

AMERICAN BAR ASSOCIATION

ILLINOIS STATE BAR ASSOCIATION

and the

SENIOR LAWYERS DIVISION OF THE AMERICAN BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association reaffirms the following
2 policy, adopted July 2000:
3

4 The sharing of legal fees with non-lawyers and the ownership or
5 control of the practice of law by non-lawyers are inconsistent with the
6 core values of the legal profession. The law governing lawyers that
7 prohibits lawyers from sharing legal fees with non-lawyers and from
8 directly or indirectly transferring to non-lawyers ownership or control
9 over entities practicing law should not be revised.
10

REPORT

The proposed resolution would reaffirm certain core principles and values of the legal profession identified in a 2000 ABA House of Delegates adopted Resolution (the “2000 HOD Resolution”). The 2000 HOD Resolution reads in part:

The sharing of legal fees with nonlawyers and the ownership or control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law should not be revised.

Affirmation of these core principles and values is important now, particularly at a time when technological advances and globalization are pressuring the profession to lessen its commitment to the public and to professional independence.

I. The 2000 House of Delegates Resolution

The 2000 HOD Resolution urged jurisdictions to implement and preserve certain core principles and values of the legal profession. Those principles and values included: (1) a number of specifically identified practice values such as undivided loyalty to a client, competence, and confidentiality; (2) lawyers are a single profession subject to individual jurisdictions’ law governing lawyers; (3) preservation of the legal professions’ core principles and values is essential to the proper functioning of the American justice system; (4) disciplinary agencies should reaffirm their commitment to vigorously enforcing their jurisdictions’ law governing lawyers; (5) each jurisdiction should reevaluate and refine, if necessary, the definition of the “practice of law”; (6) each jurisdiction should retain and enforce those laws prohibiting the practice of law by entities other than law firms; (7) sharing legal fees with, and the ownership and control of the practice of law by, nonlawyers is inconsistent with the core values of the legal profession; and (8) sharing legal fees with nonlawyers and directly or indirectly transferring ownership and control of entities practicing law is prohibited and should not be revised.

The 2000 HOD Resolution was a response to certain proposals made by the ABA’s Multi-Disciplinary Practice Commission to facilitate the provision of nonlegal services by law firms (and conversely, the provision of legal services by nonlegal providers). The 2000 HOD Resolution was an important

statement of professional independence, and a clear recognition of the preeminence of the public interest in the practice of law. It remains sound today.

II. The 2012 Proposed Resolution

The proposed resolution provides that the ABA is reaffirming portions of the 2000 HOD Resolution, namely, the following principles and values: (1) sharing legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession; and (2) prohibitions against lawyers sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law should not be revised.

Highlighting these two principles is not intended to minimize the other identified principles and values. As explained below, referencing these two specific principles and values is important as a means to provide continued guidance to the ABA when considering revisions to existing Model Rules of Professional Conduct or other positions of the Association.

III. The Need for Policy Reaffirmation

A. Commission on Ethics 20/20

In 2009, the ABA established its “Commission on Ethics 20/20” (the “Commission”) to consider the impact of technology and globalization on the legal profession and determine whether or not such influences warrant changes to the ABA’s Model Rules of Professional Conduct (“Model Rules”). Since 2009, the Commission has circulated numerous materials for consideration within the legal community on these subjects, including both: (1) recommendations for changes to the Model Rules; and (2) “working drafts” of proposals for changes to the Model Rules.

On December 2, 2011, the Commission issued two letters. One was titled “For Comment: Discussion Paper on Alternative Law Practice Structures” which suggested the District of Columbia approach to permitting lawyer-nonlawyer partnerships with a cap, however, on nonlawyer ownership. The second letter titled “For Comment: Initial Draft Proposals on Choice of Law Issues Relating to Nonlawyer Ownership Interests in Law Firms” called for changes to Model Rules 1.5(e) and 5.4(a) to permit fee sharing by a lawyer with another firm that has nonlawyer partners and owners when one of the firms (or lawyers) is in a jurisdiction that allows nonlawyer ownership. A letter dated December 28, 2011 titled “Summary of Actions by the ABA Commission on Ethics 20/20” recommended adoption of

the above reference changes to Model Rules 1.5 and 5.4, and also recommended the preparation of a White Paper “regarding forms of alternative law practice structures not recommended by the Commission for adoption in the U.S. at this time, but noting that new developments may prompt reconsideration of this issue in the future, especially in light of changes in client needs and experiences with such practices elsewhere.”

On April 16, 2012, the Commission announced that it has decided not to propose changes to ABA policy prohibiting nonlawyer ownership of law firms and it indicated that there does not appear to be a sufficient basis for recommending a change to ABA policy on nonlawyer ownership of law firms. We agree with that conclusion. However, the Commission did not withdraw its recommended proposal to amend Model Rules 1.5 and 5.4. In fact it indicated that it would continue to consider the issues raised by those proposed amendments and would decide at its October 2012 meeting whether to submit those proposals or similar proposals to the House at its February 2013 meeting. Moreover, in this announcement, the Commission did not withdraw its call for a White Paper regarding certain alternative law practice structures.

Substantial media attention has been placed on the Commission’s activities. Among other things, this attention may have created the perception that the ABA is going to change its Model Rules to permit fee splitting and nonlawyer ownership of law firms.

B. Choice of Law

As described in the December 28, 2011 “Summary of Actions by the ABA Commission on Ethics 20/20,” the proposed amendments to Model Rule 1.5 would unambiguously allow a lawyer in a jurisdiction that prohibits nonlawyer law firm ownership to divide a fee with a lawyer in a firm that has permissible nonlawyer ownership. Similar to the proposed change to Model Rule 1.5, the proposed amendment to Model Rule 5.4(a) would establish the propriety of *intra*-firm fee sharing where a firm has offices in multiple jurisdictions, and where some of those jurisdictions allow nonlawyer ownership but others do not. The proposed amendment to Model Rules 1.5 and 5.4 as recommended by the Commission on Ethics 20/20 and the draft changes to Rule 5.4 are inconsistent with and in direct contravention of the policy the Association established by Resolution in July, 2000. They are also contrary to the policies of all 50 states of the United States of America. Although the Commission has indicated it will not go forward with its discussion draft changes to Model Rule 5.4, the previously recommended amendments to Model Rule 1.5 and 5.4 if adopted would constitute approval of nonlawyer fee splitting and ownership. Each of these amendments violate

the current ABA policy. If adopted by the House, this would amount to an approval of nonlawyer fee splitting and ownership.

C. Why is it Important to Reaffirm the Current Policy?

The Commission has indicated that it intends to continue its consideration of the previously recommended amendments to Model Rule 1.5 and 5.4 which if adopted would change the current policy. Because of that intention, it is imperative that the House give its guidance and unambiguous direction as to how the Commission should proceed. A reaffirmation of the existing policy will make it clear that any forthcoming proposal should meet the test of the policy reaffirmed. The proposals that have been offered for consideration have been given great public distribution encouraging the public perception that the profession is interested in allowing nonlawyers to invest in and own law firms. The American Bar Association should wait no longer to make it clear to the public that this is not going to happen. The evils of fee sharing with nonlawyers in jurisdictions that permit nonlawyer ownership can have the same deleterious effect on lawyer independence and control as any other fee sharing with nonlawyers. The American concept and practice of lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law abroad.

IV. Conclusion

The Illinois State Bar Association and Senior Lawyers Division of the American Bar Association respectfully urge the House of Delegates to reaffirm the referenced portions of its 2000 policy on the core principles and values of the legal profession as reflected in the Resolution filed herewith.

Respectfully submitted,

John G. Locallo
President, Illinois State Bar Association

Edward J. Schoenbaum
Chair-Elect, Senior Lawyers Division of the American Bar Association

August, 2012

GENERAL INFORMATION FORM

To Be Appended to Resolutions with Reports

(Please refer to *Instructions for Filing Resolutions with Reports* for completing this form.)

Submitting Entities: Illinois State Bar Association
American Bar Association Senior Lawyers Division

Submitted By: John G. Locallo, President, Illinois State Bar Association
Edward J. Schoenbaum, Chair-Elect, Senior Lawyers
Division of the American Bar Association

1. Summary of Resolution(s).

The Resolution urges the American Bar Association House of Delegates to reaffirm portions of existing ABA policy adopted in July, 2000 (Report No. 10F) that urged jurisdictions to implement and preserve certain core values of the profession developed to protect the public interest. Specifically, that policy recognized that: (1) sharing legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession; and (2) prohibitions against lawyers sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law should not be revised.

2. Approval by Submitting Entity.

The Resolution was approved by the Illinois State Bar Association ("ISBA") Board of Governors at its March 9, 2012 meeting and is an affirmation of the ISBA policy adopted by its Assembly in June, 2000. The Senior Lawyers Division approved the Resolution by the vote of its Council on April 21, 2012.

3. Has this or a similar resolution been submitted to the House or Board previously?

Yes, and that policy is being reaffirmed.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The relevant Association policy is that policy which was adopted by the House of Delegates in July, 2000 and which is sought to be reaffirmed by this resolution. The policy would be affirmed.

5. What urgency exists which requires action at this meeting of the House?

The Commission on Ethics 20/20 has circulated various drafts of proposed changes to Model Rules 1.5 and 5.4, including as concerns (1) choice of law issues relating to nonlawyer ownership interests in law firms (including fee sharing); and (2) alternative law practice structures. The referenced draft changes -- which, if adopted, would be in contravention of ABA policy -- have been widely circulated to the public and the profession through the media. Among other things, this circulation may have created the perception that the ABA is going to change its Model Rules to permit nonlawyers to invest in and own law firms.

On April 16, 2012, the Commission publically stated that it had found no sufficient basis for changing American Bar Association policy in regards to nonlawyer ownership of law firms and that it intended not to pursue any changes regarding nonlawyer ownership of law firms. However, at the same time, the Commission stated that it is continuing to study "choice of law" issues in advance of possible action at the February, 2013 House of Delegates meeting. Moreover, the Commission is apparently continuing to recommend the preparation of a White Paper "regarding forms of alternative law practice structures not recommended by the Commission for adoption in the U.S. at this time," noting that "new developments may prompt reconsideration of this issue in the future, especially in light of changes in client needs and experiences with such practices elsewhere."

Given the ongoing review by the Commission of these matters, and the attention paid to this review by the profession and public, it would be helpful for the House to make clear that its current policy is reaffirmed.

6. Status of Legislation. (If applicable)

Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy is self-implementing on the adoption of the resolution as it would reaffirm.

8. Cost to the Association. (Both direct and indirect costs)

Not applicable.

9. Disclosure of Interest. (If applicable)

Not applicable.

10. Referrals.

The Report with Resolution will be circulated to state bar associations, the National Conference of Bar Presidents, the National Caucus of State Bar Associations, all sections and divisions of the American Bar Association, the American Bar Association Standing Committee on Ethics and Professional Responsibility, The American Bar Association Center for Professional Responsibility, the Commission on Ethics 20/20 and to other appropriate entities.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

A. Summary of Resolution.

The resolution urges the American Bar Association (“ABA”) to reaffirm existing ABA policy adopted in July, 2000 (Report No. 10F) that: (1) sharing legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession; and (2) prohibitions against lawyers sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law should not be revised.

B. Issue Resolution Addresses.

Should the ABA reaffirm and re-adopt its policy adopted in 2000 that the sharing of legal fees with nonlawyers and ownership or control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.

C. How Proposed Policy Will Address the Issue.

The resolution will address the issue by reaffirming existing ABA policy providing that sharing legal fees with nonlawyers and/or allowing nonlawyer ownership and control of law firms is inconsistent with core principles of the legal profession.

D. Minority Views or Opposition.

The Commission on Ethics 20/20 has recommended or may recommend proposals which are a violation of and in contravention of current ABA policy. No specific opposition to the proposed resolution is known at this time. There are a variety of views both pro and con from interested individuals and entities in regard to amending Model Rules 1.5 and 5.4 that have been presented to the Commission during its deliberation and study of these issues.