MINUTES
AMERICAN BAR ASSOCIATION
COMMISSION ON ETHICS 20/20
June 13, 2011
9:00 a.m. – 3:30 p.m.
Teleconference

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
Frederic S. Ury
Hon. Gerald VandeWalle

Absent:
Kenneth W. Starr
Carole Silver

Commission Liaisons Present:
Donald B. Hilliker, ABA Center for Professional Responsibility
Philip H. Schaeffer, ABA Standing Committee on Ethics & Professional Responsibility

Commission Liaisons Absent
Kenneth G. Standard, ABA Board of Governors
Carolyn B. Lamm, ABA Board of Governors
Robert E. Lutz, II, ABA Task Force on International Trade in Legal Services
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:
Jeanne P. Gray, Associate Executive Director
Ellyn S. Rosen, Commission Counsel
William Hornsby, Working Group Counsel
Dennis Rendleman, Working Group Counsel
John A. Holtaway, Working Group Counsel
Marcia L. Kladder, Policy and Program Director
Natalia Vera, Senior Research Paralegal

1. Call to Order: Co-Chair Gorelick called the meeting to order at 9:00 a.m. At her request Commission Counsel Ellyn Rosen reviewed the revised Commission timeline and confirmed that, in advance of the Commission's August meeting, the Commissioners will be provided with summaries of comments received relating to the Issues Papers and Initial Outsourcing, Technology, and Inbound Foreign Lawyer proposals.

2. Conflicts of Interest, Uniformity and Choice of Law: Professor Stephen Gillers described for the Commission the three possible approaches he, Chief Reporter Andrew Perlman, and Philip Schaeffer and E. Norman Veasey developed for indentifying how to solve choice of law issues that arise in the conflicts context. Inconsistencies can exist with regard to toleration for lateral screening; differences in tolerance for work adverse to a current client on a matter unrelated to work the firm is then doing for the client (a difference between all U.S. jurisdictions except Texas and many foreign jurisdictions); differences in the interpretations of the same language in the rules of two or more jurisdictions; and differences in remedies for the same conduct (suppression, disqualification, discipline).

Option A suggests amending Model Rule 1.10 to say that screening would only be allowed if, in addition to the requirements of Model Rule 1.10(a)(2), the rules governing the lawyer whose presence creates the conflict permit screening. Option A addresses only the issue of permission to screen. For all other inconsistencies between rules, Model Rule 8.5 would govern. Professor Perlman noted that Option A offers a clear answer, but the question remains as to whether it is the correct answer. Option A cannot work in a jurisdiction that has not adopted the recent amendments to the Model Rules permitting screening. Another concern regarding Option A is political. The House of Delegates' recently amended Model Rule 1.10 to permit screening and it may be problematic to seek to add a new precondition that could operate to restrict it.

Option B, which Professor Gillers prefers, would add a Comment to Model Rule 8.5 describing the factors to be considered in the case of inconsistent conflicts rules. The Comment approach, he stated, offers greater flexibility and it is difficult to capture in a black letter rule the many variables to be reconciled in conflicts cases where there exist inconsistent rules.

Option C would have Model Rule 1.10 apply only within the boundaries of the U.S. As a result, a U.S. lawyer's conflict of interest will not be imputed to a U.K. partner, and that U.K. partner's work will not be imputed to her U.S. partner. This approach was offered by Messrs. Schaeffer and Veasey, both members of the ABA Standing Committee on Ethics and Professional Responsibility.

Recognizing that there exist inconsistencies nationally and globally, the Commission heard from Mr. Schaeffer that the problem for lawyers trying to work with counterparts in other countries is very serious. U.S. lawyers are losing their effectiveness overseas because of the U.S. rules. It also is a recruitment problem relating to lateral hires. Mr. Schaeffer believes that Option B would not be effective because the need to weigh and balance factors results in inconsistency. Co-Chair Gorelick added that an ugly reality exists where the imputation and screening rules are used strategically to eliminate certain firms from being able to represent clients in matters. It is an issue of client choice. Others noted that, while advance waivers are theoretically possible in a multinational context, they are often difficult to obtain. Limiting the extraterritorial effect for imputation in the multinational context may make sense. Justice Elizabeth

Lacy stated that the ABA, when adopting screening, followed the philosophy that it would allow clients of any size to get representation. The Commission should stand behind that philosophy and urge states to adopt the ABA version of Model Rule 1.10. She and Judith Miller expressed concern that Option C encourages continued balkanization at a time when increased uniformity and harmonization is needed. At the conclusion of the discussion the Commission agreed to eliminate Option A from further consideration. The Commission expressed its preference for Option B, but also wants to solicit comments regarding Option C. The working Group's next draft to the Commission should make this clear and, in seeking comment on Option C, identify the issues that it would address.

The Commission reviewed the issue of whether to recommend that the current ABA Model Rule on Admission by Motion be amended. The amendment would modify the period of time and applicant is required to have been engaged in the active practice of law in one or more states, territories or the District of Columbia to three of five years instead of five of seven years. The Commission reached consensus to develop a proposal for such an amendment. Chief Justice Gerald VandeWalle offered to seek initial comments regarding this proposal from the Bar Admissions Committee of the ABA Section of Legal Education and Admissions to the Bar.

Co-Chair Gorelick advised that the overarching report to accompany the Commission's resolutions and reports to the House of Delegates should make clear that the ABA Commission on Multijurisdictional Practice did an outstanding job addressing cross-border practice issues as they existed in 2002; however, the swath of lawyers that need to practice across state lines, physically and virtually, has increased significantly, raising new problems in need of solutions. In this regard, Professor Perlman sought the Commission's guidance regarding several preliminary drafts still under consideration by the Working Group. The first is a proposal to amend Model Rule 5.5(c) akin to a rule in Colorado that would permit lawyers admitted in other states to practice there on a temporary basis, with very limited exceptions. The Working Group ultimately concluded not to recommend changes in this regard. The Commission concurred.

Professor Perlman next discussed the Working Group's recommendation to amend Comment [14] of Model Rule 5.5. Comment [14] currently provides that a matter may fit within Model Rule 5.5(c)(4) if the lawyer's services draw on "the lawyer's recognized expertise through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law." The Working Group felt that confusion over the scope of "nationally uniform" could be addressed by changing it to "law that is substantially similar to the law of the jurisdiction in which the lawyer is admitted." John Holtaway, who served as Counsel to the ABA Commission on Multijurisdictional Practice, agreed to review the MJP Commission's minutes to determine to what, if any extent, the term "nationally-uniform" was defined. Commissioners expressed concern that the term "substantially similar" was too vague and may have unintended consequences. Mr. Schaeffer raised the issue of lawyers routinely advising on the law of other states in opinion letters and cautioned that changing the current language of Comment [14] could adversely impact that practice. The Commission agreed to leave Comment [14] unchanged.

Professor Perlman explained that a majority of the Working Group suggests amending Model Rule 5.5(d) to add a new paragraph (3) as described in the MJP Issues

Paper. This new provision would address what those Group members perceive as a gap impacting lawyers admitted in one jurisdiction that need to relocate and establish themselves in another where they are not yet admitted, but have applied for admission or will do so. New Model Rule 5.5(d)(3) would allow that lawyer to establish themselves in the host jurisdiction for no more than 365 days so long as that lawyer: submits an application for admission by motion or by examination, seeks authority to practice as in-house counsel or limited licensure as a foreign legal consultant within [60] days of first providing legal services there; notifies disciplinary counsel or the licensing authority in writing prior to initiating practice; and has not previously been denied admission for character and fitness reasons. The lawyer may not appear before a tribunal in the host jurisdiction unless admitted pro hac vice.

Ms. Rosen, also Counsel to the ABA Standing Committee on Professional Discipline, explained that a majority of the Discipline Committee viewed this suggestion as a way to increase mobility for the mere convenience of lawyers that could inure to the detriment of the second jurisdiction's citizens. They were not convinced that there exists a problem in need of this proposed solution and felt it may be an issue that more appropriately falls under the purview of the bar admissions authorities.

Should the Commission decide to pursue the approach in Rule 5.5(d)(3), the Discipline Committee suggests that the following will help achieve necessary balance between public protection and allowing increased mobility of lawyers: (1) the limitation on past denials of admission should extent beyond those relating to character and fitness, including, for example, past failure to pass the bar examination or revocation of *pro hac vice* status for serious misconduct; (2) the rule should require the out-of-state lawyer to register immediately with the disciplinary authority of the host jurisdiction and include a verified statement as to whether the lawyer is currently the subject of disciplinary proceedings or sanction in his home jurisdiction; (3) the out-of-state lawyer who is permitted to establish herself in the host jurisdiction must be required to make clear to the public and potential clients her "special status" (e.g., proactively indicate that she is not fully licensed to practice law there and identify the jurisdiction(s) where she is licensed); and (4) the Commission should consider whether lawyers practicing pursuant to this grant of authority should be required to be supervised by local counsel until fully admitted. The Committee also suggests eliminating the reference to in-house counsel as that is already covered in Rule 5.5(d)(1).

With regard to the Discipline Committee's suggestion that the out-of-state lawyer be required to associate with local counsel, Professor Perlman noted that the Working Group was considering this already. For lawyers who relocate to work at an existing law firm in the host jurisdiction this requirement would be easily satisfied. An out-of-state sole practitioner would need to find local counsel with whom to associate. Associate Executive Director Jeanne P. Gray cautioned that this provision could be interpreted as discriminating against sole practitioners. Acknowledging the concern, Commissioners believed this might be one way to achieve necessary public protection while allowing the out-of-state lawyer to relocate and practice pending decision on her application for admission. Co-Chair Gorelick stated that providing a list of names of local lawyers willing to help relocating out-of-state lawyers for this purpose might be a service that the state and local bar associations could provide. Ms. Rosen added that it is not uncommon in other circumstances for lawyers to be supervised in some form by their colleagues.

She offered the example of conditionally admitted lawyers, lawyers practicing pursuant to alternatives to discipline contracts, and conditionally reinstated lawyers. ABA policy, set forth in the Model Rules for Lawyer Disciplinary Enforcement already provides for this (e.g., Model Rules 11 and 25).

The Commission would like the Working Group to continue to develop this proposal and also to consider how to address the fact that lawyers can now establish a continuous and systematic presence virtually, not just physically. That may require restating the phrase "systematic and continuous" in Rule 5.5(d).

Professor Perlman raised the issue of whether the term "predominant effect" in Model Rule 8.5 requires further clarification. This is an issue that was raised in the Commission's Initial Issues Outline in November 2009. Professor Perlman explained the Working Group's proposed addition of factors akin to those in the Restatement Third of the Law Governing Lawyers to the Comment of Rule 8.5. The Working Group believes this language, as well as that offered by the Standing Committee on might offer more clarity with regard to application of the Rule. After further discussion, the Commission agreed that it should defer to the Standing Committee on Ethics and Professional Responsibility the question whether further explanation or interpretation of the term "predominant effect" should be made and, if so, whether to do so through a Formal Ethics Opinion.

The Commission discussed further the proposal by Professors Laurel Terry and Catherine Rogers to amend Model Rule 8.5 to identify specific choice of rule provisions for when lawyers appear before international tribunals. Rule 8.5 provides that, for matters pending before a tribunal, the rules that apply are those of the jurisdiction in which the tribunal sits, unless the tribunal's rules provide otherwise. Professors Terry and Rogers identified for the Commission in an October 2010 memorandum problems that arise in this regard with international tribunals, many of whom do not have their own conduct rules. Other issues arise in the international arbitration setting where the tribunal may be located in a jurisdiction that has no connection to the matter. The Working Group has studied the Terry/Rogers proposals but has not developed one of its own and seeks Commission guidance. After further discussion the Commission reached consensus that this is an issue that may not be best covered in the Model Rules, but rather addressed through a coordinated effort by the ABA and its international counterparts to encourage international tribunals to adopted ethics rules governing the conduct of lawyers practicing before them. The Commission asked Ms. Rosen to explore how this might best be achieved.

Professor Perlman next sought guidance from the Commission regarding whether Model Rule 1.6 should be amended to address the extent of disclosures for conflict-checking purposes by codifying the current ABA Formal Ethics Opinion on the subject. Ms. Miller stated that the realities on the ground demonstrate how the Rule is being ignored. The Commission asked Professor Perlman to work on a draft of proposed amendments to Model Rule 1.6 to incorporate the guidance from the Ethics Opinion.

The Commission discussed the Working Group's proposal to amend Model Rule 1.7 to permit clients and lawyers to agree to be bound by the conflicts of interest rule of another jurisdiction or to be bound by the Model Rules. In particular, should Comment [18] be amended to add language stating that there needs to be a connection to the jurisdiction chosen? The Commission recommended that the Working Group study this

issue further and check to see how the Uniform Law Commission handled this choice of law issue.

4. Technology and Client Development: Professor Perlman updated the Commission on the work of the Technology Working Group and talked the Commission through its proposed resolutions to amend Model Rules 1.18, 7.2, and 7.3. The Working Group incorporated into this draft the Commission's recommendations from its April 2011 meeting. He explained that, with regard to two options for amending Model Rule 7.2, feedback received during presentations to state bar associations showed that Option A was problematic. It was viewed as too radical a change. The Commission agreed that the draft initial proposal to be released should be Option B, but that he should indicate in the accompanying report that the Commission also considered Option A and it remains open to comments on those suggested amendments. The Commission also requested that Professor Perlman further describe in the drafts examples of what would constitute "endorsing" or "vouching" for a lawyer under the new definition of "recommendation." The proposal should be clear as to what is and is not "lead driving." The Commission asked that the draft proposal be circulated to the Standing Committee on Lawyer Referral Services prior to broad release.

With regard to Model Rule 7.3, Professor Perlman explained how the proposal has added a new definition of "solicitation." This proposal also distinguishes between targeting activities versus things like "pop-up" and banner advertisements.

5. Alternative Litigation Financing: The Commission discussed the "thick outline" for the White Paper prepared by Reporters Tony Sebok and Bradley Wendel. The paper would not take a position on the issue of Alternative Litigation Finance, but rather is intended to review a controversial issue in a balanced way. The White Paper will signal to the profession that there have been changes in the litigation environment in the U.S., including a constriction on resources for civil litigation that has created an access to justice issue. The Commission's work on this subject cannot be the end of the profession's conversation, but rather a beginning. The Commission can do a service to the bar by ensuring that the scope of the conversation is as broad as possible. Whether alternative litigation financing will increase litigation is a criticism worth raising and exploring. Professor Sebok noted, however, that there is no empirical data to support this criticism. Herman Russomanno noted that data from the National Center for State Courts indicates that litigation has dropped in most states. Ms. Miller indicated that the White Paper should cover class action finance and focus more on the consumer protection aspects of the issue. Professor Sebok agreed that the issue of consumer protection is paramount.

Mr. Schaeffer expressed concern that the White Paper should be more limited in scope; it should concentrate on lawyers' duties in these types of transactions and the ethical rules application to the various forms of alternative litigation finance. After further discussion the Commission requested Professors Sebok and Wendel to restructure the White Paper in this regard, including a description of the number of different financing platforms. The discussion should be framed by a section regarding globalization and the economic trends that are driving movement of capital. As indicated by Professors Sebok and Wendel at the beginning of the conversation, the White Paper will not comment on whether alternative litigation financing is socially desirable or whether it is good or bad on the merits. The Commission also agreed after further

discussion that the Comment to Model Rule 1.5 should not be amended to add language regarding alternative litigation finance. This can be rolled into the White Paper.

6. Alternative Business Structures: Reporter Paul Paton and Ellyn Rosen updated the Commission on recent outreach to the General Practice, Solo and Small Firm Division and to the Young Lawyers Division. Each group was surveyed on-site during the presentations and also will be surveyed more broadly via listserves and other online survey tools. While there is no surprise that a number of lawyers are opposed to any changes to Model Rule 5.4, the presentations to these divisions also showed an interest in having more tools to allow lawyers to innovate in how they ethically provide legal services to clients in the 21st Century. This is also a willingness to learn more about alternative business structures (ABS) and how they can help lawyers and clients. The Working Group continues to study whether to recommend to the Commission any of the three remaining options for ABS (MDPs, the Washington, D.C. approach, or the Washington, D.C. approach with additional restrictions). The Commission requested that any proposal by the Working Group should note that the Commission also studied the proactive practice management model for entity regulation successfully implemented in Australia, and that the Commission has asked the Standing Committee on Professional Discipline to continue that study (including the U.K.'s efforts to implement it) and determine whether such a system would be appropriate to recommend for adoption in the U.S. A number of Commissioners indicated that they considered the Washington, D.C. approach, with additional restrictions such as a cap on the percentage on nonlawyer partners, to be a moderate one; others expressed concern about making any changes to Rule 5.4. The Commission advised that , if the Working Group decides to recommend that the Commission propose amending Model Rule 5.4 as currently permitted in Washington, D.C. (including any additional restrictions), the accompanying report should explain the options that the Commission did not choose to propose and why. The Uniformity, Conflicts of Interest and Choice of Law Working Group held a teleconference with the Alternative Business Structures Working Group to discuss the Commission's directive to find a way to address the existing, not theoretical problems facing U.S. lawyers who are practicing in jurisdictions where alternative business structures are now permitted. The Groups will continue to coordinate.

7. Adjournment: The meeting adjourned at 3:30 p.m.

Respectfully Submitted,

Ellyn S. Rosen
Commission Counsel