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VIA E-MAIL

Dear Ms. Gorelick & Mr. Traynor:

The New York City Bar Association's Professional Responsibility Committee (the "Committee") is pleased to share its comments on the ABA Commission on Ethics 20/20 (the "20/20 Commission") proposed amendments to Rules 1.5(e) and 5.4 of the ABA Model Rules of Professional Conduct ("Model Rules") as set forth in the 20/20 Commission's Initial Draft Proposal for Comment, Choice of Law-Alternative Law Practice Structures Resolution ("Draft Proposal"). For the reasons set forth below, the Committee endorses the proposed amendments.

As set forth in greater detail in the Report accompanying the Draft Proposal (the "Report"), the proposed amendments to Model Rules 1.5 and 5.4 are intended to address problems that arise from both domestic and foreign jurisdictional inconsistencies regarding nonlawyer ownership interests in law firms. Specifically, with respect to fee-sharing between different firms:

> 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 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.

Report at 1-2.

Similarly, with respect to fee sharing between different offices of the same law firm:

> [T]he 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., intrafirm 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.

Report at 2.

Additional considerations outlined by the Report include the following:

- **Model Rule 8.5**. The 20/20 Commission noted that Model Rule 8.5(b)(2), in its current form, "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." Thus, where a lawyer is admitted in a jurisdiction permitting nonlawyer ownership, and his or her "conduct occur[s] or has its "predominant effect" in that jurisdiction, Model Rule 8.5(b)(2) would permit the firm's lawyers located outside that jurisdiction 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 jurisdiction where it is permitted. Report at 6.

- **No Evidence of Undue Influence by Nonlawyers**. The 20/20 Commission found that underlying concerns that informed the prohibition on fee sharing — that is, "insulat[ing] lawyers from the influence of nonlawyers" — are not implicated where the nonlawyers are exclusively associated with "an entirely different firm" in "a different jurisdiction." Report at 3. Similarly, the 20/20 Commission concluded that there is no empirical evidence to support the assumption that "nonlawyer partners and owners might assert inappropriate influence over lawyers who are located in another jurisdiction," *id.* at 6, notwithstanding the fact that various jurisdictions have permitted nonlawyer firm ownership for years.

- **Practical Considerations**. Insofar as law firms adhere to the letter of the applicable rules of professional conduct by operating offices in jurisdictions with disparate rules concerning nonlawyer partners or owners "separately fiscally and managerially," the 20/20 Commission observed that such segregation of firm finances is "essentially cosmetic," and akin to "accounting gymnastics" that do not "actually prevent fee sharing with nonlawyers" in practice. Report at 4. *See also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-360 ("ABA Opinion 91-360") (1991). The 20/20 Commission "believes that the realities of 21st century legal practice require a more candid approach to this issue" that would "allow explicitly" what has been "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." *Id.*

Analysis

Corresponding NY Rules. In New York, Rule 1.5(g) of the New York State Rules of Professional Conduct ("NY Rules"), which generally corresponds to the current version of Model Rule 1.5(e), sets forth the circumstances under which two or more lawyers may divide a legal fee generated from a particular matter as follows:

> (g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
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> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
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> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
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> (3) the total fee is not excessive.

In addition, NY Rule 5.4, like the current version of Model Rule 5.4, does not permit law firms to have nonlawyer partners or owners.

Choice of Law Considerations in New York. The choice of law problems identified in the Report — where "fee-dividing firms are governed by different rules regarding the permissibility of nonlawyer ownership" — are problems that lawyers and law firms in New York face. Report at 1. Different permutations of the problem arise when New York lawyers and/or law firms work on matters with lawyers, law firms or branch offices of such New York law firms located in jurisdictions that permit nonlawyer ownership. Accordingly, the Report outlines the following common scenario to exemplify the problem:

> 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 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.

Report at 3.

A related problem, which was the subject of New York State Bar Association Ethics Opinion 911 (2012) ("EO 911"), illustrates the potential business and competitive issues that these choice of law considerations implicate. In EO 911, the New York State Bar Committee on Professional Ethics considered whether lawyers admitted to practice in New York "may enter into a business relationship with a United Kingdom ("UK") entity where the UK entity would be formed as an Alternative Business Structure under UK's Legal Services Act, which permits entities with non-lawyer supervisors and owners to render legal services." EO 911. The contemplated entity "would include UK non-lawyers in supervisory and ownership positions, raise capital in private equity financing, and have a professional management team." *Id.* The New York lawyers would establish a New York office and represent New York clients, but they "would be employees of the UK entity and would hold stock options and, in some cases, vested shares in the UK entity." *Id.* The New York lawyers "would not share confidences with UK non-lawyer managers." *Id.*

EO 911 noted that in the circumstances presented — New York lawyers practicing law from a New York office on behalf of New York clients — the predominant effect of the conduct would be in New York. Accordingly, applying NY Rule 5.4(a), "which forbids a lawyer from sharing fees with a non-lawyer," and NY Rule 5.4(d), "which forbids a lawyer from practicing law for profit with an entity that includes a non-lawyer owner or member," EO 911 opined that the NY Rules "would clearly be violated by the proposed arrangement," and concluded that a "New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers." *Id. Compare* New York State Bar Association Ethics Opinion 889 (2011) ("A lawyer who principally practices in another jurisdiction but is also admitted in New York may conduct occasional New York litigation, even if a non-lawyer would benefit from the resulting fees (either as a member of the lawyer's partnership in that other jurisdiction or as its employee compensated through a profit-sharing arrangement), if the arrangements comply with the ethics rules of that other jurisdiction.").

NY Rule 8.5. NY Rule 8.5(b)(2)(ii) is similar to Model Rule 8.5(b)(2)[1] and provides:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
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> * * *
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> (2) For any other conduct [not in connection with a proceeding in a court before which a lawyer has been admitted to practice]:
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> * * *
>
> (ii) If the lawyer is licensed to practice in this state 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.

Like Model Rule 8.5(b)(2), NY Rule 8.5(b)(2)(ii) also suggests that the rules of the jurisdiction in which the "predominant effect" of a lawyer's conduct occurs are relevant to ethical compliance. Accordingly, where a New York lawyer is admitted in a jurisdiction permitting nonlawyer ownership and/or is affiliated with a New York firm that has an office in that jurisdiction, or is working with another firm in that jurisdiction, NY Rule 8.5(b)(2)(ii) should permit fee sharing with lawyers or firms in the jurisdiction where it is permitted if the "predominant effect" of the relevant conduct takes place in that jurisdiction.

No Evidence of Undue Influence by Nonlawyers. The Committee is aware of no empirical or other evidence that the underlying concern informing New York's prohibition on fee sharing — that is, insulating lawyers from the influence of nonlawyers — is implicated where the nonlawyers are exclusively associated with different firms, or different firm offices, outside of New York.

Practical Considerations. Although the Report's conclusions did not cite any particular jurisdiction, the Committee believes it reasonable to infer that there may be New York firms that have out-of-state sister offices whose owners include nonlawyers. Any such New York firm would be required to maintain fiscal and managerial separation from its sister office in order to comply with the requirements of ABA Opinion 91-360. The Committee is not aware of any instance where a New York law firm has been publicly disciplined for maintaining a separate office with nonlawyer owners in a jurisdiction that permits nonlawyer ownership.

Conclusion

New York lawyers face the various choice of law and other issues implicated by disparate jurisdictional rules concerning nonlawyer ownership that inform the proposed amendments to Model Rules 1.5(e) and 5.4. The Committee believes that the proposed amendments would provide much needed guidance when these issues arise. Not only is the Committee persuaded by the policy considerations highlighted in ABA Opinion 91-360, but the Committee also believes it

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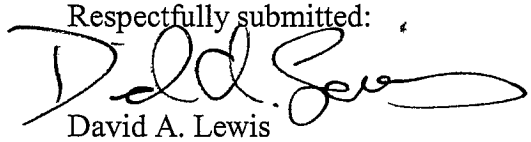
[1] Model Rule 8.5(b)(2) provides: "In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: ... (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

is appropriate and desirable for the legal profession to proactively address and resolve issues raised by the disparate professional rules concerning fee-sharing with nonlawyers. Left unresolved, these issues may present an opportunity for a regulator outside the profession to seek to fill a perceived regulatory void.

Accordingly, the Committee offers its support for the Proposal.

Respectfully submitted:



David A. Lewis