MINUTES
AMERICAN BAR ASSOCIATION
COMMISSION ON ETHICS 20/20
February 10, 2011
9:00 a.m. – 5:00 p.m.
February 11, 2011
9:00 a.m. – 4:00 p.m.
Marriott Atlanta Marquis Hotel
Atlanta, GA

Commission Members Present:
Jamie S. Gorelick, Co-Chair
Michael Traynor, Co-Chair
Stephen Gillers
Jeffery B. Golden
George W. Jones Jr.
Hon. Elizabeth B. Lacy
Judith A. Miller
Hon. Kathryn A. Oberly*
Roberta Cooper Ramo*
Herman J. Russomanno*
Theodore Schneyer
Carole Silver
Frederic S. Ury
Hon. Gerald VandeWalle

Absent:
Kenneth W. Starr

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

Commission Liaisons Absent
Carolyn B. Lamm, ABA Board of Governors
Donald B. Hilliker, ABA Center for Professional Responsibility
Youshea Berry, ABA Young Lawyers' Division

Commission Reporters:
Andrew M. Perlman, Chief Reporter
Paul D. Paton, Reporter
Anthony Sebok, Reporter
W. Bradley Wendel, Reporter*

ABA Center for Professional Responsibility:
Ellyn S. Rosen, Commission Counsel
Arthur H. Garwin, Deputy Director ABA Center for Professional Responsibility

William Hornsby, Working Group Counsel
Dennis Rendleman, Working Group Counsel
John A. Holtaway, Working Group Counsel
Marcia L. Kladder, Policy and Program Director

*= Present by telephone.

Thursday, February 10, 2011

1. Call to Order: Co-Chair Gorelick called the meeting to order at 9:00 a.m. Commission Members, Liaisons, Counsel and the Reporters introduced themselves to the audience. She welcomed audience members and encouraged their participation in the discussion of substantive matters on the Commission's agenda at various points throughout the meeting.

Chair Gorelick described the panel on which she, Commissioner Fred Ury, Chief Reporter Andrew Perlman, and Reporter Anthony Sebok participated at the New York State Bar Association's (NYSBA) Annual Meeting. The audience consisted of members of NYSBA committees with expertise in legal ethics and regulatory issues. She found this format particularly valuable for purposes of providing input to the Commission. She suggested that, in addition to the Commission's broader outreach to the profession and the public, sessions like the NYSBA panel would be useful.

2. Minutes: The Commission approved the minutes from its October 15, 2010 meeting in Chicago, IL as submitted. The Commission's October 16, 2010 meeting, including testimony of invited speakers, was transcribed.

3. Outsourcing: Commission Counsel Ellyn Rosen explained that she and Chief Reporter Andrew Perlman have reviewed all of the comments received to date regarding the Commission's November 23, 2010 Discussion Draft. They also consulted with ABA Ethics Counsel George A. Kuhlman. They found particularly compelling a number of suggestions from the ABA Section of Labor and Employment Law, the ABA Section of Real Property, Trust, and Estate Law, and Jeffrey Kraus of ALAS. They prepared a redline version of the Commission's November 23, 2010 Discussion Draft reflecting new material for consideration based upon the comments received, suggestions from the Commission's Technology Working Group, and deferred questions from Professor Stephen Gillers and Chief Justice Gerald Vandewalle regarding Model Rules 1.4 and 1.5 and client consent to outsourcing arrangements.

Professor Perlman led the discussion of the redline draft, making live changes to the document projected on the LCD screen to reflect suggested revisions. With regard to Model Rule 1.1 (Competence), the Commission discussed whether to use the term "outsourcing" in the header to the draft of new comment [7] about retaining lawyers outside the firm. Co-chair Gorelick suggested that use of "outsourcing" would be helpful given that, unlike the more traditional retention of nonfirm lawyers, outsourcing now more pervasively includes disaggregation of large pieces of a project. A number of Commissioners agreed. Audience member Jeffrey Kraus of ALAS suggested that inclusion of the term "outsourcing" would be insufficiently agnostic. The term "retaining" encompasses the more traditional practice of using nonfirm lawyers as well as the type of larger scale disaggregation of work suggested by Co-chair Gorelick. The term

"outsourcing" also may fall out of use in the near future, to be replaced with a new term of art. As a result, the Commissioners requested that Professor Perlman prepare revisions that included the term "outsourcing" in the header, and they would reconsider the arguments in favor and in opposition to its inclusion on February 11, 2011.

The Commission next addressed whether to include in new comment [7] the suggested cross-references to Rules 1.2, 1.4, 1.5(e), and 5.5(a). Professor Carole Silver observed that the Model Rules assume a duality that does not necessarily reflect reality in outsourcing. Outsourcing is not necessarily about sending work separately to a nonfirm lawyer and nonlawyer service providers outside the firm; often the entity to which the work is outsourced, whether domestic or international, is comprised of lawyers and nonlawyers. After discussion, the Commission agreed that these cross-references were appropriate; they flagged for lawyers in manner consistent in other Model Rules the need to consider matters holistically. Professor Perlman also added to these cross-references parentheticals identifying the subject matter of each Model Rule.

Mr. Kraus also posited that the changes in the comments to Model Rule 1.1 for outsourcing are better suited to Model Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). Professor Perlman explained that the Commission's Outsourcing Working Group debated this issue on several occasions during the course of its development of recommendations for the Commission's consideration. The Working Group decided, and the Commission agreed at its October 2010 meeting that, while reasonable minds may differ, Model Rule 1.1 was an appropriate location for these new comments. The overarching issue is the lawyers' obligation to provide competent representation to the client. George Jones added that the last sentence of comment [2] to Model Rule 1.1 demonstrates that the Rule is not an inappropriate location for new comments about outsourcing. To ensure proper clarification of this issue, the Commission requested that the Report accompanying the proposed changes to Model Rule 1.1 explain why the Commission reached this decision.

Professor Perlman next explained new suggested comments [8] and [9] to Model Rule 1.1. The information set forth in these paragraphs was originally included in paragraph [7]. He thought it may make sense to separate out language relating to the factors a lawyer should consider in determining whether to retain a lawyer outside the firm, and that regarding client consent to disclosure of confidential information pursuant to Model Rule 1.6. The Commission discussed the matter and agreed that the language of comments [8] and [9] in the redline draft should be reincorporated into comment [7]. The Commission also agreed to delete the example in the last sentence in comment [9] of the redline draft which stated that "[I]nformed client consent may not be required, however, when the client has impliedly authorized the disclosure." The Commission determined that this example could be construed as more restrictive than the definition of "informed consent" set forth in the Model Rules.

With regard to the list of factors lawyers should consider when retaining a nonfirm lawyer, the Commission agreed that the term "ethical environment of the jurisdiction in which the services will be performed" should remain and that "legal protections" should be added before "professional conduct rules." Parallel terminology should be used in the comments to Model Rule 5.3.

The Commission took a notional vote to approve the changes recommended in the comment to Model Rule 1.1, subject to further discussion on February 11, 2011 about use of the term "outsourcing" in the comment header.

The Commission next discussed the proposed amendments to Model Rule 5.3 in the redline draft. These changes apply to the responsibilities of lawyers using nonlawyer services providers outside the firm. As it did with Model Rule 1.1, the Commission discussed whether comment headings should include the phrase outsourcing, and discussed why it may make better sense to do so in the context of nonlawyer service providers outside the firm.

Professor Gillers stated that Model Rule 5.3 anticipated outsourcing. However, there is a question as to whether there is or should be a different level of supervisory responsibility depending on whether the nonlawyer service provider is in-house or outside the firm. He believes that distinction between nonlawyer service providers inside and outside the firm was not fully developed in comments to Rule 5.3, and that there is a drafting inconsistency. The Commission discussed this issue in the context of Rule 5.3 (b) and the limited reference to lawyers with "direct supervisory authority." A number of clarifying options were discussed, including a suggestion to delete "direct supervisory authority" from the black letter of Rule 5.3(b). Professor Gillers disfavors changing the black letter and believes the issue can be resolved via changes to the comment. The Commission requested that Professor Perlman develop in a new redlined draft the four possible options for addressing this issue for Commission review on February 11, 2011.

The Commission also agreed to keep in the proposed comments to Model Rule 5.3 a reference to cloud computing that is more descriptive instead of using that term of art.

4. Technology: Technology Working Group Co-Chair Carole Silver updated the Commission on the Group's progress in developing recommendations for Commission consideration, noting that the Commission had received numerous comments in response to both of its issues papers. Professor Perlman led the discussion of the Working Group's recommendations relating to technology and confidentiality related issues. The Working Group first recommended that the ABA create a dynamic, centralized, regularly updated web-based resource to address common questions lawyers ask (or should be asking) about ethics, technology, and the practice of law. This website would be a place to provide information about data security standards and other evolving practices that affect lawyers' ethical obligations. Judge Kathryn Oberly observed that this resource could be of particular use to solo and small firm practitioners. Justice Elizabeth Lacy posed questions regarding the resources necessary to develop and maintain this resource. Philip Schaeffer suggested that it may be possible for the ABA to enter into a joint venture similar to that for the ABA/BNA Lawyers' Manual on Professional Responsibility to keep the website up-to-date. The consensus of the Commission being positive, Ms. Rosen will explore further information relating to resources for it.

Professor Perlman next discussed the Technology Working Group's suggested amendments to Model Rule 1.0 (Terminology), paragraph (k), and its comment [9] about screening. The proposed amendment to Rule 1.0(k) would add language including electronically stored information in the type of information that must be kept from the screened lawyer. Proposed comment [9] to Rule 1.0 would be similarly amended. Mr. Schaeffer asked whether this would include lawyers who, while they should not have

access to email, nonetheless can access it. Professor Perlman suggested, and the Commission agreed, that this is an area where an ethics opinion would best address this specific concern. Commission favored inclusion of the proposed new language to the comment to Model Rule 1.0(k) and comment [9].

The Working Group also recommended amending comment [6] to Model Rule 1.1 (competence) to include language clarifying that a lawyer's obligation to provide competent representation includes maintaining requisite knowledge of the risks and benefits associated with technology. The Commission favored this change with the deletion of "that" before "technology" at the end of the added reference. The Commission also queried whether any formal action needed to be taken by it to ensure the term "technology" appears in the index of the Model Rules of Professional Conduct. Arthur Garwin, Deputy Director of the Center for Professional Responsibility, advised that no such action by the Commission was necessary for that purpose.

Professor Perlman next explained the Working Group's proposal to amend Model Rule 1.6 (Confidentiality of Information) to clarify lawyers' obligations to safeguard confidential client information in addition to obligations not to disclose it. Professor Perlman explained that the Working Group identified these as distinct issues and given advancing technologies, clarification in the Model Rule might be advisable. The first suggested change would add new Model Rule 1.6 (c), that builds on a similar provision in the New York professional conduct rules and has its roots in DR 4-101(D) of the old Model Code of Professional Responsibility. Co-Chair Gorelick noted that this may be an area where the difference between large and small firms is most heightened; the latter are less likely to have in-house technology support services. The Commission suggested inviting to its April 2011 meeting representatives of technology companies that market these types of services to small firms and sole practitioners. The Commission agreed directionally with the Working Group's suggestions and requested that during its next teleconference it work to further hone them, particularly in regard to obligations when using a third party to store data (cloud computing).

The Working Group also proposed amendments to Model Rule 4.4 (Respect for Rights of Third Persons) to address what it identified as concerns regarding metadata and "metadata mining." Professor Perlman explained that the Working Group identified a conflict in authority between ABA Formal Opinion 06-452 and a number of state ethics opinions on the subject. As a result, the Working Group suggested that the Commission consider amending Model Rule 4.4 to offer clearer guidance that either endorses the approach in Formal Opinion 06-451 or rejects it. A second Working Group proposal relating to Rule 4.4 is designed to provide guidance to lawyers who knowingly receive information that was unlawfully acquired. This scenario is conceptually distinct from that of inadvertent disclosure. In response, the Working Group offered proposed Model Rule 4.4(b)(2). The Commission expressed a number of concerns about these proposals, including First Amendment issues raised by Co-Chair Michael Traynor. At the conclusion of the discussion the Commission agreed that inclusion of these provisions in the Model Rules was premature and that the issue may be appropriate for a formal ethics opinion.

5. Alternative Business Structures/Entity Regulation: Working Group Co-Chair George Jones explained that the Working Group divided into two subcommittees and was proceeding apace. Reporter Paul Paton summarized the efforts of the Alternative

Business Structures Working Group, referring Commission members to the January 26, 2011 overview of the subject. That overview included information from the 1982 ABA Kutak Commission recommendations to present developments abroad. Professor Paton focused on changes in the practice, client expectations, and the economy since the House of Delegates rejected the proposals of the ABA Commission on Multidisciplinary Practice in 2000. Those changes warrant the Commission reexamining this subject. Based upon its research, Professor Paton advised that the ABS Subcommittee of the Working Group recommends that the Commission not submit to the House of Delegates a proposal that would allow passive equity investment in law firms and the public trading of shares in law firms. The Subcommittee suggests that these subjects are better suited for a White Paper commending these issues to individual jurisdictions for further study. The Working Group seeks the Commission's feedback on whether it agrees with this approach.

Co-Chair Gorelick reminded the members that this issue was not simply placed on the Commission's agenda because other countries were allowing law firms to structure differently than currently permitted in the U.S. The Commission was asked whether, given the advancing global legal services market, this is a subject that warrants revisiting on the merits and in the context of the U.S. regulatory structure. Are there models the Commission should be studying to determine if there are better ways to serve clients? The answer, the Commission agreed, is yes. In doing so, the Commission recognized that it will be important to have as much data as possible to support whatever conclusions it reaches. Professor Silver suggested that efforts be made to collect data regarding where else lawyers work and how current U.S. rules may impeded them from doing so. Justice Lacy agreed, noting that the Commission must be concerned with how to help U.S. lawyers who are practicing in jurisdictions where alternative business structures are now permitted. These are existing, not theoretical ethical problems for those lawyers and law firms.

The Commission agreed with the Working Group's recommendation about not developing a proposal for House of Delegates' consideration relating to passive outside investment in law firms or publicly traded law firms. Professor Gillers suggested that the Working Group focus its efforts on determining whether to recommend changes allowing nonlawyer ownership/management of law firms analogous to those allowed under Washington, D.C.'s version of Rule 5.4, or a model with more safeguards, such as the Legal Disciplinary Practice model in England and Wales that limits the percentage of nonlawyer owner/managers of law firms to 25% and requires them to pass a "fit-to-own" test. He recommended that the Commission direct the Working Group not to study MDPs further as he believes that much of what an MDP would be able to accomplish could be done through an ancillary business authorized under Model Rule 5.7. Professor Ted Schneyer disagreed with Professor Gillers regarding Rule 5.7. Professor Paton observed that, at this point in the Working Group's study, it may be premature to remove MDPs from consideration. The Commission agreed with Professor Paton and directed the Working Group to proceed accordingly.

Professor Paton next indicated that the Entity Regulation Subcommittee of the Working Group sought Commission guidance on whether to proceed further with the development of a proposal for New South Wales' style proactive practice management regulation. The Commission agreed that at this time there was insufficient evidence to proceed further with consideration of this model for adaptation in the U.S. The

Commission agreed that the Working Group should develop a White Paper on the subject to help lawyers and law firms think more systematically about how to better serve clients, and that further study of this subject could be undertaken by the ABA Standing Committee on Professional Discipline.

ABA President Elect Wm T. Robinson then addressed the Commission. He thanked the Commissioners for their time and effort and looks forward to the contributions that the Commission is going to make regarding the important issues on its agenda.

6. Alternative Litigation Financing: Professor Tony Sebok updated the Commission on the Working Group's efforts. He noted that the fact that clients are hiring litigation funders matters to lawyers for a number of reasons. Those reasons include, but are not limited to (1) waiver of privilege and issues relating to confidential client information; (2) settlement conflicts that place lawyers in the uncomfortable position of being unable to advise their client to take what they believe is a reasonable settlement because the amount the client ultimately receives may be minimal due to the contract with the funder, or the arrangement jeopardizes the lawyer's fee; and (3) other issues relating to lawyers' fiduciary obligations to clients including conflicts of interest. The Working Group has invited speakers to address the Commission on February 11, 2011 about the consumer and access to justice issues relating to alternative litigation finance as well as matters relating to the processes and procedures of the funders.

7. Commission Timeline for Work: Co-Chair Gorelick expressed concern that the timeline for completion of the Commission's work requires revision. She requested that Ms. Rosen and Professor Perlman develop a new timeline that would have the Commission circulating broadly for comment its initial proposals by no later than August 1, 2011 instead of after the Commissions August 2011 meeting.

Friday, February 11, 2011

8. Public Hearing: The Commission held a public hearing from 9:00 a.m. – 12:00 p.m. The transcript of that hearing is available on the Commission's website.

9.Conflicts of Interest, Uniformity, and Choice of Law: Professors Gillers and Perlman updated the Commission regarding the issues under consideration by the Working Group. In particular, Commission input was sought regarding the proposal of the Association of the Bar of the City of New York to address interjurisdictional conflicts of interest by amending Model Rule 1.10. By doing so, the Commission would separately address choice of law issues arising from conflicts of interest. Rule 8.5 would still cover other choice of law issues. Mr. Schaeffer agreed with the City Bar approach and viewed it as crucial enabling firms of all sizes to operate in a global legal marketplace. Mr. Jones agreed, indicating that he thought the City Bar approach provided an elegant solution that goes a long way to solving a real and practical problem. Judith Miller advised that she believed there would still be a problem with this approach in that it at least may be considered to be weighted in favor of large firms. George Jones disagreed. The Commission requested that the Working Group remain mindful of Ms. Miller's concerns when deciding what to recommend to the Commission at future meetings.

Professor Perlman next introduced for discussion the subject of broader multijurisdictional practice (MJP) matters and sought the Commission's guidance on

whether to prepare for release an issues paper on the subject. He reminded the Commission that, at the conclusion of its study in 2002, the ABA Commission on Multijurisdictional Practice indicated that the ABA would have to revisit broader MJP issues based upon continued increases in cross-border practice of law and implementation of the policies it proposed (and the House adopted). Some of those broader MJP issues involve what others have characterized as the "drivers' license" or comity approach. The MJP Commission rejected those ideas at that time as premature, but lawyers' increasing reliance on technology has continued to erode the relevance of borders, as has globalization. He offered the testimony of Richard Granat and Stephanie Kimbro, who operate their practices entirely "in the cloud," as examples.

The manner in which other countries handle the issues of mobility also is instructive. Ms. Rosen explained in detail the approaches taken by the European Union and Australia. Professor Paton described Canada's approach to the broader mobility issues. Professor Gillers added that, if every U.S. jurisdiction had a motion admission rule without the "years of practice" requirement and no reciprocity, the U.S. would come very close to a drivers' license approach of uniform, nonreciprocity-based admission. Professor Silver posited that the issue may need to be viewed more as mobility of advice rather than people. Others cautioned that the Commission should take care to temper its proposals in this area so as not to risk states pulling back from progress after adoption of the MJP Commission recommendations and noted the interrelated issues regarding attendance at ABA accredited law schools.

At the conclusion of the discussion the Commission advised the Working Group to proceed with its study and to develop an Issues Paper for broad circulation and comment.

10. Outsourcing Continued: The Commission revisited its discussion from the previous day regarding what Professor Gillers referred to as a drafting inconsistency in Model Rule 5.3 using the four possible approaches to resolving it developed by Professor Perlman. One of those options involved a reordering of the paragraphs comprising the black letter of Model Rule 5.3. Ms. Rosen suggested that in seeking to resolve this issue the Commission work toward doing so, if possible, in manner that preserves the existing structure of the Rule given the adoption of the Model Rules by jurisdictions, their use in teaching, and citation in cases and other authorities. The Commission agreed. The Commission discussed each possible option further and determined that it would not be able to reach resolution at this meeting. Professor Perlman agreed to work on revisions to be presented at the Commission's April 2011 meeting and also will consult with the ABA Standing Committee on Ethics and Professional Responsibility.

11. Executive Session: The Commission met in executive business session.

12. Adjournment: The meeting adjourned on February 11, 2011 at 4:00 p.m.

Respectfully Submitted,

Ellyn S. Rosen
Commission Counsel