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MEMORANDUM

TO: Jamie S. Gorelick and Michael Traynor, Co-Chairs, ABA Commission on Ethics 20/20
Via Email to ethics2020@staff.abanet.org

CC: Ellyn S. Rosen, Commission Counsel, rosene@staff.abanet.org

FROM: Glenn P. Hendrix, Chair, ABA Section of International Law

DATE: December 31, 2009

RE: Comments on Preliminary Issues Outline

On behalf of the American Bar Association Section of International Law (“SIL”), I am pleased to submit these preliminary comments on, and reactions to, the Preliminary Issues Outline (“Outline”) by the ABA Commission on Ethics 20/20, dated November 19, 2009. Shortly after its initial distribution, several relevant SIL Committees were asked to review and comment on the Outline. Those Committees and the respective commentators are listed in the attached Exhibit A.

SIL commends the ABA for identifying the need to examine and reevaluate the standards of professional conduct in light of the changes experienced, and to be experienced, by the profession. We also commend the appointment of the ABA Commission on Ethics 20/20 (“Commission”), and the Commission for addressing in detail the important and yet exceedingly complex issues now faced in the examination and reevaluation of the standards of professional conduct. In our view, the Outline is an excellent preliminary outline of the important issues, and we support the effort to address them.

This memorandum should not be viewed as the Section’s comprehensive response to the issues presented in the Outline. Given the time constraints imposed by the December 31 deadline, we are submitting only some preliminary observations from the leaders of some the Section committees most interested in these issues. This memorandum has not been reviewed or approved by the Section’s Council. We would welcome the opportunity to submit further input as the Commission’s work continues, as many of the issues presented in the Outline touch upon SIL’s core competency: legal practices issues impacting U.S. and foreign practitioners engaged in cross-border matters.



1. Regulations Governing Admission to Practice (Outline §I.A). The regulations governing admission to practice generated the most comments from SIL’s respondents. Any review of such regulations should place the best interests of the client first, and should effectively balance lawyer mobility with high-quality (substantive and ethical) legal representation. The comments we received may be preliminarily summarized as follows:

a. In most jurisdictions, lawyers and law firms are regulated on a national, not sub-national (State or Provincial) level. Most of SIL’s members engage in some form of multijurisdictional practice; we expect that an increasing percentage of U.S.-qualified lawyers, regardless of their geographic location or firm size, similarly will engage in some form of multijurisdictional practice, even on a periodic basis. SIL perceives a need for greater uniformity on standards among the U.S. states and among nations, especially on the concept of “practicing law.” Representing clients who are active in cross-border businesses, whether across State borders within the U.S., or international borders, raises the question of whether and when an attorney hired by a client in one jurisdiction is considered to be practicing law in another jurisdiction.

Specifically, the Commission might consider the following issues:

- i. Should standards for admission/qualification as a lawyer be harmonized internationally? Such standards, in practice, vary considerably by jurisdiction.
- ii. How best should substantial international reciprocity on admissions/qualifications be achieved?
- iii. What national laws or regulations should protect the interests of a global enterprise as a client?
- iv. Is there is a “national” interest in protecting a client when the globalization of the legal practice is a reaction to the globalization of the client base?
- v. To what extent should modifications of admissions/qualifications requirements in the U.S. be coordinated with entities such as Office of the United States Trade Representative to ensure that other countries, to the extent applicable, regulate their legal services market in a manner consistent with such country’s international commitments?
- vi. How can we best ensure that U.S. lawyers are not placed at an unreasonable disadvantage in providing legal services outside the United States?
- vii. Does the concept of “practicing law,” for purposes of admissions/qualifications, accurately reflect the actual practice of law? How does such definition impact the practice of law by multijurisdictional law firms? Does a phone call or email, concerning a case or a client, to someone in another State or country run afoul of the practice rules in the foreign

jurisdiction? What about participating in negotiations or due diligence in a foreign jurisdiction? What about conducting an arbitration before a independent tribunal where the proceedings are held in a jurisdiction where the attorney is not admitted to practice?

viii. Do existing admissions/qualifications rules unduly restrict consumers of legal services from choice in their providers?

ix. Should a “firm qualification” scheme be developed, whereby firms, in addition to lawyers, should qualify to practice?

x. The Commission may, for example, review reciprocal admissions between U.S. States and Canadian Provinces (or other jurisdictions).

xi. The Commission may, for example, review the admission of graduates from Canadian law schools to the various U.S. State bars.

xii. The bars in many nations, including, for example, Eurasia, are still in their infancy, so the Commission should consider assistance schemes so that such associations can “stand up” quickly and effectively.

xiii. The Commission should consider how other sources of law—such as Federal statutes—impact the qualification/licensing of lawyers.

xiv. How should legal training provided by U.S. law schools outside of the United States “count” for eligibility to sit for a U.S. bar examination?

xv. How may a foreign lawyer represent a party in a mediation in the United States unless authorized under the Model Rules?

b. Many SIL respondents stated that the Commission should consider modifying Model Rule 5.5 to enable temporary practice by foreign lawyers—but most respondents concluded that the scope of such temporary authority should be narrower than that of a U.S.-licensed attorney. Some form of registration system should be developed. Of concern in such modification are the differences in quality, and ethical, standards relevant to lawyers—and how such differences would impact consumers of legal services. The potential for significant State-by-State variation can create confusion as to any such new rule. Harmonization of rules across U.S. jurisdictions should be strongly considered, so that the requirements on temporary admission are transparent and consistent. In addition, potential modifications to Rule 5.5 could be used as an incentive for other countries to liberalize their legal services markets. The Commission should consider whether some sort of “gatekeeping” requirement—an examination, course, certificate or other option—should be put in place if Model Rule 5.5 is liberalized. The Commission should also examine how this issue is addressed in other jurisdictions, with a view to potential harmonization of rules across international borders.

c. Several SIL respondents noted that the U.S.’s State-based lawyer licensing regime can curtail the free movement of U.S. lawyers within the U.S.—a complication made

more severe for foreign lawyers wishing to practice in certain U.S. states. The requirements on such admission can vary widely. In some cases, there are minimum qualification period requirements that, for example, would prevent a Canadian firm with an office in Chicago from sending Canadian attorneys to work in that office, unless they have been admitted in Canada already for a significant period of time. The Commission should pay close attention as to whether this State-based licensing regime is the most efficient, effective, and transparent regime in light of the accelerating globalization of legal practice.

2. Outsourcing (Outline §I.B). As you know, the Section and the Commission are already engaged in a dialogue regarding outsourcing issues. Our comments on those issues will be provided under separate cover.

3. Conflicts of Interest (Outline §I.C). SIL respondents noted that there are widely differing rules on impermissible conflicts of interest and a need for greater uniformity of standards. Generally, the attribution rules relating to conflicts of interest are vague and exceedingly broad. There is a need for clarification and greater uniformity on how a current client conflict for an individual lawyer is going to be attributed to a global legal organization, particularly when it has separate financial units. Conflict of interest rules in most jurisdictions outside the U.S. are less stringent and also less strictly applied; as stated by several SIL respondents, such rules should not limit sophisticated clients' access to counsel.

Within the U.S., although most states base their rules on the ABA model rules, some do not, and even those which do often have adapted them and applied them in an inconsistent manner. This can cause problems when lawyers from one State are practicing in another State or when lawyers are qualified in more than one State. This problem could be overcome by a harmonized set of rules adopted and applied by all states in a consistent manner. As regards firms that practice both in the U.S. and outside the U.S., the problem is more acute. In some cases, conflict of interest rules may be mutually incompatible. This can mean, for example, that lawyers that are admitted in a U.S. State and in one of a large number of other jurisdictions (including many in Continental Europe, the Middle East and Latin America) can end up finding it very difficult to comply with both sets of rules. In specific cases, this can place them at risk of incurring a personal liability. This could be overcome by greater harmonization of the rules of professional conduct, particularly as regards the U.S. and jurisdictions of the kind mentioned above. Specifically:

a. The Commission should closely examine the concept of "impermissible conflict," and under what circumstances can it be waived by the client? Under what circumstances is the conflict not to be waived, even with informed client consent? Should a client's sophistication factor into the ability for such client to provide an informed waiver of a conflict of interest?

b. Is some defined level of financial interdependence the key in order for the conflict of one lawyer (or group of lawyers) practicing in one national unit to be attributed to another national unit, and what would those standards be? Or are there other relevant factors, such whether various national units of the organization, regardless of the degree of financial independence, operate under the same firm name or incorporate a global name or brand into their local name?

c. In absence of greater uniformity of conflicts and attribution principles, is it permissible for a client (e.g., global client) to agree that the relationship will be governed by a particular set of rules that have a reasonable relationship to the client and/or the law firm? Are there overarching public policy considerations that would prohibit such practices?

d. The Commission should consider whether specific guidelines should be established for a conflicts check for global law firms and these should be different for multinational (or sophisticated) and small clients. Although many U.S. firms have numerous U.S. licensed attorneys in their foreign offices, for profitability and service reasons, firms do seek to hire local lawyers who may not fully understand all of the issues in a conflicts check, or even the necessity for one.

e. The Commission should consider the conflict of interest rules applicable to a U.S. lawyer mediator or U.S. counsel to a party in a mediation taking place within or outside the United States where the mediator or counsel is a member of or otherwise affiliated with, a “global law firm.”

4. Confidentiality (Outline §I.D). SIL respondents largely agreed that the confidentiality rules should be re-examined in light of the globalization of legal practice. Most respondents concluded that, while there is potential for conflicts among differing sets of rules, lawyers should abide by the most stringent set of confidentiality rules applicable to them -- with the exception of those circumstances where the law of one jurisdiction requires compulsory legal disclosure in which case the licensed attorney practicing in such jurisdiction should be allowed to make the minimum level of disclosure necessary to be in compliance with such laws while making, at the same time, appropriate disclosure to the client when doing so. This is an area that requires review and greater harmonization.

5. Choice of Law (Outline §I.E). SIL respondents largely agreed that Model Rule 8.5 should be reviewed and clarified to provide that the Rule applies to foreign attorneys rendering legal services in the U.S. We note that such review should be undertaken in context with an examination of the concept of “practicing law,” as stated above.

6. Arbitration and Mediation (Outline §I.H). International arbitration is perhaps the arena in which there is the greatest opportunity for intersection between U.S. practitioners and the issues raised by the Outline. International arbitration frequently involves practitioners engaging in disputes that not only take place in jurisdictions other than where the attorney is licensed, but also governed by the law of a different jurisdiction. In addition to the numerous substantive legal considerations inherent to such a situation, there are also a myriad of ethical concerns that may be implicated as well. The potential for these issues to arise is only increasing as more litigators whose practice was previously devoted to general and domestic matters expand their activities into international arbitration. The Outline rightly raises the question of whether the framework currently in place adequately serves to address these issues.

SIL respondents do not necessarily believe that the nationality of the client should have any impact on these considerations, just as it does not for practitioners appearing before their local courts. In examining these issues, it is important that the rules be developed in an evenhanded manner that avoids creating an uneven playing field.

It should be made clear that ethical principles remain in force and effect for counsel, and arbitrators, participating in international arbitrations, regardless of the seat of arbitration or governing law. There are several areas that merit exploration in the context of international arbitration. These areas include:

a. Should there be an international code of conduct for international arbitration?

b. Which jurisdiction's code of conduct should govern international arbitration practitioners?

c. Examination, and perhaps an attempt at harmonization, of the differing standards applicable to discovery obligations, confidentiality, privilege and client preparation and communication issues.

d. Should the ABA attempt to work directly with other stakeholders in addressing these issues?

7. Issues That Arise in Light of Current and Future Advances in Technology That Enhance Virtual Cross-Border Access (Outline §II). SIL commentators believe that the Model Rules should be examined and, if necessary, amended to enable representation of clients in multijurisdictional practice. In addition, SIL respondents do not think it relevant (in terms of an ability to counsel clients) whether the lawyer or law firm maintains an office in any particular State or country in order to advise clients on law that is uniform (e.g. U.S. federal law or international law). Other comments included:

a. While many SIL commentators agreed with the ability to view a lawyer's "history" online, great care should be taken to ensure the timeliness and accuracy of such information. Further, there must be consistency across the States as to the "history" that is relevant to share with the public. At the same time, care should be taken to respect a lawyer's privacy in certain matters.

b. Non-U.S. lawyers practicing U.S. law—those admitted temporarily, *pro hac vice* or otherwise—should be included in such system.

c. Similarly, in-house counsel practicing in the U.S. should be included in such system.

8. Particular Issues Raised by Changing Technology (Outline §III). Technology will continue to play a large role in the affordable distribution of legal services. SIL respondents did not indicate that they believed that separate rules should govern the standard of any such services that may be rendered with the aid of technology. However, some specific issues have been raised:

a. At what point does the online provision of legal "forms" or "templates" constitute the practice of law? Although many of these websites have disclaimers, these

forms provide, in many situations inadequate legal protection as peripheral issues are left unaddressed by the parties involved causing a misunderstanding, dispute, or even litigation at a later date. Query whether these websites should have greater policing or be approved by an authoritative body.

b. How can various, differing data protection laws (such as those in the U.S. and European Union) be better harmonized so that attorneys do not run into conflicts generated by such differences? What level of care should attorneys exercise with regard to information security—especially in light of increasing threats by hackers?

c. Should there be cross-border model rules on disclosure of privilege information, especially with regard to Canadian privacy rules?

d. How do emerging forms of communications, such as social networking media, impact expectations of privacy and confidentiality for clients?

9. Other Issues. In addition to the issues raised in the Outline, SIL commentators offered comments on other issues impacting the global practice of law.

a. All lawyers who work, for example, in New York or who are New York qualified are required to comply with the extensive rules on advertising provided by the New York Rules of Professional Responsibility. This requirement is independent of the location of the recipient of the advertisements. This means that New York lawyers working in London have to comply with the New York rules *and* the English rules. While not strictly in conflict, the New York rules are far more onerous than the English rules. In addition, there may be instances where including some of the rubric required by the New York rules could be construed as being misleading (the English rules state that “publicity must not be misleading or inaccurate”). Examination and harmonization of such rules may be in order.

b. The Commission should examine the impact of EU rulings have stated that this privilege does not apply to in-house counsel. This difference can cause problems for any U.S. attorney involved in cross-border transactions in the EU as well as in-house counsel.

c. Differing document retention requirements can create confusion. For example, in London, law firms need to keep documents for six years in case a claim is brought against the firm or its client. In New York, the requirement is seven years; in Luxembourg the requirement is ten or 30 years, depending on whether the client is a commercial entity or an individual. On cross-border transactions on which the New York office of a firm works with the Luxembourg office of the same firm, that firm therefore needs to keep documents for at least 10 years (i.e. the stricter of the rules). Examination and harmonization of such rules may be in order.

d. New client identification evidence requirements vary considerably. Under the U.K. regime lawyers are subject to quite prescriptive requirements in relation to the documents needed as evidence of new client identity (including proof of beneficial owner(s) and directors’ identification) whereas in the U.S. there is a general obligation for lawyers “to

know who their clients are” but no specific requirements regarding what documents are needed and no express need to identify owners and directors.

10. Conclusion. As previously indicated, SIL commends the Commission on the excellent Outline. The Outline has generated significant interest in SIL’s Committees, including those whose mandate specifically includes the issues mentioned in the Outline. SIL, through its Committees and otherwise, stands ready to assist the Commission in addressing the important and exceedingly complex issues with respect to standards of professional conduct in light of the globalization of legal practice.

EXHIBIT A:
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