

AMERICAN BAR ASSOCIATION

ABA Commission on Ethics 20/20

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November 19, 2009

On behalf of the ABA Commission on Ethics 20/20, we are pleased to provide for your review and comment the attached Preliminary Issues Outline. The Commission expects that the number and nature of subjects in the Outline will change as its work progresses and comments are received. Particular phraseology and the order in which subjects are listed are not intended to connote any prioritization of or Commission position on issues, nor is consideration of other topics omitted intended to be foreclosed.

We would appreciate receiving comments via e-mail at ethics2020@staff.abanet.org by **December 31, 2009**. The Commission will post on its website all written comments received. Please advise us if you request that your submission be posted without attribution. The Commission will consider comments at its February 4, 2010 meeting in Orlando, Florida.

If you have any questions about the Outline or the Commission's work, please contact Commission Counsel Ellyn S. Rosen at rosene@staff.abanet.org.

Sincerely,



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

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ABA Commission on Ethics 20/20

Preliminary Issues Outline

November 19, 2009

Introduction

In the United States, the highest court of each state and the District of Columbia has the authority to regulate lawyers within its borders. In 1908, the American Bar Association, concerned with the standards of the legal profession and the low esteem in which it was held by the general public, promulgated the Canons of Professional Ethics, a set of aspirational principles for law practice that the states were free to, and in the majority of cases did, adopt. The latter half of the 20th Century saw the promulgation by the ABA of successively less aspirational and more rule-based models of professional regulation – the 1969 Model Code of Professional Responsibility and the 1983 Model Rules of Professional Conduct, as periodically amended (the “Model Rules”). All states except California have adopted the Model Rules with some variations, although California has adopted selected language from the Model Rules.

As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA endeavors to ensure that the Model Rules keep pace with societal change and the evolution of the practice of law and that other sources of professional regulation, including court rules and statutes do so as well. The accelerating pace of technological innovation and the increase in globalized law practice raise serious questions about whether existing ethical rules and regulatory structures adequately address the realities and challenges of 21st Century law practice. With respect to technology, the profession faces not merely the proliferation of personal computing, e-mail, “smart-phone” technology, enhanced personal digital assistants, and the internet, but the likelihood that on the horizon is a potential new or second internet as well as technologies that cannot now be fully anticipated. As for globalization, already the profession is encountering the competitive and ethical implications of U.S. lawyers and law firms seeking to represent American and foreign clients abroad and foreign lawyers seeking access to the U.S. legal market.

In August 2009, ABA President Carolyn B. Lamm created the ABA Commission on Ethics 20/20. The Commission is to conduct a plenary review and assessment of the

Model Rules and other sources of lawyer regulation in the context of the aforementioned trends, including legal practice developments in other countries. The Commission's work will be guided by three principles: protecting the public, preserving core professional values of the American legal profession, and maintaining a strong, independent, and self-regulated profession.¹

The Commission will work transparently and collaboratively and will promote education on these subjects for the legal profession and the public. The Commission will engage the judiciary, the bar (including state, local, international, and specialty bar associations), and the public in framing issues for consideration, and enlist their support in crafting suitable recommendations that will benefit clients and the public, strengthen the ability of the legal profession to meet the challenges facing it, and maintain those core principles that guide its work. The Commission has a website, www.abanet.org/ethics2020 and a general discussion list serve that interested individuals can subscribe to via the website. Notice of the Commission's meetings, public hearings, roundtables and educational programs is also available on the website.

Of particular note is the breadth of this project. The Commission will focus on ethical and regulatory issues affecting the entire spectrum of legal work -- from what some call "Big Law" to individual, quintessentially local practice (*e.g.*, criminal defense, wills, and matrimonial law). At its first meeting on September 24-25, 2009, the Commission began to identify critical issues. Subject to continuing modification and possible additions, the Commission identified three overlapping areas of inquiry: (1) issues that arise because U.S. lawyers are regulated by states but work increasingly across state and international borders; (2) issues that arise in light of current and future advances in technology that enhance virtual cross-border access; and (3) particular ethical issues raised by changing technology. A detailed preliminary outline follows this Introduction.

Preliminary Issues

Initially, the Commission has identified the following issues for consideration and study. This "issues outline" is preliminary only and will continue to evolve. The Commission expects that, during its tenure, the number and nature of the subjects on this outline will change as the work progresses. The use of this format and particular phraseology is not intended to connote any prioritization of or position on the issues identified below, nor is

¹ The Model Rules have retained the "self-regulation" terminology. However, the U.S. legal profession is primarily regulated by each states' highest court of appellate jurisdiction, with appropriate involvement of the bar. The ABA Commission on Evaluation of Disciplinary Enforcement (the McKay Commission) found regulation by the judicial branch to be superior to regulation by the legislative or executive branches of government in the state regulatory scheme that exists. *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT* (1992), http://www.abanet.org/cpr/reports/mckay_report.html.

consideration of omitted issues intended to be foreclosed. The Commission welcomes and encourages constructive comments and suggestions on the current version of this document and on future iterations.

I. Issues That Arise Because U.S. lawyers are Regulated by States but Work Increasingly Across State and International Borders

A. Regulations Governing Admission to Practice

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

The Commission will study approaches adopted in representative foreign jurisdictions with respect to admission of lawyers from outside those jurisdictions generally and U.S. lawyers in particular.

2. Admission of Foreign Lawyers to Practice in the U.S.

- Model Rule 5.5 (c), which authorizes multijurisdictional practice of law by U.S. lawyers, does not include temporary practice by foreign lawyers. The ABA adopted a separate Model Rule for Temporary Practice by Foreign Lawyers.² Most jurisdictions that have adopted Model Rule 5.5 have not, however, adopted the corollary foreign temporary practice rule. Should the ABA amend Model Rule 5.5 to include lawyers from outside the U.S.? Should the scope of authority be the same for them as for U.S. lawyers?
- The ABA does not currently have a policy regarding practice and registration of foreign lawyers practicing in-house in the U.S. Should the ABA adopt such a policy?
- Should the ABA adopt a Model Rule for *Pro Hac Vice* Admission of Foreign Lawyers?³

² See Report 201J, American Bar Association Commission on Multijurisdictional Practice, Report to the House of Delegates (2002), available at <http://www.abanet.org/cpr/mjp/201j.pdf>.

³ A recent report by a Special Committee on International Issues of the ABA Section of Legal Education and Admissions to the Bar, relating to the admission of foreign law graduates and lawyers, observes that the ABA currently lacks policies relating to foreign in-house counsel and *pro hac vice* admission of foreign lawyers. See, <http://www.abanet.org/legaled/home.html>.

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

B. Outsourcing

Legal process outsourcing is increasing both in amount and in the sophistication of the outsourced work. Are there ethical issues or other policy positions that the Commission should explore regarding outsourcing that are not addressed in Formal Opinion 08-451 of the Standing Committee on Ethics and Professional Responsibility?⁴

C. Conflicts of Interest

1. The Current Model Rules

- In view of the trends of substantial growth in law firm size, mergers and consolidations of such firms, and the emergence of many “global” law firms, Model Rule 1.7 (Conflict of Interest—Current Clients) should be re-examined. In many instances, this Rule is more stringent than other countries’ conflicts rules. While some caselaw and secondary authority may recognize that it is appropriate to have different standards for sophisticated clients than for clients who rarely use lawyers, the Commission will examine whether and how this can and should be translated into ABA policy.
- In the same context of growth and globalization of law firms, the Commission will study the utility and ongoing feasibility of imputed disqualification rules such as Model Rule 1.10.

2. Best Practices

How have multinational firms coped with the issues presented by the current Model Rules and the regulatory disparities among nations in which they practice? For example, what contractual, choice of law, and choice of forum approaches are they using?

⁴ See generally ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 451 (2008), available at <http://www.abanet.org/cpr/docs/08451.pdf>. The ABA Section of International Law has a Legal Process Outsourcing Task Force that is also studying the issue. Its web site is <http://www.abanet.org/dch/committee.cfm?com=IC100123>.

D. Confidentiality

1. Model Rule 1.6

- U.S. confidentiality rules, based on Model Rule 1.6, generally allow lawyers to disclose confidential information in certain circumstances, both with and without their clients' permission. Model Rule 1.6 differs from rules in other countries where, in some instances, lawyers are forbidden to make disclosures even with client consent. Other countries' rules may require disclosure in circumstances when Model Rule 1.6 requires confidentiality. Other laws, such as European Union privacy and data protection regimes, also have an impact on lawyer confidentiality. How can these differences be addressed for those lawyers or firms that practice across international borders?
- Similar variations have from time to time bedeviled wholly U.S. practice where lawyers are admitted, or law firms practice, in multiple states in which the applicable versions of Rule 1.6 impose differing, and sometimes irreconcilable, obligations.

2. Inadvertent Disclosure and Waiver

- In the United States, there are unresolved issues regarding inadvertent disclosure and waiver of privilege.
- Given varying rules in other countries, the problems of inadvertent disclosure and waiver of privilege may be exacerbated.⁵

E. Choice of Law

Does Model Rule 8.5, which was written with domestic U.S. practice most in mind, adequately address global legal practice? Should it be made clear (where it may now be ambiguous) that Rule 8.5 applies equally to foreign lawyers who, permissibly or not, render legal services in the U.S.?

⁵ It is as yet uncertain whether the Commission will address what are essentially evidentiary issues relating to the attorney-client privilege and work product doctrine, including matters relating to waivers, or confine itself to issues addressed in the Model Rules.

F. Alternative Business Structures

Alternative business structures (*e.g.*, law practices with non-lawyer managers/owners, multidisciplinary practices or incorporated or publicly traded law firms) in other countries raise ethical and regulatory questions for U.S. lawyers and law firms of all sizes employed, associated, or otherwise doing business with these entities and their clients.

- How are U.S. law firms and lawyers coping with these concerns? Do the Model Rules need to be amended to take account of those structures? Alternatively, are there best practices that the Commission should recommend?
- How can core principles of client and public protection be satisfied while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures?

G. Law Firm or Entity Regulation

- With the exception of New York and New Jersey, U.S. jurisdictions regulate individual lawyers, not law firms. The concept of regulating law firms (in addition to regulating individual lawyers) is being embraced in other countries as a method of increasing client and public protection. With U.S. lawyers and law firms increasingly engaging in multijurisdictional practice on an interstate and international basis, should the U.S. model be revised to provide for entity regulation and discipline? Are there good reasons to do so even without regard to experience abroad?
- Other countries have developed more proactive (as opposed to reactive) systems of lawyer and law firm regulation as a means of increasing client and public protection and accountability for law firms that have non-lawyer owners or managers, multidisciplinary practices, or public shareholders (*e.g.*, Australia). Should a similar model be considered for the United States regardless of how the question whether or not to permit alternative business structures is resolved?

H. International Arbitration

Do the Model Rules adequately address ethical issues relating to international arbitration? What, for example, should be the ethical rules that govern a U.S.

lawyer engaged in an arbitral proceeding in another country where the governing law is not U.S. law? Should it matter whether the lawyer's client is or is not a U.S. person or entity?

II. Issues That Arise in Light of Current and Future Advances in Technology That Enhance Virtual Cross-Border Access

A. Whether the Model Rules Unnecessarily Impede a Lawyer or Law Firm's Ability to Employ New Technologies in Representing Clients

The Commission will study ways in which technology enables lawyers and law firms to represent clients in a multijurisdictional practice better or in a more efficient or cost-effective manner that may be precluded or inhibited by the Model Rules in their current form.

B. Protection of Clients

- “Virtual law firms” are emerging with increased frequency. In theory, the lawyers who participate in such arrangements are skilled, experienced, and competent. Do existing UPL, ethics, and disciplinary rules adequately address this new practice paradigm?
- The Commission will study whether there should be different standards applicable to providing advice on law that is uniform nationwide, such as federal or international law. For example, lawyers and law firms in Washington, D.C. routinely advise clients in all 50 states and in other countries on U.S. federal law such as tax, securities, banking, and antitrust. Should it make a difference whether the lawyer or law firm maintains an office in the other states or countries?

C. Social Networking; “Unbundling,” and “Opensourcing” of Legal Services

- Do the Model Rules and existing disciplinary enforcement mechanisms adequately address the use of social networking sites by lawyers and law firms?
- Unbundled legal services providers are proliferating and clients are increasingly using these services. Do existing ethical and disciplinary enforcement rules adequately protect clients in this context?

- What are the ethical implications of “opensourcing” (on-line services that provide free forms or other legal information or legal advice)?
- What are the ethical implications of lawyers sharing work product on-line (sometimes referred to as “peer to peer”)?⁶

D. Lawyer Accountability and Accessibility of Public Information

Given an increasingly technology-driven and multijurisdictional law practice reality, how can the ABA encourage increased transparency about lawyers and legal services? For example:

- Should the ABA National Lawyer Regulatory Data Bank include public regulatory actions related to non-U.S. lawyers?
- Should all state lawyer disciplinary agencies and/or state bar associations make information about public lawyer regulatory actions available on the Internet? Would doing so lead to litigation brought by lawyers whose practices are adversely affected?
- Does existing law adequately protect the public when the public uses web sites that provide assessments or ratings of individual lawyers’ and law firms’ capabilities?
- Should the ABA recommend that other countries create client protection funds?

III. Particular Ethical Issues Raised by Changing Technology

A. Access to Justice

Do advances in technology increase or enhance the opportunities for lawyers and law firms to improve access to justice? Can technology ameliorate the availability of affordable legal services to underserved segments of the public? If so, what type of regulation of those services is appropriate?

B. Competence

Does the rapid pace of technological evolution raise issues relating to lawyer competence?

⁶ See note 5, *supra*.

C. Data Security and Confidentiality Issues

- The Commission will investigate whether there is or should be a professional obligation to understand and to use new technologies and new applications reasonably. For example, how does a lawyer's obligation to avoid inadvertent disclosure of confidential or privileged information apply to the phenomenon of "cloud computing," where the lawyer or law firm no longer maintains physical possession of, or exercises control over, the server that holds such information?
- How does technology accentuate or ameliorate the risks and consequences of inadvertent disclosure of confidential and/or privileged information (*e.g.*, metadata and other document integrity issues)? Do the Model Rules adequately address these issues and those that can be anticipated from next-generation technology?
- What are the implications of advances in technology for data retention policies and procedures?
- Do the Model Rules and existing ethics opinions adequately protect clients from inappropriate use by lawyers of available technologies, (*e.g.*, the use of cellular telephones in public locations, blogging, Tweeting or the indiscriminate use of the "reply all" function in e-mail)?

D. Jurisdictional Issues

What difficulties do technological advances create for lawyers, law firms, and regulators in terms of establishing a jurisdictional nexus for the application of ethical and disciplinary rules? Does technology present opportunities for lawyers and law firms to reduce or increase the risk that they will come under the jurisdiction of regulatory officials in countries in which they do not wish to practice?