whether the lawyers who are practicing in an office where nonlawyer fee sharing is impermissible can share fees with nonlawyers in the same firm who are governed by the rules of a jurisdiction that permits such fee sharing.

The ABA Standing Committee on Ethics and Professional Responsibility addressed this issue twenty years ago in ABA Formal Opinion 91-360, just after the District of Columbia authorized nonlawyer ownership in law firms.<sup>5</sup> Formal Opinion 91-360 concluded that a lawyer licensed in both the District of Columbia and in a jurisdiction that does not permit nonlawyer fee sharing can share fees with District of Columbia-based nonlawyers, but only if the lawyer practices exclusively in the District of Columbia.<sup>6</sup> If, however, the lawyer practices in a jurisdiction that prohibits intra-firm fee sharing (or is licensed solely in that jurisdiction), the

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<sup>3</sup> See MODEL RULES PROF'L CONDUCT ANN. 456 (2011).

<sup>4</sup> The Commission's proposed solution to this choice of law problem is consistent with the only available authority on this issue – a 2010 ethics opinion by the Philadelphia Bar Association. Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op., 2010-7 (2010).

<sup>5</sup> D.C. RULES OF PROF'L CONDUCT R. 5.4 (2007).

<sup>6</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-360 (1991), at 2.

Opinion concluded that the lawyer cannot share fees with the firm's nonlawyers.<sup>7</sup> (For reasons that appear below, Opinion 91-360 is outdated. It relied on a version of Rule 8.5(b) that is no longer part of the Model Rules.)

Despite this limitation on fee sharing, the Opinion recognized that law firms often have offices in multiple jurisdictions and that those firms might want to take advantage of nonlawyer fee sharing in jurisdictions (like the District of Columbia) that allow it. The Opinion suggested that a firm can have nonlawyer partners or owners in those jurisdictions, but that the office has to be "fiscally and managerially separate from and independent of" any offices located in jurisdictions that prohibit nonlawyer partners and owners.<sup>8</sup> In sum, while the firm can operate under a single name, it has to operate separately fiscally and managerially.

The Commission concluded that this attempt to segregate the firm's finances is essentially cosmetic. First, the entire firm can have a profit-sharing arrangement that includes nonlawyers whose compensation can be based "in whole or in part" on the plan (Rule 5.4(a)(3)).<sup>9</sup> The interests of a nonlawyer partner (or a nonlawyer owner in District of Columbia) in the plan can then easily be adjusted based on factors similar to those that define compensation schemes for lawyer partners.

Second, the nonlawyer's participation in the District of Columbia-based profits can be adjusted to compensate the nonlawyer, who cannot directly participate in the profits generated elsewhere. For example, in dividing up the income earned solely in the District of Columbia, no rule prevents the District of Columbia office of a multistate firm from recognizing the inability of the District of Columbia nonlawyer partners to participate in the income earned in other jurisdictions and thus to increase the District of Columbia nonlawyer's share in the District of Columbia-only income accordingly. In this sense, the Opinion's approach produces accounting gymnastics, but it does not actually prevent fee sharing with nonlawyers.

Rather than have firms continue to engage in separate bookkeeping, the Commission believes that the realities of 21<sup>st</sup> century legal practice require a more candid approach to this issue. That is to allow explicitly what Formal Opinion 91-360 has essentially permitted in practice for more than twenty years: the firm-wide sharing of fees, including with the firm's office that has nonlawyer partners and owners, but only if the nonlawyer performs professional services that 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 phrase "assist the firm in providing legal services to its clients" is intended to preclude lawyers from engaging in intra-firm fee sharing where one office of the firm has nonlawyer passive equity investors.<sup>10</sup>)

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 12.

<sup>9</sup> See, e.g., Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op., 04-03 (2004); Utah State Bar Ethics Advisory Opinion Comm., Advisory Op. 02-07 (2002).

<sup>10</sup> The Commission is not proposing a similar restriction on *inter-firm* fee divisions under Rule 1.5, because the Commission concluded that there is no risk to professional independence when a lawyer divides fees with a different law firm that has passive equity investors. In particular, there is no plausible basis to believe that the nonlawyer equity investors of a law firm will be in a position to influence lawyers who not only are in a different jurisdiction, but also practice in an entirely different firm.

The Commission also took issue with the assertion in Formal Opinion 91-360 that a jurisdiction that prohibits nonlawyer fee sharing has a “substantial and legitimate interest” in prohibiting nonlawyer fee sharing in another jurisdiction.<sup>11</sup> Relying on Rule 8.5, the Opinion explained that a jurisdiction might be legitimately concerned that nonlawyers in another jurisdiction might interfere with the professional independence of all of the lawyers in the firm, wherever they might be.<sup>12</sup> The Commission concluded that the Opinion’s analysis in this regard may be outdated for two reasons.

First, the Opinion was written at a time when the choice of law provisions in Rule 8.5 were very different from, and considerably less helpful than, the provisions that exist today. In 1991, when Opinion 91-360 was published, Rule 8.5 provided only that “[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.”<sup>13</sup> Comment [3] to the 1991 version of the Rule provided little additional guidance: “Where a lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation.”<sup>14</sup>

On the recommendation of the Standing Committee on Ethics and Professional Responsibility, Rule 8.5 was amended in 1993, to provide that for conduct not in connection with a matter pending before a tribunal, “(i) if the lawyer is licensed to practice only in this jurisdiction the rules to be applied shall be the rules of this jurisdiction, and (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.”<sup>15</sup>

Significantly, in 2002, on the recommendation of the Commission on Multijurisdictional Practice, Rule 8.5 was amended again. This amendment eliminated the focus on the place of licensure or practice and now provides that, as to conduct not in connection with a matter pending before a tribunal, “the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.”<sup>16</sup> Thus, as amended in 2002, Rule 8.5(b)(2) prescribes a very different choice of law analysis for determining which rules govern conduct not connected to any matter pending before a tribunal. Today, Rule 8.5(b)(2) makes it clear that licensure and practice are not controlling for choice of law purposes; rather, the focus is on the rules of the jurisdiction in which the “conduct occurred” or in which the “predominant effect” of the conduct is felt.

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<sup>11</sup> *Supra* note 6, at 2-3.

<sup>12</sup> *Id.*

<sup>13</sup> MODEL RULES PROF’L CONDUCT ANN. 639 (2011).

<sup>14</sup> *Id.*

<sup>15</sup> See A LEGISLATIVE HISTORY, THE DEVELOPMENT OF THE ABA MODEL RULES OF PROF’L CONDUCT 825 (2006).

<sup>16</sup> See MODEL RULES OF PROF’L CONDUCT R. 8.5 (2011).

For these reasons, the Commission concluded that the analysis in the Opinion is now outdated. In particular, as to “a matter of firm organization,”<sup>17</sup> the “conduct occur[s]” or has its “predominant effect” in the jurisdiction in which the nonlawyer is admitted to the partnership or the office from which the nonlawyer principally works. For example, if a nonlawyer is admitted to partnership in the District of Columbia office of a firm and works principally with lawyers and serves clients in the District of Columbia office, Rule 8.5(b)(2) would permit the firm's lawyers located outside the District of Columbia to share fees with the nonlawyer, even if those lawyers were licensed in jurisdictions that do not permit such partnerships or ownership interests, because the “predominant effect” of the fee sharing is in the District of Columbia.

Second, the Commission found no empirical basis for the Opinion's assumption that nonlawyer partners and owners might assert inappropriate influence over lawyers who are located in another jurisdiction. Today, there exists empirical information that the Standing Committee did not have. Specifically, the District of Columbia, although prohibiting multidisciplinary practices and outside nonlawyer ownership interests in law firms, has permitted limited forms of nonlawyer ownership in law firms. The lawyers working in such District of Columbia firms have been permitted to share legal fees with those nonlawyers for more than two decades, and the Commission's research has uncovered no evidence that nonlawyers have exercised inappropriate influence over lawyers in the same firm, even when they are in the same physical office.<sup>18</sup> Thus, there is no reason to think nonlawyers located primarily in one jurisdiction, subject to its rules, will be able or inclined to attempt to interfere with the exercise of independent judgment by lawyers practicing in another jurisdiction. To be clear, if there were evidence that those lawyers permitted nonlawyers to exercise inappropriate influence over the lawyers' exercise of independent judgment in the representation of clients, disciplinary action against those lawyers would be appropriate, whether the nonlawyers were located in the same office as the lawyers or in different offices.

One concern expressed during the Commission's deliberations was that the Commission's proposal would allow a law firm to accomplish through the “back door” what it cannot accomplish through the “front door.” That is, the proposal would allow a lawyer who cannot otherwise share fees with nonlawyers to engage in such fee sharing simply by becoming associated with a firm that has an office in a jurisdiction that permits nonlawyer fee sharing.

In fact, the Commission's proposal is intended to recognize that a jurisdiction can simultaneously conclude that some forms of nonlawyer fee sharing create undue risks to professional independence, while at the same time conclude that those risks are substantially mitigated if the nonlawyers are located in a different jurisdiction where nonlawyer ownership is permissible and appropriately regulated. The Commission's proposal rests on the idea that these two views are compatible and that nonlawyer fee sharing should therefore be permissible when the nonlawyer performs professional services that assist the firm in providing legal services to its clients and when that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer.

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<sup>17</sup> *Supra* note 6, at 3 n.3.

<sup>18</sup> *Supra* note 2, at 4.

**Conclusion**

The Commission's proposals are intended to help lawyers and law firms resolve choice of law problems that have arisen due to inconsistencies among jurisdictions with regard to the question of dividing and sharing fees with firms that are permitted to have nonlawyer owners. The Commission believes that its proposals protect a lawyer's professional independence while giving appropriate deference to jurisdictions that have decided to permit some form of nonlawyer partnership or ownership in law firms. Accordingly, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.