

NEW YORK  
CITY BAR

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PROFESSIONAL RESPONSIBILITY**

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**VIA E-MAIL**

Dear Ms. Gorelick & Mr. Traynor:

The New York City Bar Association's Professional Responsibility Committee is pleased to share its comments on the ABA Commission on Ethics 20/20's Choice of Law and Conflicts of Interest Initial Proposal. We unanimously support the substance of Comment 23, but recommend the following changes to the proposed wording:

“A matter may require a lawyer to perform work either in multiple jurisdictions whose conflict rules differ or in one jurisdiction where the work has a substantial impact in another. 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 jurisdiction in the 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 with a reasonable relationship to the work being done by the lawyer, including without limitation because the work is substantially done or has substantial effect in such jurisdiction or the client is principally located in such jurisdiction relating to, the matter is reasonably expect 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.~~ “As noted in Comment 6 to Rule 1.1, there are circumstances when it may be appropriate for the lawyer to advise the client to seek the advice of other counsel regarding such agreement.”

These changes are being proposed for the following reasons.

The addition at the end of the first sentence is recommended (i) to broaden the situations in which these choices can be made and (ii) because it is often the case that the lawyer does all her work from one jurisdiction, but the impact of the transaction is mostly or entirely in another jurisdiction, and in those cases the lawyer and her client would lose their right to choose conflict rules for no apparent reason.

The addition to the second sentence is solely for clarity.

Our reasoning behind the first deletion in the third sentence is rooted in the definition of “informed consent”, which the ABA Model Rule 1.0 defines as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

ABA Comment 6 to Rule 1.0, under the heading “Informed Consent,” provides:

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be

appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

One of the potential pitfalls of some of the language used in proposed new Comment 23 to Rule 1.7, is that the proposed new Comment borrows from “informed consent” concepts, but differs from the nomenclature utilized in Rule 1.0(e) and Comment 6 just enough to raise issues as to what is intended. Thus, instead of having a relatively settled and broadly developed body of interpretative materials to refer to, issues will be raised which will have to be grappled with *ab initio*, for no apparent good purpose.

For instance, Comment 6 to Rule 1.0 provides that “[i]n determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved ....” Proposed new Comment 23 to Rule 1.7 provides that “[c]lient consent under this paragraph is more likely to be effective if the client is an experienced user of legal services.” In using this “experienced user of legal services” language, the proposed new Comment 23 admittedly borrows directly, but not completely, from the unique language utilized in Comment 22, the waiver-of-future conflicts provision which, as the September 7, 2011 Report notes, provided the conceptual template for proposed new Comment 23. Comment 22, however, refers to “an experienced user of the legal services involved”. Presumably this means the type of legal services (i) currently proposed to be rendered by the lawyer seeking the waiver and (ii) for which future conflicts are being waived. No such qualifier is in Comment 23. Someone going through a long divorce may be very experienced using legal services for that purpose, but have no familiarity with multi-jurisdictional conflict rules. In fact, most lay people who might be considered “experienced users of legal services,” from career street criminals to litigious plaintiffs to film producers, know nothing about multi-jurisdictional conflict rules. Such persons would be fully protected by the informed consent requirement, but not protected at all by the proposed language in Comment 23.

Comment 6 to Rule 1.0 provides that “[i]n determining whether the information and explanation provided are reasonably adequate, relevant factors include whether ... the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.” Proposed new Comment 23 to Rule 1.7 provides that in addition to obtaining the client’s “informed consent” the lawyer must “advise the client in writing of the

desirability of seeking independent counsel, regarding the agreement” and give the client “a reasonable opportunity to consult with independent counsel regarding the agreement.”

These deviations in Comment 23 from the safeguards already provided by the “informed consent” provisions of Rule 1.0(e), could, without materially increasing the client protections afforded, add interpretative complexities to a provision which is meant to permit the attorney and client to obtain a level of certainty regarding what would otherwise be the potentially difficult and complex application of Rule 8.5.

There is a further theoretical problem with advising a client in a multi-jurisdictional matter to seek additional counsel as such counsel will then also be advising on a multi-jurisdictional matter and may want to also invoke this Comment 23 which then leads to advice to the same client to seek still another independent counsel, etc.

Comment 23 will rarely be of relevance to the least sophisticated clients - consumers and very small businesses. On the odd occasion when it is so relevant, the definition of “informed consent” and its accompanying commentary make clear that the attorney will have a high burden to establish that such client has agreed to an alternative set of rules governing conflicts of interest.

The further changes to the third sentence are recommended (i) to broaden the choices available to the lawyer and client, (ii) because the existing standard can be difficult to apply - it is often very difficult if not impossible to determine which jurisdiction has the "predominant effect" so lawyers and their clients will lose their freedom of choice for no good reason in such cases, (iii) because a client will often prefer the rules of its home jurisdiction even if that is not where the lawyer works or where the predominant effect is and (iv) because the “reasonable relationship” standard is already a very common one in many other contexts such as conflicts of law.

The deletion of the last sentence is recommended because it is not at all clear as to how it is to be applied or how it modifies the preceding portions of the comment. We believe the concept of protecting less-experienced users is already embedded in the definition of informed consent, as discussed above.

Respectfully submitted:

David A. Lewis