MINUTES
AMERICAN BAR ASSOCIATION
COMMISSION ON ETHICS 20/20
April 15, 2011
9:00 a.m. – 5:00 p.m.
April 16, 2011
9:00 a.m. – 3:00 p.m.
Washington, D.C.

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 (telephone)
Roberta Cooper Ramo (telephone)
Herman J. Russomanno (telephone)
Theodore Schneyer
Carole Silver
Frederic S. Ury
Hon. Gerald VandeWalle

Absent:
Kenneth W. Starr

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

Commission Liaisons Absent
Carolyn B. Lamm, ABA Board of Governors

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

ABA Center for Professional Responsibility:
Jeanne P. Gray, Associate Executive Director
Ellyn S. Rosen, Commission Counsel
William Hornsby, Working Group Counsel
Marcia L. Kladder, Policy and Program Director

April 15, 2011

1. Call to Order and Approval of Minutes: Co-Chair Gorelick called the meeting to order at 9:00 a.m. The Commission approved the minutes of its February 2011 meeting as submitted.

2. Domestic and International Outsourcing: Chief Reporter Andrew Perlman directed the Commission's attention to the draft Resolutions and Report on outsourcing. He and the Working Group have continued working with the Standing Committee on Ethics and Professional Responsibility on this issue, particularly Committee Chair Robert Mundheim and Robert Creamer, Committee member and Working Group participant. Professor Perlman advised that the Ethics Committee has not expressed concerns about this draft and discussed the proposed additional language in new Comment [6] to Model Rule 1.1. The new language specifies that, if information protected by Model Rule 1.6 will be disclosed to nonfirm lawyers, a lawyer must "ordinarily" obtain informed client consent to such disclosure. Professor Carole Silver raised concerns that, conceptually, this does not adequately address how the boundaries in law firms are changing, and in some regards dissolving. Others disagreed and the Commission reached consensus on retaining "ordinarily" in the last sentence of proposed new Comment [6].

Professor Stephen Gillers asked whether the Commission should add a sentence stating that client consent must be obtained to retain a lawyer outside the firm. He felt strongly that such language should be added. Professor Silver disagreed. Judith Miller recalled that when the Commission discussed this issue in February 2011, there seemed to be consensus that Model Rule 1.4 was sufficient. Jeff Golden stated that he felt that ABA Formal Ethics Opinion 08-451 was unclear on this issue. Upon further discussion the Commission agreed to defer this question, and Co-Chair Gorelick asked Commission Counsel Ellyn Rosen and Chief Reporter Andrew Perlman to conduct additional research and develop additional language so that the Commission could return to this subject later during the meeting. The Commission later returned to this subject and discussed the additional research, including references in the Restatement of the Law Governing Lawyers. The members reached consensus to add language to proposed new Comment [6] to Model Rule 1.1 stating that "before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client..."

In the context of proposed language "within or outside the firm" to new Comment [1] of Model Rule 5.3, the Commission discussed George Jones' concern that Model Rule 5.3(a) does not apply to nonlawyers outside the firm. He understands Rule 5.3(a) to apply only to nonlawyers inside the firm, citing to Comment 2 of the Rule. Professor Perlman discussed with the Commission the additional research that had been conducted on this issue, including ABA Formal Opinion 95-398. After further discussion the Commission agreed to retain "or outside" in Comment [1]. Mr. Jones also suggested deleting the last sentence of proposed new Comment [3] and inserting "selecting and" between "when" and "using" in line 121 of the draft. Professor Perlman explained that this would lose the intended distinction between direct supervision versus providing direction to outside nonlawyer service providers retained to do work on a client matter.

This distinction exists in reality but is not currently captured in the Comment. After further discussion the Commission agreed to retain the last sentence.

At the conclusion of the discussion about domestic and international outsourcing, Co-Chair Gorelick asked the Commissioners to provide Professor Perlman with any additional editorial suggestions so that the draft Initial Resolutions and Report can be released for comment.

4. Technology and Confidentiality: Professor Perlman explained that the Working Group's draft Resolutions and Report regarding lawyers' use of technology and confidentiality first proposes that the Commission add language to the black letter of Model Rule 1.0 (k) (Terminology) to add "electronically stored information" to that information from which a screened lawyer must be protected. The Working Group also recommended corresponding amendments to paragraph [9] of the Comment. He noted that the Ethics Committee expressed no disagreement with the additional language, but did indicate that it thought the amendments were not necessary. Philip Schaeffer, liaison to the Commission from the Ethics Committee added that the Committee would find the new language more palatable in the Comment to Rule 1.0. Justice Elizabeth Lacy also suggested agreed with this approach. After further discussion, the Commission reached consensus to remove the language from the black letter of Rule 1.0(k) and retain the new language in Comment [9].

Professor Perlman next sought the Commission's input regarding the addition of "including the benefits and risks associated with technology" to the language in Comment [6] to Model Rule 1.1 (Competence) explaining that "in order to maintain requisite knowledge and skill a lawyer should keep abreast of changes in the law and its practice..." Mr. Schaeffer does not agree with those on the Ethics Committee who think this additional language creates a new obligation or necessitates lawyers to obtain expertise not readily available with them. Justice Lacy, agreed with Mr. Schaeffer, noting that the key words are "benefits and risks" and that technology is and will continue to have impact on the law and how it is practiced. Roberta Cooper Ramo also felt this to be an important addition, noting that technology is second nature to young lawyers, new lawyers, and law students. Because their use of technology is so intertwined with their professional and personal lives, they may not always think about the risks of its use in law practice. New guidance in the Comment would call their attention to it. The Commission agreed to retain the new proposed language to Comment [6] of Model Rule 1.1.

Professor Perlman next sought the Commission's input regarding proposed new Model Rule 1.6(c). Specifically, he sought to ensure that the proposed language clarifies lawyers' ethical duties in this area and also would not have adverse effects on solo and small firm practitioners. He believes that lawyers already have this obligation to make reasonable efforts to prevent inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client, and that it is important to elevate that to the black letter. Professor Bradley Wendel agreed with Professor Perlman that lawyers already have this obligation, but that including it in the black letter is important. The Commission agreed, understanding that the Ethics Committee may have concerns. If that is the case, the Commission will work with the Committee to alleviate those concerns. The Commission also agreed with the proposed new language to Comment [16] of the Rule.

Professor Perlman explained the proposed revisions to the black letter of paragraph (b) and Comments [2] and [3] of Model Rule 4.4 (Respect for Rights of Third Persons). These changes would codify ABA Formal Opinion 06-442. He stated that there had been some conversations with the Ethics Committee about whether the changes do, in fact, codify the Formal Opinion. The other option is to do nothing, as the Ethics Opinion exists. Mr. Schaeffer advised that the Ethics Committee was concerned about the universality of metadata and whether the proposed changes would require lawyers and law firms to send notices every time an electronic document was received. Mr. Jones concurred and also expressed concern that lawyers would have to make judgments about what does and does not constitute metadata. Don Hillker disagreed and stated his belief that today lawyers should know or assume there is metadata. Justice Lacy and Fred Ury raised questions about the impact on solo and small firm practitioners and costs. Mr. Golden expressed interest in learning more about technology to scrub metadata from documents prepared and sent via smart phone. Ms. Miller noted, and Justice Lacy agreed, that if a lawyer determines that he is not going to scrub metadata from a document that is not inadvertent; the lawyer has made a choice not to do so. Paragraph (b) of Rule 4.4 refers to inadvertent disclosure. At the conclusion of the discussion the Commission requested that Professor Perlman work to revise the proposal to take into account the Commission's and Ethics Committee's concerns.

5. Technology and Client Development: Professor Perlman explained that the Working Group was seeking the Commission's guidance regarding the draft proposals regarding lawyers' use of technology and client development. The Working Group will present to the Commission draft Resolutions and Reports for its consideration during its June 2011 teleconference.

Model Rule 1.18 was proposed by the Ethics 2000 Commission and adopted by the House of Delegates in 2002 to address lawyers' duties to prospective clients. Because of increased use of technology based client development tools by lawyers, coupled with the public's considerable use of the Internet and social media and to learn about legal services and lawyers, the Working Group believes that codification of some provisions of ABA Formal Ethics Opinion 10-457 is advisable in addition to clarification about what constitutes a "prospective client." The proposed amendments to the black letter of Model Rule 1.18(a), and accompanying new Comment [3], offer a definition as to when someone becomes a prospective client and provide guidance in the form of factors upon which reasonableness of the expectation of the person communicating with a lawyer depend. The suggested language also addresses the fact that, because of the manner in which communications occur electronically, the term "discusses" is no longer sufficient. Chief Justice Gerald Vandewalle expressed a preference for not changing the black letter. Co- Chair Michael Traynor suggested that the Working Group revisit the last sentence of proposed Comment [3] to determine whether it suggests an unintended safe harbor.

Professor Perlman updated the Commission on the Working Group's efforts to develop a proposal to amend Model Rule 7.2 to address the impact of the Internet on how lawyers advertise. For example, new client development methods such as "pay-per-click" or Groupon do not fit neatly into existing categories. He reminded the Commission that the original purpose of Rule 7.2 was to prohibit ambulance chasing or the use of "runners." Those remain legitimate concerns, but the Working Group suggests

amending Model Rule 7.2 to allow lawyers to ethically take advantage of these and future tools. While the Working Group has not reached consensus, it has developed a tentative proposal and seeks the Commission's guidance as to how to proceed. The proposal would allow a lawyer to pay a third-party (whether a lawyer or nonlawyer) for marketing services so long as the methods employed on behalf of the lawyer are consistent with the lawyer's professional obligations and do not violate Rules 1.5(e) and 5.4. Professor Perlman indicated that some on the Working Group thought this proposal went too far. The Commission agreed that there exists ambiguity in this area that needs to be addressed. Professor Gillers believes the amendment seeks to achieve a result with which he agrees, but that further refinement is necessary. He also would like to retain paragraphs (3) and (4) of the black letter of Rule 7.2. Mr. Schaeffer added that one of the most serious issues for people is finding counsel and the extent to which the Commission can encourage referral to reputable lawyers is a social good. Mr. Ury noted that according to a recent ABA survey the primary way that people find lawyers is through referrals. Ms. Miller remained cautious about the proposal. Professor Ted Schneyer asked how the proposal impacts for-profit referral services. Audience member Patricia Sallen, from the Arizona State Bar Association, noted that when reviewing its version of Rule 7.2, it discovered an issue relating to not-for-profit referral services and Rule 5.4's prohibition of the sharing of fees with nonlawyers. The Arizona Supreme Court amended Rule 7.2 to accommodate this issue. The Commission requested that Professor Perlman work to refine and clarify this proposal and that the Working Group develop an alternate proposal for the Commission's consideration during its June 2011 conference call. The Commission also requested that Professor Perlman circulate information about how lawyer advertisements appear in these new media.

The Commission also discussed the Working Group's proposed amendments to Model Rule 7.3, and agreed with the proposed change from "prospective client" to "potential client." The Commission also agreed that a White Paper should be developed to better explain to the profession recent court decisions relating to the constitutionality of online lawyer communications. A number of recent cases have resulted in successful challenges to state advertising rules. The Working Group also has developed a list of technology-related ethics issues that could be addressed by the Ethics Committee in formal opinions.

6. Inbound Foreign Lawyers: Professor Gillers explained the Working Group's proposals to: (1) amend the ABA Model Rule on Pro Hac Vice Admission to include foreign lawyers; (2) amend the ABA Model Rule on Registration of In-House Counsel to include foreign lawyers; and (3) amend ABA Model Rule 5.5 accordingly and to incorporate the now free-standing ABA Model Rule on Temporary Practice by Foreign Lawyers. These drafts reflect input from the Commission's April and August 2010 meetings. These proposed amendments would address it. After further discussion the Commission reached consensus that the drafts contain appropriate safeguards, should not contain reciprocity provisions, and agreed to release them for comment as initial proposals.

7. Conflicts of Interest, Uniformity, and Choice of Law: The Commission next discussed the March 28, 2011 memorandum from the Working Group that identifies possible solutions to a number of choice of law problems arising from different types of conflicts of interest, concurrent conflicts being the most difficult. The memorandum sets

forth an example illustrating a successive conflict and one demonstrating a concurrent conflict. In the context of those examples the Working Group sought to draft a choice of law rule to help lawyers and courts determine which jurisdiction's conflicts rule should prevail in these situations. The memorandum further explains, via hypothetical scenarios 1 – 5, how each example of successive and concurrent conflicts would be resolved by proposed amendments to Model Rule 1.10 (Imputation of Conflicts of Interest). The Working Group developed four proposals to amend Rule 1.10(Options A – D). Co-Chair Traynor noted that choice of law, if applied thoughtfully and correctly, makes it possible for lawyers to practice in the current world. The Commission discussed the various hypothetical scenarios set forth in the memorandum. The Commission also questioned whether there existed sufficient cooperation among disciplinary agencies on choice of law matters. Gene Shipp, Chief Disciplinary Counsel in the District of Columbia, advised the Commission that such cooperation does exist and is effective. At the conclusion of the discussion the Commission agreed to disseminate the memorandum broadly for comment as an Issues Paper. Mr. Schaeffer requested that language be included regarding this issue of advanced waivers. Co-Chair Traynor noted that Mr. Schaeffer's request is consistent with the basic principle set forth in court opinions regarding the ability of parties to contract as to which laws will apply to a transaction. Justice Lacy cautioned, and the Commission agreed, that the issues under consideration by the Commission are different than choice of law issues in a contractual context. The Commission requested that Professor Perlman revise the memorandum in accordance with the Commission's discussion and that the document be clear that the Commission has not reached any conclusions on these issues.

Professor Perlman advised the Commission that the comments received to date in response to the Commission's Issues Paper regarding Model Rule 8.5 (included in the Commission's agenda materials) have been helpful and generally positive. In particular, he directed the Commission to comments received by Stephanie Kimbro in relation to virtual law practices. Based upon those comments he expects that the Working Group, in advance of the Commission's June teleconference, will work to refine proposals regarding Model Rule 8.5(b)(2) and the phrase "offering to provide."

The Commission next discussed the Working Group's draft suggesting amendments to the ABA Model Rule for Admission by Motion. Professor Perlman explained that the Model Rule was adopted as part of the package of recommendations submitted by the ABA Commission on Multijurisdictional Practice. The Working Group received and evaluated comments responsive to the MJP Issues Paper and is seeking Commission input on its recommendation to decrease the years-in-practice requirement from 5 of the last 7 years to 3 of the last 5 years. Justice Lacy reminded the Commission that the purpose behind the original years-in-practice requirement was to ensure that the lawyer seeking motion admission had sufficient active practice experience and had remained up-to-date on the law. Professor Silver stated that, in revisiting the 5 of 7 years-of-practice requirement, the Commission should remain cognizant that lawyers' careers are no longer at "straight line" as they have been in the past. She suggested that 2 of last 4 years in practice would be an appropriate criterion.

Professor Robert Lutz asked about the relationship between the Working Group's suggestions and the Uniform Bar Examination. Chief Justice VandeWalle explained that while states may adopt the Uniform Bar Examination, there are not recommendations at

this time for states to adopt uniform "cut scores." A few Commissioners expressed concerns that by lowering the years-in-practice requirement those jurisdictions that have not yet adopted motion admission would be less likely to do so. The Commission then discussed whether it would be better to urge jurisdictions that have not done so to adopt the Model Rule, and to do so without adding reciprocity requirements. The Commission also discussed urging those jurisdictions that have adopted motion admission, but which have incorporated reciprocity provisions, to eliminate those requirements. The Commission reached an initial consensus that the Working Group's draft recommendation and the report should urge increased implementation without the addition of reciprocity provisions and state why it is in the best interest of clients and the profession for those jurisdictions that have existing reciprocity provisions to eliminate them. Jeanne Gray, Associate Executive Director of the ABA, suggested that Professor Perlman review Recommendations 1 and 5 of the MJP Commission's Report. In each of those Recommendations the ABA reaffirmed its support for existing policy.

The Commission discussed additional comments received with regard to the Commission's Issues Paper on Multijurisdictional Practice and Model Rule 5.5. Professor Perlman described how Colorado's approach to temporary practice is more open-ended than that set forth currently in Model Rule 5.5(c). Professor Gillers noted that the difference between the Colorado approach and Rule 5.5 (c) is the nexus requirement that currently exists in the Model Rule for transactional work. Professor Perlman also directed the Commission's attention to suggestions in the Issues Paper regarding changes to Model Rule 5.5 (d) that could increase the circumstances under which lawyers are permitted to establish a systematic and continuous presence in a jurisdiction where they are not currently admitted. For example, Washington, D.C. has adopted a rule that permits a lawyer to establish an office there, subject to certain requirements, while the lawyer pursues admission. The Commission instructed the Working Group to prepare for consideration during the Commission's June 2011 teleconference proposed amendments to the black letter and comment of Model Rule 5.5.

8. Alternative Litigation Finance: Professor Wendel advised the Commission that the Working Group has been studying two approaches to alternative litigation financing. The first is whether there should be amendments to the Model Rules of Professional Conduct, and the second is development of the White Paper discussed at earlier Commission meetings. The Commission's agenda contains suggestions from three Working Group members (Mr. Schaeffer, Professor Gillers, and Olav Haazen) to amend the Comment to Model Rule 1.5 (Fees). Professor Wendel expressed his opinion that a White Paper would better capture for the profession the inherently complex and fact specific issues relating to alternative litigation finance. The complexities vary to such an extent that it would be difficult to encapsulate in a Comment to the Rules and provide the profession with useful guidance. The White Paper will allow lawyers and clients to see and understand in better detail how alternative litigation financing works and is being used. He and Professor Anthony Sebok have been working on the White Paper. A draft can be provided in time for the Commission's June 2011 teleconference.

Mr. Schaeffer agreed that a White Paper will be helpful, but stated that he also felt additional Comment in Model Rule 1.5 would add to the already enormous amount of literature on the subject. He believes that lawyers should explain to clients what the client is getting into in an alternative litigation finance arrangement, and if the lawyer

lacks the expertise to do so, the lawyer should refer the client to someone with that expertise. Mr. Ury concurred. Professor Gillers expressed concern that the text of Mr. Schaeffer's proposed Comment to Rule 1.5, as set forth in the agenda materials, could be interpreted as creating new duties that would best be addressed in the black letter should the Commission determine that lawyers should have additional ethical obligations in the context of alternative litigation financing. Without committing himself as to whether a Comment is necessary, Professor Gillers prepared draft language (also included in the agenda materials) to demonstrate how difficult it is to develop a Comment to address these issues.

Co-Chair Gorelick asked Professor Wendel whether the problem that needs addressing with regard to lawyers' obligations and alternative litigation finance is one of disclosure of information to clients or whether there exist other adverse consequences for clients that should be addressed. Professor Wendel responded that it depends on the nature of the transaction as well as, if it is the client who seeks and obtains financing, what the lawyer knows about the agreement. Professor Wendel does not believe that a change in lawyers' existing duties is necessary.

The Commission also acknowledged that there are significant access to justice issues. Mr. Ury noted that clients often have nowhere else to turn in order to pursue their claims. Professor Gillers noted that some existing legislation appears as if it was drafted by funders. He suggested that the Commission's interest in assuring adequate client protection could be included in the White Paper by indentifying types of provisions that model legislation should include. Board of Governors' Liaison Kenneth Standard suggested that the Commission engage in outreach to legal defense and education funds to ensure that they are aware of the Commission's work. Herman Russomanno suggested it may also be useful to determine whether there exist legal malpractice implications when lawyers engage in alternative litigation finance transactions.

The Commission also discussed whether it wants to suggest substantive limits on the ability of lenders to interfere with the client-lawyer relationship. Justice Lacy disagreed with such an approach, suggesting that the Commission's role in this should be to advise lawyers about their ethical duties when engaging in alternative litigation financing. Professor Wendel agreed, noting that this was the focus of the Working Group, but the question remains whether there is a need for new duties or highlighting the existing ones for lawyers. At the conclusion of the discussion the Commission requested that Professors Wendel and Sebok continue to work on the White Paper and to make necessary revisions to their drafts to ensure that it includes discussion of the societal and client protection policy pieces discussed by the Commission. They also should prepare alternate Comment language for the Commission to consider during its June teleconference.

9. Alternative Business Structures: Reporter Paul Paton updated the Commission on planned outreach to the General Practice, Solo and Small Firm Division. He also described to the Commission the structure of the draft Issues Paper that was released on April 5, 2011. Co-Chair Traynor observed that there are issues that cross over into the area of choice of law. Professor Paton agreed and noted that the Working Group is looking at them. The issue of how U.S. lawyers and law firms should address their interactions with lawyer and law firms from other countries where alternative business structures are permitted is very real. The Commission, as discussed at earlier

meetings, should provide guidance in this area, whether or not it suggests any modifications to Rule 5.4. Mr. Jones noted that some firms have addressed this by developing separate partnership structures or other entities. Professor Paton is seeking additional information to ensure that he better understands the manner in which non-U.S. firms are structured. Professor Ted Schneyer referenced a Pennsylvania ethics opinion addressing the issue of how Pennsylvania lawyers may share fees with a Washington, D.C. firm that has nonlawyer principals. The District of Columbia has, for the past 21 years, had a rule permitting nonlawyers to have a partnership or financial interest in a law firm. The underlying concern is the potential influence of the nonlawyers. Mr. Schaeffer referred the Commission to the ABA Ethics Opinion on this issue from 1991 with regard to foreign law firms. He suggested that it may be appropriate for the Ethics Committee to study the choice of law issue in the context of alternative business structures.

Professor Schneyer noted that Professor Gillers has raised questions as to what, in the context of the Model Rules 5.4 and 5.7, constitutes multidisciplinary practice and what does not. Professor Gillers described the issue as follows: If a U.S. lawyer can have a nonlawyer partner who is a lobbyist, can that lobbyist perform lobbying work for a client of the law firm if that client currently has no legal work pending with the firm? In Professor Gillers' opinion, Model Rule 5.7 would currently suggest that the lobbyist could do so. Professor Schneyer disagreed with Professor Gillers' analysis, noting that what Professor Gillers suggested was the essential characterization of a multidisciplinary practice. That is not what Rule 5.7 permits. Also, under the District of Columbia's version of Rule 5.4, the nonlawyer partner's work must have as its sole purpose assisting the lawyer in providing legal services to a client. District of Columbia Chief Disciplinary Counsel Gene Shipp noted that under its version of Rule 5.4 there is comfort for both Professors Gillers and Schneyer. He noted that, under that Rule the price of being a nonalwyer partner is that the nonlawyer surrenders his right to market and offer his services separately.

Professor Paton noted that while the Working Group and the Commission have reached no decisions, it appears that, based on the information collected thus far, the choice will be between Options 2 and 3 in the Issues Papers (the District of Columbia version of Rule 5.4 or the Legal Disciplinary Practice Model in the U.K.). The Commission advised that the Working Group should continue its study of whether to recommend to the Commission one of the three structures described in the Issues Paper. The Working Group should coordinate with the Uniformity, Conflicts of Interest and Choice of Law Working Group to try to develop proposals to address existing choice of law issues in a domestic and international context.

10. Technology and Client Development: Professor Perlman advised that the Working Group is seeking the Commission's guidance regarding whether and how to propose changes to Model Rule 7.3 (Direct Contact with Prospective Clients). One suggestion is to change the term "prospective client" to "potential client" in the Rule. Professor Perlman believes this better expresses the reality encountered by lawyers and would be intended to narrow, not broaden the Rule. There also are recent cases finding that jurisdictions are regulating advertising in an Internet age in ways that exceed constitutional boundaries. He suggests that the Commission consider issuing a White Paper on the constitutional issues to alert jurisdictions to these matters. The Working Group also recommends asking the Ethics Committee to consider drafting formal

opinions on the subject of using social media to conduct investigations and judges "friending" lawyers and litigants. The Commission advised the Working Group to continue to develop a proposal regarding Model Rule 7.3 and agreed with the suggestion that a White Paper would be useful to the profession along with the suggested Ethics Opinions.

11. Invited Speakers: The Commission next heard from Anthony Davis of Hinshaw Culbertson, and James Jones, from Hildebrandt International regarding the proposal submitted to the Commission from law firm general counsel. A copy of the proposal may be accessed on the Commission's website. The main concern of the proposal, as expressed by Mr. Jones, is how lawyers can practice ethically in a world replete with conflicting rules. The law firm general counsel who signed the submission to the Commission do not believe that the current regulatory scheme in the U.S. services multijurisdictional clients. Despite the good intention of the Model Rules of Professional Conduct, they lack of uniformity impedes the flow of legal services. In particular, he stated, these non-uniform rules are designed to protect individual clients as opposed to large commercial entities and their lawyers. The end result, Mr. Jones explained, is to drive up cost or deny these clients their choice of counsel. The current rules also serve as grounds for pretextual disqualification motions. He asked the Commission to consider how the jurisdictions with which the U.S. competes are liberalizing, in part by carving out rules for large commercial clients who are sophisticated and the lawyers who represent them. Mr. Davis explained that the firms that signed on to the proposal are large firms with multinational clients and they are a "sleeping giant." He stressed that these lawyers and clients face sometimes impossible regulatory challenges, and their voices are getting louder. One suggestion is to allow them to enter into agreements as to which rules will apply.

Ms. Miller, a former general counsel, cautioned against painting with too broad a brush on this subject. She suggested that working to increase the efficacy of screening might be appropriate and helpful. In response, Mr. Davis noted that the proposal is not saying that that sophisticated clients and firms have to enter into these agreements, but that if they do, they should stick. Mr. Jones added that there is precedent for such agreements in the areas of securities and consumer protection law. They agreed with Ms. Miller about the need to better structure screening arrangements given increased lawyer mobility at the large firm level. Professor Gillers stressed that the issues relating to lawyer mobility are not sophisticated client or large law firm issues. Mobility affects all lawyers and all clients. Limiting liability is more of a large firm issue. Mr. Ury agreed. The Commission also asked Mr. Jones and Mr. Davis how they believed these issues would be received by the House of Delegates. Mr. Jones and Mr. Davis agreed that the House would likely not look favorably on proposals such as the one submitted to the Commission. At the conclusion of the discussion the Commission thanked Mr. Jones and Mr. Davis for their presentation and discussion of complex and challenging issues.

The Commission next heard from Jeff Goens and Seth Wilson of the International Legal Technical Standards Organization (ILTSO). ILTSO is an organization of information technology professionals, lawyers, and others who publish standards designed to help lawyers and law firms better understand and develop best practices regarding online data storage and transmission. ILTSO's guidelines are designed to recognize that what may be considered a reasonable practice in 2011 may not be so in

2014. As a result, ILTSO intends to publish updated guidelines every year. Mr. Goens described the current draft of the ILTSO guidelines to the Commission. In response to a question by Co-Chair Traynor, Mr. Goens agreed that geographical location of data remains very important and is relevant to the issue of encryption. Lawyers also need to be very cognizant of choice of law issues relating to off-site storage of data. Audience member Carolyn Elefant stated that she relies very heavily on cloud providers and that it has made law practice management tools readily and economically available to solo and small firm practitioners. She encouraged states to adopt uniform standards in order to preempt federal incursions. She also expressed concerns regarding the manner in which state bar associations have addressed issues relating to metadata. At the conclusion of the discussion the Commission thanked Mr. Goens and Mr. Wilson for a valuable exchange.

12. Executive Session: Co-Chair Traynor thanked the audience members for attending the Commission's meeting and for their participation and questions. The Commission then commenced its executive business session.

13. Adjournment: The meeting adjourned on at 3:00 p.m.

Respectfully Submitted,

Ellyn S. Rosen
Commission Counsel