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VIA E-MAIL

Dear Ms. Gorelick & Mr. Traynor:

The Standing Committee on Client Protection (the “Committee”) thanks you for the opportunity to comment on the preliminary issues outline established by the ABA Commission on Ethics 20/20 (the “Commission”). We look forward to further involvement as the agenda progresses. The Committee commends the Commission on its efforts to review the Model Rules of Professional Conduct in light of evolving technology, and is especially interested in the Commission’s efforts to ensure that the Model Rules recognize the increased globalization of the legal practice that this evolving technology allows. We are particularly pleased that the protection of the public is a guiding principle of the Commission’s review.

The Committee’s jurisdictional statement requires it to “promote and enhance client protection mechanisms, including programs to reimburse financial loss caused by lawyers’ misappropriation of client funds”; to “identify and comment on emerging issues in the regulation of the unlicensed practice of law”; and “to identify and comment on emerging issues in the regulation of the practice of law, including the multijurisdictional practice of law.”

Reduced local regulation and the increased use of technology increases the need for appropriate client protection measures. Those measures should start with the Commission’s consideration of all of the client protection rules in the Compendium of Client Protection Rules.

The following additional comments are offered for the Commission's consideration:

I.A.1. Admission of U.S. Lawyers to Practice in Other Countries

- Committee members encourage the Commission to explore methods of ensuring that the privileges extended to foreign licensed lawyers desiring to practice law in the United States are equivalent to those extended to United States licensed lawyers desiring to practice law abroad.

I.A.2. Admission of Foreign Lawyers to Practice in the United States

- Committee members encourage the Commission's efforts to further explore methods of regulating foreign lawyers practicing in the United States. The adoption of reasonable regulatory measures will help to ensure that foreign lawyers practicing within the United States are held to the same regulatory standards as licensed United States lawyers.
- Committee members encourage studying the adoption of a foreign lawyer component to Rule 5.5 of the ABA Model Rules of Professional Conduct provided that the Commission also recommends reasonable regulatory measures that hold foreign lawyers to the same standards as licensed U.S. lawyers. These standards include a financial contribution to a jurisdiction's lawyers' fund for client protection, compliance with trust account overdraft notification rules and disclosure of professional liability insurance. The Committee understands that allowing foreign lawyers to practice law under the provisions of Model Rule 5.5 will expand the scope of practice that is currently allowed under the ABA Model Rule for Temporary Practice by Foreign Lawyers.
- Committee members encourage studying the adoption of a foreign lawyer component to the ABA Model Rule on Registration of In-House Counsel provided, once again, that the Commission recommends reasonable regulatory measures that hold foreign lawyers to the same standard as licensed United States lawyers, including contributing annual dues as required by a jurisdiction's in-house counsel rule and a financial contribution to the jurisdiction's lawyers' fund for client protection.
- Committee members encourage studying the adoption of a foreign lawyer component to the ABA Model Rule for Pro Hac Vice Admission provided the Commission recommends reasonable regulatory measures that hold foreign lawyers to the same standards as licensed United States lawyers, including a financial contribution to a jurisdiction's lawyers' fund for client protection.
- Foreign lawyers permitted to practice law in the United States should be subject to reciprocal discipline in the lawyer's licensing country.

I.A.3. What are the Pros and Cons of Proposals for State-Based National Licensure?

- State-based national licensure would require a reasonable and consistent regulatory scheme, including reasonable and consistent client protection mechanisms. Such

consistency has proven difficult to accomplish, even with the regulation of nationally accepted mechanisms such as lawyers' funds for client protection. If state-based national licensure were adopted, what jurisdiction would collect a lawyer's dues, including a lawyer's contribution to the lawyers' fund for client protection? Who would regulate lawyers holding such a license? If a lawyer misappropriates client funds, which jurisdiction's lawyers' fund for client protection would pay?

I.B. Outsourcing

- In reviewing legal outsourcing, the Committee asks that the Commission consider the effect of increased outsourcing on client protection efforts. Specifically, who is responsible for harm to a client if the contracted lawyer causes the harm? What if the contracted "lawyer" is licensed in another jurisdiction? Formal Opinion 08-451 suggests that it may be necessary to get informed consent from the client when work is outsourced to a lawyer or non-lawyer who is not under the direct supervision of the lawyer or law firm retained by the client. *See*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 451 (2008). Should there be a heightened disclosure requirement in jurisdictions with mandatory disclosure of professional liability insurance?

I.F. Alternative Business Structures

- While the need to have a regulatory scheme that maximizes the United States licensed lawyer's ability to compete in a global legal market, preservation of the client and the public is a paramount concern.

I.G. Law Firm or Entity Regulation

- Committee members support the exploration of alternative business structures for law firms as long as reasonable measures for regulation and client protection are in place and equal to those requirements currently imposed on other professional corporations (e.g. professional liability insurance, self-audit, entity contribution). Should the entity be required to pay into the lawyers' fund for client protection? If a model for alternative business structures was adopted, how would that impact lawyers as a self-regulating profession?

II. B. Virtual Law Firms

- As the Commission noted, the number of lawyers operating fully "virtual law firms" or individual practice groups as "virtual law practices" is rapidly increasing. Ideally, these virtual firms can minimize the appeal of unregulated "document preparers" to clients by minimizing overhead consequently lowering the cost to provide limited legal services to clients. Most rules that are currently in place adequately cover this developing method of practicing law. However, the potential for inadvertent violations of these existing ethics, disciplinary and specifically the rules governing the unlicensed practice of law, are heightened. Committee members suggest the Commission consider providing specific

“best-practices” guidelines for lawyers operating any form of virtual law practice (e.g. specific acknowledgment that client is located in a lawyer’s licensing jurisdiction).

- Arizona and California have adopted regulations for licensed document preparers. *See*, ACJA § 7-208; and also, Cal. Bus. and Prof. Code D.3 Ch. 5.5 §6400 et seq. Should the Commission encourage other jurisdictions to adopt similar regulations?
- The Committee suggests the Commission study the approach taken in Canada as an example of potential approaches to balancing the need for short-term cross-border practice with the protection of client interests. According to the National Mobility Agreement, lawyers may practice for up to 100 days within a calendar year in a reciprocating jurisdiction, without applying for a specific permit. Lawyers that enter another jurisdiction must show proof of malpractice insurance, are subject to that jurisdiction’s disciplinary system and cannot have an “economic nexus” in that jurisdiction. If there is client harm caused by a lawyer defalcation, the compensation fund of the lawyer’s home jurisdiction shall respond to the claim and payment of the claim is covered by a Uniform Compensation Fund.
See: http://www.flsc.ca/en/pdf/mobility_agreement_aug02.pdf.
- The Committee strongly encourages the Commission to promote the adoption of a method to reimburse clients for losses caused by lawyer misappropriation in all countries.

Thank you again for the opportunity to comment on this preliminary outline and we look forward to further opportunities as the Commission’s proposals are developed. If you have any questions regarding these comments, please contact Selina Thomas, Associate Client Protection Counsel, at 312/988-6721 or thomass@staff.abanet.org.

Sincerely,

Hon. Daniel J. Crothers
Chair
Standing Committee on Client Protection