

**COMMENTS ON  
ABA COMMISSION ON ETHICS 20/20 PRELIMINARY ISSUES OUTLINE  
December 31, 2009**

The undersigned members of the ABA Section of Litigation\* have reviewed the ABA Commission on Ethics 20/20 Preliminary Issues Outline (November 19, 2009) and have several comments.

In general, we are pleased to see the Commission turning focused attention to important issues involving cross-border legal practice and the ethical issues created by advancing technologies. We are particularly pleased that the Commission has linked these two phenomena, because technology advances have obviously facilitated cross-border practice and will continue to do so. We would suggest that the Commission give some thought to the mechanism for creating or enforcing multinational norms. Would this be accomplished through a treaty? Would it involve particular forms of outreach to foreign jurisdictions in which U.S. lawyers frequently practice? Some practical suggestions for moving forward with the Commission's eventual recommendations would be useful.

Although we acknowledge the importance of examining the link between technology and cross-border practice, we believe the outline could also do more to address the technology issues affecting primarily "individual, quintessentially local practice," as referenced in the Introduction. The outline currently makes few references to the types of issues facing smaller or local practitioners. We therefore encourage the Commission to expand the third section of the outline ("Particular Ethical Issues Raised by Changing Technology") to identify the particular categories of technology-driven ethical issues of potential interest to the individual and local lawyer, or perhaps to add a fourth section that focuses specifically on the local lawyer. For example, the potential disparity between a big firm's and a local lawyer's very access to technological developments could potentially raise ethical issues.

Beyond these overarching issues, we have the following specific comments on particular outline sections:

1. **Admission of U.S. Lawyers to Practice in Other Countries (Outline Section I-A-1).** The Commission intends to "study approaches" in other countries for admitting foreign lawyers to practice. Is this study designed to assist U.S. lawyers in meeting the requirements for admission in other countries, or is it designed to guide U.S. policy in setting its own standards for admitting foreign lawyers to practice here? We believe that the second purpose is most in line with the Commission's stated goals, but both approaches could be helpful.

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\* The comments expressed in this document are those of the individual signatories, all of whom are leadership members in the Section of Litigation. The Section's Council has not considered the matter, so these comments do not express the official position of Section.

2. **Pros and Cons of Proposals for State-Based National Licensure (Outline Section I-A-3).** We believe that this issue is potentially worthy of greater emphasis in the outline, because a national licensure system could eliminate all of the difficulties that attorneys encounter with practicing law across state borders.
3. **Mediators and Arbitrators Who Cross Borders (Outline Section I-A).** Perhaps the Commission can address not only the regulations that apply to lawyers who cross borders, but also mediators and arbitrators who hold sessions outside their home jurisdictions.
4. **Outsourcing (Outline Section I-B).** We would suggest distinguishing between outsourcing to a U.S. firm and outsourcing to a firm outside the U.S., as the location of the vendor may affect the ethical considerations the Commission wishes to study. We also suggest exploring whether the ABA should add a new model rule dealing with outsourcing or should modify the existing rules on subordinates, assistants and law-related services (Model Rules 5.2, 5.3, and 5.7).
5. **Alternative Business Structures (Outline Section I-F).** This issue is not unique to multi-jurisdictional or cross-border practice and may therefore fall outside the scope of the Commission's charge. If the Commission is looking to eliminate any of the identified topics, this one may be a candidate.
6. **Uniform Rules for Client Protection in Certain Contexts (Referenced in Outline Section II-B).** The advisability of a uniform standard for advising clients on uniform laws seems logically to fit better in Outline Section I than in its present location, since it is not an issue particularly affected by technological advances. It may belong in an expanded version of Outline Section I-A-3 ("Pros and Cons of Proposals for State-Based National Licensure"); see Comment 2 above.
7. **Technology Issues (Outline Section III).** We would suggest examining the adequacy of Model Rule 1.18, "Duties to Prospective Client," in light of technological advances that make it easier for prospective clients to share information with attorneys, with or without the attorneys' encouragement.
8. **Technology Issues (Outline Section III).** Many litigators are concerned about the rise in the expense of litigation caused by the discovery of electronically stored information ("ESI"), making the courts increasingly inaccessible to those with legitimate grievances. Courts have struggled with managing discovery that is arguably directed to relevant evidence but that threatens to overwhelm the resources of the parties. We would suggest that the Commission study whether Model Rule 3.4, "Fairness to Opposing Party and Counsel," adequately addresses the overuse and abuse of ESI discovery.
9. **Access to Justice (Outline Section III-A).** We are pleased that the Commission intends to study the ways in which advances in technology will affect access to justice. We would suggest broadening that inquiry beyond technology

advances. We think that the importance of this issue warrants a study of how legal assistance is provided in other countries to those who cannot afford lawyers and, in particular, the mechanisms for authorizing and regulating law-related practice by non-lawyers in that context.

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