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Model Rules

**Ethics 20/20 Commission Reviews
Comments on Its Preliminary Agenda**

ORLANDO, Fla.—Convening Feb. 4 during the ABA Midyear Meeting, the ABA Ethics 20/20 Commission indicated that two sets of issues on UUits preliminary agenda—foreign lawyers practicing in the United States, and outsourcing of legal services—are on a fast track for action.

The commission also developed seven working groups that will tackle those and other key clusters of issues. Co-chair Jamie S. Gorelick explained that the idea is to roll out recommendations over the course of the commission's three-year tenure rather than waiting until the end to make all of the proposals. She emphasized repeatedly that the commission wants the widest possible input on its work.

At the meeting, held the day before its first public hearing (see 26 Law. Man. Prof. Conduct 110), the commission examined its ambitious preliminary agenda in view of comments that have been submitted, and it also used the meeting to hear from several lawyers about what the commission should try to accomplish.

Although several of those who spoke or submitted comments acknowledged likely opposition to any suggestion of reviving the debate over multidisciplinary practice, in which lawyers practice law in an entity that includes nonlawyer professionals, the commission kept that subject on the table in light of key changes in legal practice overseas.

Working Groups Appointed

The commission was launched in August 2009 by incoming ABA President Carolyn B. Lamm to recommend updates to the Model Rules in light of evolving technology and globalization of legal practice. See 25 Law. Man. Prof. Conduct 418.

In December, the commission released a preliminary list of issues that it proposed to address during its project, and invited public comment on the list. See 25 Law. Man. Prof. Conduct 694; 25 Law. Man. Prof. Conduct 695. By the close of 2009, the commission had received 16 sets of comments about its preliminary issues agenda from individuals, ABA entities, and organizations outside the ABA. At the Feb. 4 meeting the commission discussed reshaping its agenda with those comments in mind.

Throughout the meeting, Gorelick urged the commission to focus on its mission—the challenges arising from globalization and changing technology. “Today we're trying to define for ourselves what we're about, with the idea of a report in August on the issues and where there might be a mismatch” in the rules, said Gorelick, of WilmerHale in Washington, D.C.

“We have an array of choices, and the challenge for us is to match up solutions with problems.”

Jamie S. Gorelick
Co-Chair, Ethics 20/20 Commission

The commission's next meeting is scheduled for April 29-30 in Washington, with subsequent meetings on Aug. 6 in San Francisco and Oct. 15 in Chicago.

The commission's reporter, Keith R. Fisher of Chicago, noted that one issue Lamm has identified as especially important is the subject of third-party financing of litigation. The commission decided that one of its working groups will be devoted to that subject.

Other working groups will focus on outsourcing legal services, the implications of new technology, data security and confidentiality; foreign regulation of legal services and "alternative business structures," uniformity and choice of law issues, and foreign lawyers practicing in the United States.

Imports/Exports of Legal Services

The working group on "in-bound" foreign lawyers is close to presenting the commission with recommendations about modifying the Model Rules to permit some types of legal practice within the United States by foreign-licensed attorneys, according to commission member Stephen Gillers, who chairs the group and is a law professor at New York University.

The commission is hoping to present the ABA House of Delegates with recommendations on the subject in August. (*See box.*)

Also on the commission's agenda is the issue of "out-bound" U.S. lawyers who provide services in other countries. Although in written comments some lawyers from the ABA Section of Litigation took the position that the commission should focus more on U.S. policy for admitting foreign lawyers, Gorelick said the commission's assigned mission of looking at the impact of globalization also covers questions about U.S. lawyers practicing abroad.

According to Gorelick, there is "tremendous anxiety" among U.S.-licensed lawyers whose matters take them to other countries, and she said some of the concerns emanate from the impact of state ethics rules that govern those lawyers. The commission should identify those concerns and provide guidance about the obligations of lawyers who are present physically or virtually in another jurisdiction vis-à-vis their own licensing jurisdiction, she said.

Georgetown University Law Center professor Carole B. Silver, a member of the commission, also urged the commission not to exclude the subject of assisting U.S. lawyers abroad. We need to keep an eye on exporting legal services, she said.

Clearinghouse?

According to Fisher, several ABA entities, including the ABA Task Force on International Trade in Legal Services and the Section of International Law, are exploring the issue of U.S. lawyers' admission to practice in other countries. Fisher recommended that the commission monitor that work with respect to liberalizing legal services markets under the General Agreement on Trade in Services, and coordinate with those groups.

Law professor Robert E. Lutz, who chairs the ABA's International Trade in Legal Services Task Force, told the commission that the U.S. trade representative needs assistance from the legal profession on these issues. It is within the commission's scope to muster this information and provide it, or point to others who can, he said. Lutz, who is serving as a liaison to the commission, is a law professor at Southwestern University School of Law in Los Angeles and has written extensively on transnational legal practice.

Commission member Jeffrey B. Golden, of Allen & Overy in London, said the commission should hear from bar groups elsewhere in the world. There is tremendous interest outside the United States in the

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commission's work, he said, adding "We can be a clearinghouse."

Along the same lines, Silver suggested that one of the commission's functions could be to serve as an accumulator of information and to make it available to lawyers.

Gorelick said she agrees that the commission needs comprehensive information about what other countries are doing.

Outsourcing Report Expected Next Year

The subject of outsourcing of legal services is on a fast track for the commission, according to commission co-chair Michael Traynor, Berkeley, Cal.

Traynor told the commission that the Section of International Law is working on the subject of international outsourcing and plans to hold a public hearing on the question, but is nowhere near a conclusion. The commission will be getting the section's drafts, Traynor said.

The commission has set a goal for itself of submitting a report and recommendation on the subject of outsourcing for the ABA's midyear meeting in February 2011, Traynor said.

In remarks to the commission, ABA President-Elect Stephen N. Zack said that although he is "agnostic" on the issue of outsourcing, he recognizes that the lack of an official ABA position on this subject is "a real problem." An opinion on outsourcing issued by the Standing Committee on Ethics and Professional Responsibility, ABA Formal Ethics Op. 08-451 (2008), has been taken by others as a formal ABA endorsement, he noted. Zack is a partner in Boies, Schiller & Flexner, Miami.

Traynor pointed out that an ABA ethics opinion reflects only the views of the ethics committee. The ABA House of Delegates needs an opportunity to consider outsourcing, he said.

Gorelick said that the commission's work on outsourcing will be put out for public comment, so that by the time the report comes before the delegates at the 2011 midyear meeting it will be "fully vetted."

According to Lutz, while the ABA ethics opinion offers guidance on U.S. attorneys' professional obligations when outsourcing legal services, it would be also helpful for lawyers to have a guide or advice about "best practices" for outsourcing. (In a report issued last year, the New York City bar offered its views about outsourcing in several common scenarios. See 26 Law. Man. Prof. Conduct 19.)

Along with several others, commission member Elizabeth B. Lacy, a senior justice of the Virginia Supreme Court, said that the issue of outsourcing legal work within the United States needs to be addressed as well. Traynor confirmed that domestic outsourcing is also an important item for the commission.

Alternative Business Structures

Fisher noted that the ABA ethics committee has asked the Ethics 20/20 Commission to undertake a comprehensive survey of alternative business structures (ABS) for law practices that are authorized in the United Kingdom under the Legal Services Act of 2007.

After some discussion among commission members, Gorelick summarized their apparent consensus: Although the topic of ABS is within the commission's jurisdiction and it should garner enough information to inform its discussion of the subject, the commission itself is not in a position to perform a comprehensive study of this topic.

Concerning nonlawyer ownership of law firms, Gillers suggested that the commission distinguish among three different models:

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- a legal multidisciplinary practice that only practices law but has nonlawyer equity owners, such as in the District of Columbia;
- a multidisciplinary practice that provides not only legal services but also services in other disciplines and has nonlawyer equity owners; and
- a nonlawyer corporation that employs lawyers to render legal services to third parties.

The first model is the “least aggressive,” Gillers said, noting that since March 2009 U.K. law firms have been allowed to have up to 25 percent nonlawyer ownership.

Wallace E. “Gene” Shipp Jr., longtime bar counsel in the District of Columbia, attended the commission's meeting and told the members that he has seen no problems with D.C.'s unique version of Rule 5.4, which allows law firms to include nonlawyer equity owners.

Gillers said that according to a paper he had just received, there have been no problems so far in the United Kingdom under the new law on nonlawyer ownership.

‘Tesco Law.’

The U.K. reform opening up nonlawyer ownership of law practices has sometimes been called “Tesco law” to hint at the possibility that eventually legal services may be offered by commercial entities such as the Tesco supermarket chain.

Silver urged the commission to keep an open mind and not give up too quickly on nonlawyer participation in the offering of legal services. She related that her own family recently used a “doc-in-the-box” within a CVS drug store to meet a weekend need for medical consultation. “This has broadened my thinking,” she said.

It is “a real problem” that the ABA itself does not have a position on outsourcing.

ABA President-Elect Stephen N. Zack

Fisher cautioned that the commission should expect negative reactions to the idea of a Walmart offering legal services, and may want to consider a “smaller step.”

With regard to these new models of law practice, Lacy offered the view that the commission shouldn't “get hijacked by ABS” but “can't cross it off” the agenda. “It's just part of what we're doing,” she said.

Golden wondered if the commission might benefit from looking into the experience of other professions, such as the medical profession, that have been affected by rapid changes in technology.

Deja Vu?

The subject of multidisciplinary practice (MDP) has a history of controversy within the ABA. In 1998 the organization created a Commission on Multidisciplinary Practice, which recommended that the ABA accept MDP to some extent. However, on two occasions the House of Delegates rejected the commission's suggested reforms and went so far as to disband the panel in 2000. See 16 Law. Man. Prof. Conduct 367.

One member of the Ethics 20/20 Commission, law professor Theodore J. Schneyer of the University of Arizona, said during the meeting that some people are complaining that the idea of MDP is rising up like a

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zombie even though it was killed a decade ago.

Traynor, who was a member of the MDP Commission, said that the Ethics 20/20 Commission faces an “education challenge” on MDP. There’s a feeling, he said, that the “evil dragon was slain 10 years ago and it’s now coming out of its lair.”

That’s not the case at all, he declared, saying that the commission needs to look at the issue without minimizing or exaggerating it.

Data Security, Confidentiality

Some of the comments that the commission received about its preliminary agenda centered on data security and confidentiality, asking questions such as what level of care attorneys should exercise in regard to information security, whether the Model Rules adequately address how technological advances have made it easier to share information unilaterally with attorneys, and how differing confidentiality and data protection regimes might be harmonized so that lawyers do not run into conflicting obligations.

Michael P. Downey of Hinshaw & Culbertson in St. Louis told the commission that in some ways, “cloud computing”—in which organizations and individuals use applications and data storage facilities on the internet rather than in their own computer systems—can provide better data security for laws firms than most firms can provide on their own.

Asked whether he thinks standards should be promulgated for protection of client information, Downey said the commission should come up with “best practices” regarding data security. Lawyers are “dodging bullets every day” on this issue, he said.

Commission member Diane P. Wood, Chicago, a judge on the U.S. Court of Appeals for the Seventh Circuit, wondered if a law firm simply goes to “the lowest common denominator” when faced with conflicting confidentiality rules.

This is one of the most important issues for the commission to deal with, Gorelick commented.

Importance of Uniformity

In comments to the commission, the ABA Section of International Law endorsed the goal of harmonizing confidentiality rules, particularly in global settings.

Similarly, Downey said in his remarks to the commission that law firms practicing across borders face “huge issues” in trying to comply with rules that vary among jurisdictions. For example, he explained, a Florida rule may require disclosures in a situation in which Maine forbids it.

Commission counsel Elyn S. Rosen, Chicago, pointed out that the need for uniformity and harmonization was a recurring theme in comments the commission received on its preliminary issues outline. More uniformity may help with some of the concerns brought to the commission’s attention, she said.

State courts may have more and more reason to see the importance of uniformity in the rules governing lawyers, Schneyer said.

State-Based Regulation

In comments they submitted on the issues outline, lawyers from the Section of Litigation asked the commission to reconsider whether the state-based licensing regime is the most efficient and practical in light of the accelerated globalization of legal practice.

On this question, Gillers pointed out that “this isn’t an either/or proposition” and that the state-based

system of regulation could be supplemented by something else.

Gorelick said the issue of state-based regulation could be addressed not on its own but only as it bears on specific solutions that the commission wants to consider.

Saying that the commission is not facing a binary choice, and urging it to avoid an abstract discussion, Gorelick stated, "We have an array of choices, and the challenge for us is to match up solutions with problems."

Impact of Variances on Discipline

When Shipp made his remarks to the commission, Gorelick asked him if the National Organization of Bar Counsel has discussed any rule of thumb or comity to apply in disciplinary matters where there are conflicting standards on core principles such as confidentiality.

Shipp answered that NOBC has not discussed that issue. "I don't see it as a problem," he said, adding that this type of case "is not really the lawyer we want to prosecute." (In remarks at the commission's public hearing the next day, however, attorney Samuel Crews of Columbia, S.C., predicted that the profusion of differing rules will lead to "discipline shopping." Attorneys with offices in several states may ask themselves where they should break the rules, he suggested.)

Lawyers are "dodging bullets every day" in regard to data security.

Michael P. Downey

Gorelick said that it's important for the commission to understand whether the variations among rules make a difference in terms of discipline, and whether the differences are a real or theoretical problem. The commission would like to hear from NOBC on this issue, she said.

Shipp offered his perspective as bar counsel: "We want the bad guys"—the lawyers who hurt the public. He said that his office has pursued lawyers across international boundaries in three cases.

In one instance, he related, when a lawyer who had been suspended in the District of Columbia decided to become an official in another country, bar counsel went to the embassy and the lawyer was quickly removed from office. Bar counsel must have the ability to follow the bad guys once we discipline them, he said.

Sophisticated Clients

One question the commission mulled at its meeting was whether there should be different levels of regulation depending on whether the lawyer is serving a sophisticated client or one who is not an experienced, knowledgeable user of legal services.

Schneyer pointed out that a comment to Model Rule 1.7 already makes this distinction. According to the Ethics 2000 Commission, sophisticated clients include those that have their own in-house counsel, he noted.

Gillers added that "sophisticated" is becoming a term of art. "The concept is fuzzy but established," he said, suggesting that the commission can try to help flesh it out.

Although Fisher said the commission should expect some push-back on this issue as a concern of "big law," Gorelick took the position that the issue is important for the commission and that it should take evidence on the subject.

Conflicts of Interest

On a related topic, the commission is being asked to examine whether the rules governing conflicts of interest need updating in light of changes in the legal profession.

In comments it submitted, the ABA's ethics committee asked the commission to consider whether, as law firms become larger, the Model Rules should be modified so that conflicts of interest among current clients present a problem only when a firm's representation of one client will be materially limited by its responsibilities to another client, and not when the representation of one client will be directly adverse to another client.

The Section of International Law said in its written comments that the rules governing "attribution" of conflicts are vague and overbroad, and that greater clarity and uniformity is needed about 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.

Fisher recommended to the commission that, considering the growth and globalization of law firms, it should study the utility and ongoing feasibility of imputed disqualification rules such as Model Rule 1.10.

As a start, Gorelick suggested, the commission could talk to large firms to determine how conflicts are checked and see how conflicts checking is different for large firms.

Advertising Rules

At the meeting, Ronald C. Minkoff of Frankfurt Kurnit Klein & Selz, New York, urged the commission not to recommend more advertising rules or try to regulate social networking on the internet. Given the fast pace of change in lawyers' use of the internet, "we have to see how the current regulatory structure can work," he said.

But Philip H. Schaeffer, general counsel to White & Case in New York, suggested that the sheer volume of lawyer speech on the internet makes it "qualitatively different," perhaps warranting its own rules. Schaeffer is serving as the ABA ethics committee's liaison to the commission.

Lacy commented that just as electronic discovery was thought to warrant its own rules, perhaps the internet too may be a "different world" that needs its own standard of lawyer conduct.

Without taking any position on the need for rules relating to internet use, Gorelick said these comments address "the core of what we're grappling with" on the commission. "We need to take account of new technology," she declared.

Arbitration

Reacting to a comment on its preliminary issues outline, the commission also discussed whether it should examine conflicts in arbitration, particularly international arbitration. Some members saw that subject as outside the commission's charge, while others viewed it as relevant to globalization and changes in law practice.

Commission member Judith A. Miller, San Francisco, saying that big companies are starting to distrust arbitration, stated that the subject should be left on the table. Miller is general counsel of the Bechtel Group.

Gorelick asked Rosen and Fisher to show the commission what standards are out there. The commission can't take on the whole issue and should make a recommendation only if there's a gap that needs to be filled as a result of globalization, she said.

Access to Justice

In discussing the preliminary agenda, Gorelick made clear that the commission's recommendations need to address the potential benefits of technology with regard to access to justice.

Similarly, Minkoff urged the commission to focus on access to justice and making legal services accessible to the public. The legal profession engenders hostility and loses the confidence of the public by clamping down on services such as paralegals' doing document preparation, he said.

By Joan C. Rogers

The Ethics 20/20 Commission's website is <http://www.abanet.org/ethics2020/>.

Written comments that witnesses provided for the commission's Feb. 5 public hearing can be viewed at <http://www.abanet.org/ethics2020/submissions.pdf>.

The commission's preliminary issues outline is posted at <http://www.abanet.org/ethics2020/outline.pdf>.

Ethics 20/20 Commission Is Formulating Rules for Practice in United States by Foreign Lawyers

One of the Ethics 20/20 Commission's working groups is developing recommendations for amending the Model Rules to allow foreign lawyers to practice law in the United States in some situations.

At the commission's Feb. 4 meeting in Orlando, Fla., commission member Stephen Gillers, who chairs the working group, explained that it tentatively plans to recommend that Model Rule 5.5 be modified to allow foreign lawyers to serve as in-house counsel and to be admitted pro hac vice in a U.S. jurisdiction under the same circumstances as counsel admitted in another U.S. jurisdiction can do so.

The commission is also planning to recommend, Gillers said, that current ABA policy on temporary practice by foreign lawyers be incorporated into the Model Rules, either as part of Model Rule 5.5 or as a standalone model rule.

Gillers explained that when the ABA adopted multijurisdictional practice reforms in 2002, it recommended that states adopt the ABA Model Rule for Temporary Practice by Foreign Lawyers. But that suggestion—Recommendation 9—has been generally overlooked by the states, Gillers said. The model allows foreign lawyers to perform services on a temporary basis in the United States when:

- they do so in association with a U.S. lawyer;
- the services are related to litigation outside the United States;
- the services are connected to alternative dispute resolution proceedings in or outside the United States, if they relate to the lawyer's practice outside the United States;
- the services are performed for a client who resides or has offices in the lawyer's home country, or are related to a matter with a substantial connection to the lawyer's home country; or
- the services are governed by foreign or international law.

Gillers pointed out that the Model Rule for Temporary Practice by Foreign Lawyers does not authorize foreign lawyers to provide temporary services in a U.S. jurisdiction merely because they have expertise in a matter, unless the matter is governed by international law. The working group is not planning to

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recommend a policy change on that issue, he said.

According to Gillers, the working group hopes to present its proposals to the commission in April.

Gorelick expressed hope that the commission will be ready to make a recommendation to the ABA House of Delegates in August at the bar group's annual meeting, rather than waiting to roll out all of the commission's recommendations at the end of its work.

Commission member Carole B. Silver described the subject of temporary practice by foreign lawyers as contentious. Modifying the Model Rules along these lines "will create new work for the states," yet it "maybe doesn't go far enough," she said.

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