

AMERICAN BAR ASSOCIATION

ABA Commission on Ethics 20/20

321 N. Clark Street

Chicago, IL 60654-7598

Phone: (312) 988-5311

Fax: (312) 988-5280

Website: www.abanet.org/ethics2020

2011-2012

CO-CHAIR

Jamie S. Gorelick

WilmerHale

1875 Pennsylvania Ave., N.W.

Washington, DC 20006

CO-CHAIR

Michael Traynor

3131 Eton Ave.

Berkeley, CA 94705

MEMBERS

Professor Stephen Gillers

New York, NY

Jeffrey B. Golden

London, United Kingdom

William C. Hubbard

Columbia, SC

George W. Jones, Jr.

Washington, DC

Hon. Elizabeth B. Lacy

Richmond, VA

Carolyn B. Lamm

Washington, DC

Judith A. Miller

Washington, DC

Hon. Kathryn A. Oberly

Washington, DC

Roberta Cooper Ramo

Albuquerque, NM

Herman Joseph Russomanno

Miami, FL

Professor Theodore Schneyer

Tucson, AZ

Professor Carole Silver

Bloomington, IN

Frederic S. Ury

Fairfield, CT

Hon. Gerald W. VandeWalle

Bismarck, ND

LIAISONS

ABA Board of Governors

Kenneth G. Standard

New York, NY

ABA Center for Professional Responsibility

Donald B. Hilliker

Chicago, IL

ABA Task Force on International Trade

in Legal Services

Professor Robert E. Lutz, II

Los Angeles, CA

ABA Standing Committee on Ethics and Professional Responsibility

Philip H. Schaeffer

New York, NY

ABA Young Lawyers Division

Youshea A. Berry

COMMISSION REPORTERS

Andrew M. Perlman, Chief Reporter

Boston, MA

Paul D. Paton

Sacramento, CA

Anthony Sebok

New York, NY

W. Bradley Wendel

Ithaca, NY

CENTER FOR PROFESSIONAL RESPONSIBILITY

Jeanne P. Gray, Director

Ellyn S. Rosen, Commission Counsel

(312) 988-5311

Marcia Kladder, Policy & Program Director

(312) 988-5326

Natalia Vera, Senior Paralegal

(312) 988-5328

Kimley Grant, CPR Paralegal

(312) 988-5319

To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals

**From: Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20**

Re: Summary of Actions by the ABA Commission on Ethics 20/20

Date: December 28, 2011

The Commission's Mission. The Commission was appointed to look at the impact of technology and globalization on the legal profession and to determine what, if any, changes to the ABA Model Rules of Professional Conduct and other policies governing lawyer regulation should be proposed.

The Commission's Process. We spent our first year listening to the profession and the public about the ethical challenges lawyers and clients face from the changes produced by the proliferation of technology and increased globalization. We spent the second year formulating possible solutions to these problems and putting them out for comment and feedback. We have held hearings, taken submissions and appeared before over 60 different Sections, Committees, and state and local bar associations.

At our October 2011 meeting we decided that, to better facilitate the House of Delegates' consideration of the issues on the Commission's agenda, we would split our recommendations to the House into two sets of proposals. The first set will proceed to the House in August 2012, and the second set will proceed to the House in February 2013.

We have published for comment all of our initial policy proposals and discussion drafts. Now, more than with earlier drafts circulated for comment, we need to hear from you about what we have produced. We want feedback and input from as many people as possible so that we can present fully vetted recommendations to the House of Delegates for its consideration.

What We Heard. For two years, we listened to all elements of the profession as well as clients, consumer groups and businesses that support, sell to, and report on the profession. Our proposals respond to what we have heard and are intended to address the following developments:

- Legal advice and information about legal services are increasingly communicated through electronic media – including e-mail, texts, podcasts, blogs, tweets, and websites – reaching easily across jurisdictional lines, both domestically and globally.
- Client confidences are no longer kept just in file cabinets, but on laptops, smart phones, tablets, and in the cloud.
- Connections with potential clients are sought not just through print advertisements but via social networks, lead generation services, “pay-per-click” ads, and “deal of the day” coupon sites.
- Legal and non-legal services are increasingly outsourced, both domestically and internationally, raising questions for lawyers working with other people and entities about who is responsible for the work that is being outsourced.
- Lawyers in all practice settings increasingly need to cross state and national borders – virtually and physically – in order to serve their clients. They need to know what rules apply to them.
- Non-U.S. lawyers increasingly seek to practice in the United States, and U.S. lawyers increasingly need to practice internationally in order to meet their clients’ needs.
- In other countries, there is movement toward both more liberal multijurisdictional practices and permitting new law firm practice structures, including nonlawyer ownership interests in law firms.
- Lawyers change jobs regularly, triggering potential conflicts of interest and other ethics issues that need to be addressed.
- Many new ways of funding litigation are emerging.

What We Concluded. In general, we have found that the principles underlying our current Model Rules are applicable to these new developments. As a result, many of our recommendations involve clarifications and expansions of existing Rules and policies rather than an overhaul. In sum, our goal has been to apply the core values of the profession to 21st century challenges.

Our recommendations take several forms. In addition to recommending changes to some Model Rules, we are suggesting that the ABA provide resources – such as continuously updated websites – to help lawyers stay abreast of changes wrought by technology and globalization and to describe useful practices for dealing with those changes. We are also producing white papers to explain some problems, and possible solutions, in more detail. Finally, we have made referrals of several questions to other ABA entities that are better able to address them.

Our Proposals. The following is a summary of our proposals by subject matter, along with links to the actual proposals, discussion drafts, and accompanying draft reports. The Commission's proposals and reports, as well as the comments the Commission has received in response, may also be viewed at <http://www.americanbar.org/Ethics2020>.

Technology: Confidentiality

The Commission is suggesting the creation of a user-friendly, continuously updated website containing answers to common questions about the protection of confidential information when using technology. The website also will contain detailed information about the latest data security standards.

The Commission is also proposing several amendments to the Model Rules and their Comments to clarify a lawyer's obligations when using technology, particularly a lawyer's obligations with regard to competence and confidentiality. They are:

- A new paragraph (c) in Model Rule 1.6 (Confidentiality of Information) and related amendments to the Comments that would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure and unauthorized access. The website mentioned above is intended to offer guidance on what those measures might include.
- Amendments to Model Rule 4.4 (Respect for Rights of Third Persons) and its Comments to clarify a lawyer's obligations upon receiving confidential information that the lawyer was not supposed to receive, including confidential information contained in e-mails, hard drives, and data embedded in electronic documents.
- Amendments to Comment [6] of Model Rule 1.1 (Competence) to emphasize that, in order to stay abreast of changes in the law and its practice, lawyers should have a basic understanding of technology's benefits and risks.
- Amendments to Comment [9] of Model Rule 1.0 (Terminology) to make clear that, when erecting screens to prevent the sharing of information within a firm, those screens should prevent the sharing of both tangible and electronic information.

More details are available here:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_confidentiality_revised_resolution_and_report_posting.authcheckdam.pdf

Technology: Client Development

The Commission concluded that the principles underlying the existing Rules are applicable to new forms of client development tools and that these tools should not be subject to new restrictions. The Commission determined, however, that lawyers could use more guidance regarding the use of these new tools. To that end, the Commission is proposing:

- Amendments to Model Rule 1.18 (Duties to Prospective Client) and its Comments to clarify when electronic communications give rise to a prospective client-lawyer relationship. The proposed amendments clarify that a prospective client is someone who communicates with a lawyer about the possibility of forming a client-lawyer relationship and has a reasonable expectation that the lawyer is willing to consider forming that relationship. The proposed amendments also identify several precautions that lawyers should take to prevent the inadvertent creation of such a relationship – especially when using electronic media - and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.
- Amendments to the title and text of Model Rule 7.3 (Direct Contact with Prospective Clients) and its Comments to clarify when a lawyer’s online communications constitute “solicitations” that are governed by the Rule. For example, new Comment [1] clarifies that communications in response to a request for information, such as requests for proposals and advertisements generated in response to Internet searches, are not “solicitations.”
- Amendments to the Comments to Model Rule 7.2 (Advertising) to address confusion concerning the kinds of technology-based client development tools that lawyers are permitted to use, especially because of an ambiguity regarding the prohibition against paying others for a “recommendation.” The proposals clarify that a recommendation exists only when someone endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities.

More details are available here:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_client_development_posting.authcheckdam.pdf

Uniformity, Conflicts of Interest, and Choice of Law

The Commission is proposing amendments that would make it easier for lawyers to cross jurisdictional lines to serve their clients’ needs, but with appropriate safeguards to protect clients and the public. We are also proposing to clarify how to resolve inconsistencies among jurisdictions’ ethics rules and to clarify the circumstances under which lawyers are permitted to disclose limited confidential information to detect and prevent conflicts of interest, such as when lawyers seek to move to another firm or when two firms consider a merger. In particular, the Commission is recommending:

- Amendments to Model Rule 1.6 (Confidentiality of Information) that explain the ethical considerations associated with the disclosure of confidential client information to detect and prevent conflicts of interest. Consistent with ABA Formal Opinion 09-455, which addressed the same issue, the Commission’s proposal ensures protection of client confidences while allowing lawyers to identify potential conflicts of interest that might arise in commonly encountered situations, such as when a lawyer seeks an association with another firm or two firms consider a merger.

- A stand-alone Model Rule on Practice Pending Admission that would enable a lawyer licensed in one jurisdiction to establish a systematic and continuous presence in a new jurisdiction while diligently pursuing admission in the new jurisdiction through one of the procedures that the jurisdiction authorizes (e.g., admission by motion or passage of that jurisdiction’s bar examination). The new Model Rule’s restrictions and limitations, including various registration and disclosure requirements, are designed to protect the public.
- Reduction of the “time in practice” requirement in the ABA Model Rule on Admission by Motion from 5 of 7 years to 3 of 7 years. The Commission will also seek a resolution that encourages jurisdictions that have not adopted the Model Rule on Admission by Motion to do so and urges other jurisdiction to eliminate any restrictions in their admission by motion procedures that do not appear in the Model Rule, such as reciprocity requirements.
- Amendments to Model Rules 1.5 (Fees) and 5.4 (Professional Independence of a Lawyer) to address inconsistencies among jurisdictions, both domestically and abroad, with regard to the sharing of fees with nonlawyers. The proposed amendment to Model Rule 1.5 would clarify that a lawyer can divide a legal fee with another firm that has nonlawyer partners and owners. The proposed amendment to Model Rule 5.4 would clarify when a lawyer who is practicing in the office of a law firm where nonlawyer fee sharing is impermissible can share fees with nonlawyers in the same firm who are located in another office 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.
- Amendments to the Comments to Model Rule 1.7 (Conflict of Interest: Current Clients) that are intended to permit lawyers and clients to agree to be bound by the conflict of interest rules of a particular jurisdiction.

More details are available here:

Model Rule 1.6:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_confidentiality_and_lawyers_moving_firms_initial_resolution_report.authcheckdam.pdf

Model Rule 1.7:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_1_7_choice_of_law_conflicts_initial_resolution_and_report_for_comment.authcheckdam.pdf

Model Rule on Practice Pending Admission:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_5_5_d3_continuous_presence_initial_resolution_and_report_for_comment.authcheckdam.pdf¹

Model Rule on Admission by Motion:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_admission_by_motion_initial_resolution_and_report_for_comment.authcheckdam.pdf

Model Rules 1.5 and 5.4:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.authcheckdam.pdf

Outsourcing

The Commission concluded that lawyers need more guidance on their ethical obligations when engaged in outsourcing. Thus, the Commission is proposing amendments that would identify the factors that lawyers need to consider when retaining lawyers or nonlawyers outside the firm to assist on a client's matter (i.e., outsourcing legal and non-legal work). In particular, the Commission is proposing:

- New Comments to Model Rule 1.1 (Competence) to make clear that lawyers must make reasonable efforts to ensure that the work outsourced to lawyers outside the firm is performed competently and contributes to the overall competent and ethical representation of the client. A new Comment identifies the relevant factors to consider when assessing whether those efforts have been reasonable. The Comment also provides that, ordinarily, a lawyer should obtain a client's informed consent before retaining a nonfirm lawyer to assist on a client's matter. The changes also provide guidance when clients direct or suggest that lawyers use particular lawyers in another firm to perform certain tasks.
- Amendments to the title of Model Rule 5.3 (changing it from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance") as well as its Comments to underscore that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information. The changes also alert lawyers that they have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. The changes also provide guidance when clients direct or suggest that the lawyer use particular service providers.

¹ The draft currently available on the Commission's website reflects that this proposal would take the form of a new Model Rule 5.5(d)(3). At its October 2011 meeting, the Commission decided to pursue this proposal as a stand-alone Model Rule on Practice Pending Admission rather than as an amendment to Model Rule 5.5. The proposed new Model Rule would be mentioned by cross-reference in Model Rule 5.5. A new version of this proposal will be released for comment by the end of March 2012.

- Adding language to the Comment of Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice) to make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

More details are available here:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_outsourcing_revised_resolution_and_report_posting.authcheckdam.pdf

Alternative Litigation Financing

The Commission believes that the most effective way to address the many nuanced issues arising from new forms of litigation financing is to issue a White Paper that can be used as a resource by the profession. The Commission will file the White Paper as an Informational Report with the ABA House of Delegates at the February 2012 ABA Midyear Meeting. The White Paper offers guidance on conflicts of interest resulting from the lawyer's involvement in a funding transaction; obligations relating to the duty of confidentiality and the attorney-client privilege; competence in advising clients with respect to alternative litigation financing; and rules regulating the exercise of the lawyer's independent judgment.

The Informational Report is available here:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf

Alternative Law Practice Structures

Alternative law practice structures are proliferating outside the U.S., and the Commission has considered whether to propose amendments to Model Rule 5.4 (Professional Independence of a Lawyer) to allow U.S. lawyers to utilize similar structures. The Commission rejected proposals to amend the Model Rules to permit: (a) publicly traded law firms, (b) outside nonlawyer ownership of or investment in law firms, and (c) multidisciplinary practices (i.e., law firms that offer both legal and non-legal services separately, but in a single entity).

The Commission has released a discussion draft that seeks feedback regarding a limited form of court-regulated, nonlawyer ownership in a law firm. Following the model in place in the District of Columbia for more than twenty years, the sole purpose of such a law firm must be the delivery of legal services, and the services provided by nonlawyers must be limited to assisting the lawyers in the delivery of those legal services. The lawyers would be responsible for assuring that the conduct of the nonlawyers is consistent with the lawyers' obligations under the Model Rules. Nonlawyer owners would not have their own clients or offer nonlegal services to clients independent of the legal services provided to clients of the firm. The model is not multidisciplinary practice by another name.

The discussion draft contains additional restrictions beyond those imposed in the District of Columbia. For example, lawyers would have to maintain the controlling financial interest and voting rights in the law firm. Also, before a nonlawyer is permitted to have a financial interest in a law firm, the lawyers with financial interests in the firm would have to investigate the

nonlawyer's professional reputation for integrity. The investigation would be analogous to a character and fitness inquiry, and the firm would have to maintain a record of that investigation and its results.

For the Commission's proposals relating to choice of law issues arising from jurisdictional inconsistencies relating to nonlawyer ownership, see the entry above concerning "Uniformity, Conflicts of Interest, and Choice of Law."

The discussion draft is available here:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf

Inbound Foreign Lawyers

The Commission is proposing changes to the Model Rules concerning pro hac vice admission, multijurisdictional practice, and registration of in-house counsel that would authorize, and place limitations on, the practice of foreign lawyers within the United States. In particular, the Commission is proposing the following:

- Amendments to Model Rule 5.5 (Multijurisdictional Practice) that would incorporate the provisions of the 2002 ABA Model Rule for Temporary Practice by Foreign Lawyers in order to encourage increased implementation of this longstanding ABA policy by state supreme courts. The relocation of these provisions to Model Rule 5.5 creates no new practice rights for foreign lawyers.
- Amendments that would include foreign lawyers within the ABA Model Rule on Pro Hac Vice Admission, with appropriate regulatory safeguards. Notably, the power to permit a foreign lawyer such limited practice authorization (and the power to revoke that authorization) would be within the discretion of the trial judge. The trial judge would be required to review the foreign lawyer's professional background and training, and a U.S. lawyer must be of record in the matter and fully responsible to the court and the client for the proceeding. Many courts, including the United States Supreme Court, already permit this type of pro hac vice admission for foreign lawyers.
- Amendments that would include foreign lawyers within the scope of Model Rule 5.5(d)(1). As a result, foreign lawyers (like U.S. lawyers) would be permitted to work as in-house counsel in a jurisdiction where they are not admitted, provided such services are limited to the employer and its organizational affiliates. The Commission also proposes amending the ABA Model Rule for Registration of In-House Counsel so that foreign lawyers are expressly included. This amendment ensures that foreign lawyers can be more easily identified, monitored, and regulated.

More details are available here:

ABA Model Rule on Pro Hac Vice Admission:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_foreign_lawyers_and_pro_hac_vice_resolution_report_posting.authcheckdam.pdf

ABA Model Rule for Registration of In-House Counsel:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_foreign_lawyers_and_in_house_registration_resolution_report.authcheckdam.pdf

ABA Model Rule 5.5:

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_foreign_lawyers_and_model_rule_5_5_resolution_report.authcheckdam.pdf

Rankings

The Commission was asked to examine lawyer and law firm ratings and rankings. In response, the Commission submitted an Informational Report to the House of Delegates in August 2011, which concluded that no changes to the Model Rules are necessary. The Report, however, suggested that the profession and public would benefit from a Formal Ethics Opinion from the ABA Standing Committee on Ethics and Professional Responsibility that provides additional guidance to lawyers on how they should address their confidentiality obligations when asked for information from ranking entities and on how lawyers can use ratings and rankings in manner that is truthful and not misleading.

Referrals to Other ABA Entities

In addition to proposing changes to the Model Rules, the Commission has made various referrals to other ABA entities that are better equipped to address certain issues:

- To the Center for Professional Responsibility to work with relevant entities within the Association to develop two dynamic websites relating to (a) outsourcing and (b) confidentiality-related ethics issues arising from lawyers' use of technology.
- To the Task Force on International Trade in Legal Services to study ways in which the ABA can facilitate with its international counterparts resolution of inconsistencies and lack of clarity regarding which rules of professional conduct apply in international arbitrations.
- To the Standing Committee on Professional Discipline the study of pro-active practice management based regulation of firms, as distinct from individual lawyers.
- To the Standing Committee on Client Protection a request that the Committee develop a Model Rule relating to lawyers' obligations to retain client files.
- To the Standing Committee on Ethics and Professional Responsibility the following issues that may benefit from the development and issuance of Formal Ethics Opinions:

1. As noted above, with respect to lawyer and law firm rating and rankings, guidance on how to respond to requests for information from providers, given confidentiality-related concerns arising under Rule 1.6, and to further explicate how lawyers may use ratings or rankings in ways that are not misleading.
2. Further explanation or interpretation of the term “predominant effect” in Model Rule 8.5 on choice of law.
3. Greater guidance on how to resolve inconsistencies among jurisdictions with regard to their rules governing conflicts of interest.
4. More clarity regarding the limits of a lawyer’s multijurisdictional practice authority under Model Rule 5.5(c)(4).
5. A variety of issues arising from lawyers’ use of social media to conduct investigations, the meaning of Model Rule 7.1’s prohibition against “false or misleading” communications, the ethics of online social or professional networking between lawyers and judges, and the meaning of a “legal fee” as applied to new forms of online marketing arrangements.
6. More guidance on when client consent is needed to engage in outsourcing.

White Papers

As noted above, there are several questions that the Commission believes are best addressed in White Papers to draw the profession’s attention to the complex ethical issues surrounding a particular issue, including:

- A White Paper on the multiple ethical issues arising out of alternative litigation financing arrangements. (This paper is described above in the entry regarding the Commission’s work in the area of “Alternative Litigation Financing.”)
- A White Paper regarding the constitutional limitations on lawyer advertising rules in the Internet context.
- 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.