AMERICAN BAR ASSOCIATION
COMMISSION ON ETHICS 20/20
October 15, 2010
9:00 a.m. – 5:00 p.m.
ABA Headquarters
Chicago, IL

Commission Members Present:
Jamie S. Gorelick, Co-Chair
Michael Traynor, Co-Chair
Stephen Gillers
Jeffery B. Golden
Hon. Elizabeth B. Lacy
Hon. Kathryn A. Oberly
Roberta Cooper Ramo
Theodore Schneyer
Carole Silver
Frederic S. Ury
Hon. Gerald VandeWalle

Absent:
George W. Jones Jr.*
Judith A. Miller
Herman J. Russomanno
Kenneth W. Starr

Commission Liaisons Present:
Kenneth G. Standard, ABA Board of Governors
Donald B. Hilliker, ABA Center for Professional Responsibility
Robert E. Lutz, II, ABA Task Force on International Trade in Legal Services
Phillip H. Schaeffer, ABA Standing Committee on Ethics & Professional Responsibility

Commission Liaisons Absent
Carolyn B. Lamm, ABA Board of Governors*
Youshea Berry, ABA Young Lawyers' Division

Commission Reporters:
Keith R. Fisher
Andrew M. Perlman

ABA Center for Professional Responsibility:
Ellyn S. Rosen, Commission Counsel
George A. Kuhlman, Ethics Counsel
William Hornsby, Counsel
Marcia L. Kladder, Policy and Program Director
Natalia M. Vera. Senior Research Paralegal
Kimley Grant, Regulation Paralegal

*= Present for during Commission's October 16, 2010 business meeting, which was transcribed.

1. Call to Order: Co-Chair Traynor called the meeting to order at 9:00 a.m. Commission members, liaisons, counsel and the reporters introduced themselves to the audience. He welcomed audience members, including invited speakers, and encouraged their participation in the discussion of substantive maters on the Commission's agenda at various points throughout the meeting.

2. Minutes: The Commission approved the minutes from its August 5, 2010 meeting in San Francisco, CA as submitted.

3. Lawyer and Law Firm Rating/Ranking Working Group: Working Group Co-Chair Donald Hilliker advised that the Group continues to engage in outreach and research. Counsel are compiling for the Group's consideration information from state and local bar associations, lawyer disciplinary counsel, the public, and the rating and ranking providers.

A. Vincent Buzard testified on behalf of the New York State Bar Association, stating that the issue of law firm rankings is one of the most important confronting the profession. He noted that U.S. News and World Report magazine originally intended to rank firms numerically, and asserted that as a result of the ABA House of Delegates' passage in February 2010 of Resolution 10A, the magazine now ranks law firms in tiers. This change, Mr. Buzard testified, does not lessen the importance of the issues raised by the New York State Bar Association. He cited U.S. News Research Director Robert Morris' blog as evidence of the level of impact of these rankings on the profession. He likened the dangers of law firm rankings to those arising from the ranking of law schools, and read a portion of the report prepared by the ABA Section of Legal Education and Admissions to the Bar's Special Committee on the U.S. News and World Report Rankings. With regard to lawyers and law firms, Mr. Buzard testified that continued dangers include adverse impact on decision making by consumers, law firm advertisements arising from the rankings, and competitive pressure on firms to participate in the ranking process (his law firm chose not to participate).

Mr. Buzard stated that the ABA should represent the interests of the Tier 2 and 3 firms. He indicated that by ranking firms in tiers, U.S. News is saying firms other than Tier 1 firms are "less capable of doing the work." He urged the Commission to ensure that it adequately understands the methodology used by U.S. News and other ranking providers. He stressed the importance of hiring an expert, (e.g., a psychometrician) to analyze the U.S. News' and other methodologies and offered to share resumes with the Commission. Once an expert validates or invalidates the methodology, he asserted, the ethical issues can be addressed. As an example, Mr. Buzard questioned whether the rankings validly show that Tier 2 firms are less capable. If they do not, he claimed that Tier 2 firms are placed at a "gross competitive disadvantage." He indicated that the Commission should learn about valid "cut points" and whether and how they can be set so that there are statistically significant differences demonstrating that Tier 1 firms are more capable than Tier 2 firms.

In response to questions from Commissioners about the scope and expense of the expert analysis that the New York State Bar Association believes the ABA should conduct, Mr. Buzard agreed that the House of Delegates' resolution is not limited to U.S. News and World Report; he stated that U.S. News was "merely the precipitating factor." Roberta Cooper Ramo asked why the New York State Bar Association did not object to Martindale Hubbell and Best Lawyers. Mr. Buzard responded that they were already in

existence and the ABA purported to approve them. He stated that Best Lawyers is troublesome, but they do not purport to rank. He reaffirmed that while his firm did not participate in the U.S. News rankings, lawyers in his firm are rated by Martindale Hubbell. Professor Stephen Gillers noted that reasonable experts can disagree about the validity of a particular methodology. In light of that, Professor Gillers inquired whether the solution is to have disclaimers regarding the reliance consumers should place on ratings and rankings. Mr. Buzard agreed that disclaimers would be useful, and further stated that disclaimers do not solve the concerns about the validity of the methodology and the practice of ranking providers vouching for the meaningfulness of their results. He stated that U.S. News also should bear the burden of providing its own validation studies.

4. Uniformity and Choice of Law: Co-Chair Traynor introduced invited speakers Jennifer Paradise, Assistant General Counsel at White & Case, Anthony Davis of Hinshaw & Culbertson, and Professor Laurel Terry from the Penn State Dickinson School of Law. Ms. Paradise and Mr. Davis served on the Association of the Bar of the City of New York Professional Responsibility Committee (City Bar). That Committee issued a "Report on Conflicts of Interest in Multijurisdictional Practice: Proposed Amendments to New York Rules of Professional Conduct 8.5 (Disciplinary Authority and Choice of Law) and 1.10 (Imputation of Conflicts of Interest)." Professor Terry and Professor Catherine Rogers (also of Penn State Dickinson) developed proposed revisions to Model Rule 8.5 to govern choice of law issues for legal activities that occur before an international tribunal. Mr. Traynor thanked them for assisting the Commission as it grapples with the extremely complex issues relating to choice of law. It is an area of law that he has a great interest in, and believes it likely that any solutions to the questions faced by lawyers and law firms in an increasingly global practice environment are likely to be multilateral.

Professor Gillers, Chair of the Commission's Conflicts of Interest, Uniformity and Choice Working Group noted that, as the profession has engaged in more cross-border practice, lawyers have had more difficulty determining which jurisdiction's ethics rules to apply to a particular problem. This difficulty is compounded by the variations that exist with regard to the choice of law rules that exist in the state rules of professional conduct. As a result, lawyers have had difficulty identifying which rules to apply in a number of areas, including conflicts of interest and confidentiality. Choice of law and uniformity issues also are implicated with regard to alternative litigation financing and the advent of alternative business structures in countries where many U.S. lawyers and law firms practice. Professor Terry agreed, stating that there is a need for the profession to have a more robust discussion of these complex issues. She agreed with Co-Chair Traynor that solutions are likely to be multilateral.

Professor Terry explained that she and Professor Rogers believe that Model Rule 8.5(b)(1) does not work optimally with regard to international tribunals. Often there is no nexus between the physical location of the dispute, where the clients reside, and the place where the international tribunal sits. Sometimes the lack of relationship is intentional. Rule 8.5(b)(1) requires lawyers to follow the rules of professional conduct of the jurisdiction where the international tribunal sits. As a result, the Rule can require U.S. lawyers to follow rules completely unrelated to the proceedings in which they are appearing. The proposal developed by Professors Terry and Rogers would address this

problem by amending Rule 8.5(b)(1) to provide that, if the international tribunal has adopted rules of professional conduct applicable to lawyers appearing there, then those rules apply. If the tribunal has not adopted such rules, then Rule 8.5 applies.

Ms. Paradise explained that the origin of the City Bar Report was a large firm lawyer seeking advice regarding Rule 1.10. The City Bar Committee realized that a problem arose when Rule 1.10 was read in conjunction with Rule 8.5. She and Mr. Davis described how the City Bar proposal provides a "safe harbor" in Rule 8.5(b)(2) for when the predominant effect of the conduct occurs in another jurisdiction. Mr. Davis noted that in many transactions it is impossible to determine the location of the predominant effect. As a result, the test should be whether the lawyer has exercised reasonable judgment. The City Bar Committee's proposed amendments to Rule 1.10 are intended to resolve what is perceived to be the undesirable result of applying extraterritorially New York's conflict of interest rules to lawyers who are not licensed in New York or engaged in matters without any nexus to the State. Also with regard to Rule 1.10, Ms. Paradise stated that, in her experience, clients do not think about conflicts of interest the same way that the bar does. She thinks that the best answer is full disclosure accompanied by an advance waiver. The problem with the advance waiver, however, is that courts do not always recognize it. Mr. Davis added that many sophisticated clients will deliver to their lawyer in advance of retention the terms they will agree to waive and those they will not.

In the context of the City Bar and Terry/Rogers proposals, the Commission and invited speakers discussed several Fact Patterns developed by Professor Gillers, and which are attached to these minutes as Appendix A. The Commissioners and speakers agreed that Fact Pattern 1 highlights problems with the current lack of uniformity in a world where mobility of people and information is ever increasing. Mr. Davis cited to the Canadian model as one that the Commission should consider. The problem of uniformity, he expressed, is one that is not only substantively complex, but politically challenging. He believes the Commission should urge uniformity of rules in the U.S. Justice Elizabeth Lacy responded that, while the Commission could urge uniformity in certain ways, complete uniformity cannot be achieved because of the international facet to practice. Professor Terry suggested that the Commission consider identifying appropriate regulatory objectives, like those in the Legal Services Act, as a way to assist it in developing solutions. She believes that upon identifying those objectives it could view the conduct it seeks to address through that lens. Co-Chair Gorelick recommended that the Commission seek additional data regarding mobility of lawyers and law firms. She also suggested that the Commission seek to determine how often disciplinary proceedings are related to issues arising under Rule 8.5 and 1.10.

Another issue discussed was that of the lawyer's duty of loyalty to the client. Professor Terry noted that, in the U.S., the profession has defined loyalty by the nature of the lawyer-client relationship. Outside the U.S., the lawyer's duty of loyalty is often defined by the matter. She favors the approach in Fact Pattern 5. In this context, Mr. Davis believes that the current rules inhibit competition for firms of all sizes and limits client choice. He favors the approach of loyalty to the matter.

Discussion regarding Fact Pattern 3 focused on differences between ethical issues versus problems that arise in the disqualification context. Mr. Davis explained that the City Bar approach to Rule 1.10 may solve the ethical problem with imputation, but it does not resolve the issue of disqualification. Ms. Paradise noted that by seeking to

address problems with Rules 1.10 and 8.5, the Commission would be helping a significant number of lawyers. She noted that many court decisions on disqualification issues relate to Rule 1.6 and confidentiality, not on the relationship between client matters. The City Bar is not advocating any change to Rule 1.6.

The Commission agreed that Fact Pattern 4 is that which the City Bar Report addresses. Fact Pattern 5 posits whether contractual choice of law clauses regarding which jurisdiction's professional conduct rules apply would be helpful. Co-Chair Traynor noted that courts have permitted some autonomy in this area, but there are limits. For example, the clause could not bind the disciplinary agencies, criminal prosecutors or third parties. Justice Lacy agreed that the parties could not abrogate the courts' regulatory authority in this manner.

5. Outsourcing: Co-Chair Gorelick related her conversation with ABA President Steven Zack regarding the Commission's work on outsourcing, the nature of the proposals under consideration, and his concerns about developments in India. President Zack agreed with the Commission's suggestion, as related to him by Co-Chair Gorelick, that its Report and Resolution about outsourcing be submitted to the House of Delegates in August 2011, as opposed to February 2011.

The Commission discussed the Outsourcing Working Group's draft offering suggested amendments to the Comments of Model Rules 1.1 and 5.3. Ellyn Rosen detailed the discussions held by the Working Group subsequent to the Commission's August 2010 meeting. At its August 2010 meeting the Commission learned that the ABA Standing Committee on Ethics and Professional Responsibility had serious concerns with the Working Group's initial suggestion to make changes to the black letter provisions of Model Rules 5.1 and 5.3. The Commission also learned at that time of additional concerns raised during Judge Kay Oberly's appearance before the Section of International Law's Council. Since August, Ms. Rosen explained, the Working Group continued discussions with the Section and also consulted extensively with Robert Mundheim, Chair of the Ethics Committee, and Ethics Committee member Robert Creamer. The Working Group held additional teleconferences and developed the draft under consideration by the Commission at this meeting.

Mr. Mundheim, Chair of the Ethics Committee joined the Commission for its discussion of the draft. Judge Oberly explained upon consideration of the Ethics Committee's objections to the August proposal, the Working Group agreed that no changes to the black letter of the any Model Rules were necessary. The Model Rules are rules of reason, and are in most instances general. The Comments to the Rules provide guidance for practicing in compliance with the black letter provisions. While the Comments cannot address every possible scenario or provide comfort to lawyers about all dealings with clients, the Working Group agreed that additional language in the Comments was necessary with regard to outsourcing. Judge Oberly also cited to the caution in the Model Rules regarding lawyers' obligations to seek supplemental guidance about their conduct by looking to court rules, substantive and procedural law in general, caselaw, ethics opinions and existing texts such as the Restatements. Judge Oberly explained the proposed amendments to the Comments of Model Rules 1.1 and 5.3. The Working Group agreed that, since obligations under the Model Rules flow from the duty of competence in Rule 1.1, it made sense to include language about outsourcing there. Rule 1.1 and its Comment address situations where a lawyer obtains the assistance of

another lawyer outside the firm. Changes to the Comment of Rule 5.3 were appropriate because that Rule addresses situations where lawyers and law firms obtain the assistance of nonlawyers, including those outside the firm. The proposed language in the October Working Group draft is intended to help lawyers engage in required reasonable efforts to independently evaluate and understand the capabilities and basic competencies of outside service providers retained. On the issue of how client choice of an outside service provider impacts the lawyer's decision making process in hiring an outside provider, Judge Oberly advised that the Working Group agreed that acceptance/rejection of the client's choice or recommendation is a business decision. A lawyer may have to decline representation because the provider chosen or recommended by the client cannot perform in a way that allows the lawyer to meet her ethical obligations. Talking a client out of a choice may be difficult, but it is analogous to delivering bad news to a client. Further, agreeing to use the client's provider does not relieve the lawyer of her ethical responsibilities.

The Commission agreed to remove the brackets around suggested language in the Comment to Rules 1.1 and 5.3 providing further explanation regarding lawyers' obligations under Model Rule 1.6 (confidentiality). In the context of recent concerns raised by ABA President Zack, the Commission discussed whether the Comment to Model Rule 5.5 should be amended to reference outsourcing. Mr. Mundheim stated that he did not think additional language was necessary. After further discussion, the Commission agreed to add a reference to Rule 5.5 in the proposed new Comment to Rule 1.1, and to add language to the Comment to Model Rule 5.5 consistent with that found in ABA Formal Opinion 08-451. Based upon Mr. Mundheim's concerns, the Commission also agreed that, as modified based upon the Commission's discussion, the revised proposal would be circulated for comment as a discussion draft with the specific caveat that the Commission, the Ethics Committee, and the Section of International Law have not voted to approve the draft. Rather, each entity has reserved its approval pending consideration of comments and suggestions received in response to the circulation of the Draft. Based upon this understanding, no entity is estopped from recommending further changes.

The Commission also agreed to revise the draft to ensure that the listing of factors in the Comment to Rules 1.1 and 5.3 were in parallel construction. In the second full paragraph on page six of the draft Report the Commission agreed to change "myriad" to "significant volume" and to add language noting that the proposed web based resource could also serve as a valued resource for those with specialized practices. The Commission directed Ellyn Rosen to incorporate other editorial suggestions on page seven regarding process efficiencies and quality of outsourced work. In the first sentence of the second full paragraph on page 8 of the Report, the Commission changed "found" to "heard."

6. Technology Working Group: Working Group Co-Chairs Carole Silver and Fred Ury reported on the Working Group's October 14, 2010 meeting. They advised the Commission that among the options the Group was considering for addressing lawyers' ethical concerns about evolving technology and client confidentiality, marketing, and law practice is a web based resource similar to that proposed for the subject of outsourcing. The Working Group discussed how questions posed on the website might alert lawyers to important issues that the lawyers had not previously considered. In other cases, the

questions could lead lawyers to other resources, either on the ABA's website or elsewhere, that offer more in-depth treatment of particular topics. The Working Group recognizes that amendments to the Model Rules and Commentary may be appropriate. With regard to the Model Rules' treatment of technology, Professor Perlman noted that it appears that nowhere in that document does the word "technology" appear. Given the role that technology has in the practice of law, this is an issue that the Working Group is considering too.

Michael Downey of Hinshaw & Culbertson addressed the Commission regarding technology issues. He is the liaison from the ABA Law Practice Management Section to the Commission's Technology Working Group. His practice, writings and teaching focus on ethics, risk management and technology. His presentation focused not on those in the profession most comfortable with technology, but the experience of the bulk of lawyers, solo and small firm practitioners in particular. Many of his clients and students fall into this practice demographic. Mr. Downey began his presentation by noting that while avoiding technology is impossible, the manner in which populations adopt technologies vary. He cited to the Diffusion of Innovation model developed by Everett M. Rogers that describes the percentages of the population described as "innovators," "early adopters," "early and late majority adopters," and "laggards." With regard to the speed by which U.S. lawyers adopt new technologies, he noted that many studies suggest that lawyers are more risk-averse than the general population. On the other hand, clients' use of technology has resulted in shifting expectations of the lawyer-client relationship. In addition to expecting that lawyers respond far more quickly to requests for information and provision of work product, technology is changing the nature of the work lawyers do. More clients are using technology to obtain answers and resources in lieu of or before consulting a lawyer.

Mr. Downey discussed with the Commission five major areas of challenge for solo and small firm practitioners. The first related to the ways in which technology has changed the manner in which legal services are provided. More courts and clients insist upon interacting with lawyers through technology and lawyers must adapt. Multijurisdictional practice issues abound, and new technologies are forcing lawyers to collaborate more with clients and colleagues in the performance of their duties. Second, increased use of technology raises confidentiality concerns that, as noted by the Commission, need to be addressed. Lawyers, Mr. Downey noted, often do not know that they have to treat certain types of data differently. Data destruction is also an issue; Mr. Downey related that he often hears of lawyers disposing of computers and other technologies without wiping hard drives or otherwise taking steps to protect data. He urged the Commission to consider providing the profession with greater guidance about how lawyers and law firms handle client data.

Lawyers' use of technology to maintain client records, participate in discovery and to develop clients are also areas Mr. Downey believes warrant study. With regard to maintenance of client records, in addition to data security, lawyers need to be concerned with back-up and transfer of information. Electronic discovery is particularly challenging for solo and small firm practitioners. Mr. Downey indicated that changes to the Comment of Model Rule 1.6 could provide necessary clarity on these issues. In addition, the Commission could provide other forms of guidance and education on archiving and transfer of information, data protection, and data destruction.

7. Executive Business Session: The Commission met in Executive Business Session until 5:00 p.m.

Respectfully Submitted,

Ellyn S. Rosen
Commission Counsel