To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals

From: Jamie S. Gorelick and Michael Traynor, Co-Chairs

ABA Commission on Ethics 20/20

Re: For Comment: Revised Draft Proposals Relating to Technology, Outsourcing, and Inbound Foreign Lawyers

Date: September 19, 2011

The Commission is pleased to release revised draft proposals relating to lawyers’ use of technology, inbound foreign lawyers, and outsourcing. Key changes from the earlier drafts are highlighted in this memorandum. In developing the revised proposals, the Commission benefited greatly from the input of various ABA and outside entities, as well as from many people who commented on the Commission’s prior drafts. The Commission is grateful to those who have provided comments to date.

Our work is at a critical stage, so we still need to hear from you about what we have produced. We want feedback and input from as much of the public and profession as possible so that we can present fully vetted recommendations to the House of Delegates next August. As a result, we strongly encourage you to comment on the Commission’s revised proposals, as well as the new proposals that the Commission released on September 8, 2011, by November 30, 2011. Comments may be submitted to Senior Research Paralegal, Natalia Vera at natalia.vera@americanbar.org. (Comments received may be posted to the Commission’s website.) The Commission anticipates releasing one more drafts of these proposals for public comment in early 2012 before finalizing and submitting them to the ABA House of Delegates in May 2012, for the House’s consideration at its August 2012 meeting.

When reading these revised drafts of the Commission’s proposals, it is important to note that the Commission has released its proposals by subject matter. Given the broad array of topics under Commission consideration, this approach was designed to facilitate comments on specific substantive issues. As a result, the Commission has proposed changes to the same Model Rule in different proposals. For example, the Commission has proposed changes to Model Rule 1.6 to address issues relating to technology, as well as issues relating to conflicts checking. Similarly, the Commission has proposed changes to Model Rule 5.5 that address issues relating to outsourcing, inbound foreign lawyers, and multijurisdictional practice. Within the next few weeks, after all of the Commission’s draft proposals are released, the

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1http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_tecnology_and_confidentiality_revised_resolution_and_report_posting.authcheckdam.pdf

2http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_confidentiality_and_lawyers_moving_firms_initial_resolution_report.authcheckdam.pdf


5http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_5_5_d3_continuous_presence_initial_resolution_and_report_for_comment.authcheckdam.pdf
Commission will make available a comprehensive document that shows all of the proposed changes to each Model Rule.

I.  New Proposed Language Relating to Technology (Confidentiality)

Model Rule 1.6. The Commission received several comments regarding the proposal to change the language in Comment [16]. It was suggested that, when considering whether a lawyer has used reasonable safeguards to protect a client’s information from unauthorized access or inadvertent disclosure, it is necessary to consider the difficulty of implementing the safeguards and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). The Commission agreed with these recommendations, and the new proposed version of Comment [16] includes these two factors in addition to the factors that the prior draft identified.

The revised draft also adds a sentence to Comment [16] that is nearly identical to an existing sentence that appears in Comment [17], to make clear that a client might require the lawyer to implement special security measures not required by the Rule, or may give informed consent to the use of security measures that are different from what the Rule prescribes.

Finally, the updated draft adds a sentence to the end of Comment [17] that is designed to remind lawyers that, when sending confidential information, other laws and regulations impose confidentiality-related obligations beyond those that are identified in the Model Rules of Professional Conduct. The sentence is analogous to a similar sentence in Comment [16], which addresses a lawyer’s duties when storing confidential information.

Model Rule 4.4. The Commission heard concerns, including from the New York State Bar Association’s Committee on Standards of Attorney Conduct (COSAC), that the proposed new phrase “document or information” was ambiguous and might be overly broad. The Commission agreed and has re-phrased the proposal so that it uses a term that is commonly found in the discovery context – “document or electronically stored information.”

The Commission also decided to propose to replace the word “inadvertent” with the phrase “not intended to be disclosed to the lawyer.” The purpose of the change is to recognize that a lawyer might send a document intentionally, but mistakenly send it to the wrong party. A lawyer who erroneously receives the document would still have a duty under Rule 4.4(b) to report the error to the sender, even though the sending lawyer did not send the document “inadvertently.”

Model Rule 1.4. The Commission has developed a new proposal to amend Comment [4] to Model Rule 1.4. The last sentence currently says that, “[c]lient telephone calls should be promptly returned or acknowledged.” The Commission proposes to replace that admonition with the following language: “Lawyers should promptly respond to or acknowledge client communications.” The Commission nevertheless concluded that this language more accurately describes a lawyer’s obligations in light of the increasing number of ways in which clients use technology to communicate with lawyers, such as by email.

II.  New Proposed Language Relating to Technology (Client Development)

In response to concerns raised by the Standing Committee on Lawyer Referral and Information Service and the New York State Bar Association’s Committee on Standards of Attorney Conduct, the Commission re-drafted some of the language in Comment [5] to Rule 7.2
to make clear that a lead generator cannot use false or misleading communications on a lawyer’s behalf. In particular, the new draft contains language that explains that lead generators must disclose that they are being paid by the lawyers who are receiving the referrals. The lead generator cannot state or imply that it has analyzed the potential client’s legal problems when determining which lawyer should receive the referral.

The Commission also incorporated a suggestion to refine the definition of a “recommendation” for purposes of Rule 7.2, as any communication that “endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities.”

The revised draft also deletes the word “autodialing” in renumbered Comment [3] to Rule 7.3. The Commission’s research revealed that “autodialing” (or “robo-calling”) is now unlawful in many situations. See, e.g., 47 U.S.C. 227(b). The updated proposal instead reminds lawyers that other law often governs a lawyer’s conduct in this area.

III. New Proposed Language Relating to Outsourcing

The revised draft of the Commission’s proposals relating to outsourcing adds Comment [7] to Model Rule 1.1. The new Comment is intended to describe a lawyer’s obligations when a client requests multiple firms to perform discrete legal tasks concerning the same legal matter. In such situations, the new Comment language makes clear that law firms should consult with each other and the client about the allocation or scope of representation and responsibility, including the allocation of responsibility for the monitoring and supervision of any nonfirm lawyers who will be working on the client’s matter. When making any allocations of responsibility, the proposed Comment reminds lawyers that they (and their clients) might have additional obligations that are a matter of law beyond the scope of these Rules, particularly in the context of discovery.

IV. Inbound Foreign Lawyers

The Commission continues to recommend carefully circumscribed revisions to ABA Model Rules concerning foreign lawyers and pro hac vice admission, multijurisdictional practice, and in-house counsel. The substance of the Commission’s proposals has not changed, but the accompanying draft reports have been updated to reflect developments in state law and related ABA policies.