

## **ABA Commission on Ethics 20/20 Introduction and Overview**

The ABA Commission on Ethics 20/20 respectfully submits to the House of Delegates the accompanying Resolutions and Reports. They are the product of a three-year study of how globalization and technology are transforming the practice of law and how the regulation of lawyers should be updated in light of those developments. As we neared the end of our work, we decided that, to better facilitate the House of Delegates' consideration of the issues, the Commission should split its recommendations to the House into two sets of proposals. The first six proposals are set forth here; the Commission will decide later this year which additional recommendations it will ask the House of Delegates to consider in February 2013.

As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission")<sup>1</sup> and the ABA Commission on Multijurisdictional Practice ("MJP Commission").<sup>2</sup> Those Commissions, the ABA House of Delegates, and the ABA Center for Professional Responsibility performed an invaluable service to the profession, clients, and the public by developing, adopting, and implementing those recommendations.

Technology and globalization have transformed the practice of law in ways the profession could not anticipate in 2002. Since then, communications and commerce have become increasingly globalized and technology-based.<sup>3</sup> In August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to tackle the ethical and regulatory challenges and opportunities arising from these 21<sup>st</sup> century realities. She charged the Commission with conducting a plenary assessment of the ABA Model Rules of Professional Conduct and related ABA policies, and directed it to follow these principles: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.<sup>4</sup>

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<sup>1</sup> See ABA Commission on Evaluation of the Model Rules of Professional Conduct (Ethics 2000 Commission), [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html).

<sup>2</sup> See ABA Commission on Multijurisdictional Practice, [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission\\_on\\_multijurisdictional\\_practice.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html).

<sup>3</sup> Sucharita Mulpuru et al., *U.S. Online Retail Forecast, 2010 to 2015*, Forrester Research, Inc. (2011) (finding that, in 2010, U.S. online retail sales grew 12.6%, reaching \$176.2 billion and that, by 2015, they are expected to reach \$278.9 billion). See also Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 *Hastings L.J.* (forthcoming May 2012).

<sup>4</sup> See *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT* (1992), [http://www.abanet.org/cpr/reports/mckay\\_report.html](http://www.abanet.org/cpr/reports/mckay_report.html). While the Model Rules for Lawyer Disciplinary Enforcement retain the "self-regulation" terminology, the U.S. legal profession is primarily regulated by each jurisdiction's highest court of appellate jurisdiction. The ABA has long supported this form of regulation of the U.S. legal profession.

Our work product has taken four forms.

- First, we developed the accompanying Resolutions and Reports.
- Second, we filed with the House of Delegates Informational Reports on “Lawyer and Law Firm Ratings and Rankings” as well as on “Alternative Litigation Finance.” The Commission is developing an informational report about alternative law practice structures.
- Third, we referred specific topics to ABA entities with the necessary expertise to address them, *e.g.*, asking the Center for Professional Responsibility to report on constitutional issues associated with lawyer advertising rules in a digital age and requesting the Standing Committee on Ethics and Professional Responsibility to develop ethics opinions on several topics.<sup>5</sup>
- Finally, because globalization and technology are evolving at such a rapid pace, we have recommended that the Center for Professional Responsibility coordinate with other ABA entities to establish centralized and up-to-date websites to help lawyers address critical and constantly evolving ethical and other issues relating to technology and outsourcing.

We do not recommend changes to our basic regulatory construct. Some commentators have suggested that state-based judicial regulation of the profession is unworkable in the modern environment.<sup>6</sup> The Commission concluded, as did the MJP Commission before it, that those advocating for a departure from state-based judicial regulation of the legal profession in the U.S. had not made their case and, indeed, that there remain strong reasons to maintain our state-based system of judicial regulation.<sup>7</sup>

### **The Commission’s Process**

At its first meeting in September 2009, the Commission agreed that transparency, broad outreach and opportunities for frequent input into its work would be crucial. In November 2009, the Commission released its Preliminary Issues Outline,<sup>8</sup> and subsequently released for comment a

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<sup>5</sup> Specific information regarding these referrals can be viewed at the Commission’s website at [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html).

<sup>6</sup> *See e.g.* Comments of the Association of Professional Responsibility Lawyers to the ABA Commission on Ethics 20/20 (April 4, 2011), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/associationofprofessionallawyers\\_issuespaperconcerningmultijurisdictionalpractice.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/associationofprofessionallawyers_issuespaperconcerningmultijurisdictionalpractice.authcheckdam.pdf); Comments of the Association of Corporate Counsel to the ABA Commission on Ethics 20/20 (July 2010), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/associationofcorporatecounsel\\_inboundforeignlawyermemorandaandtemplate.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/associationofcorporatecounsel_inboundforeignlawyermemorandaandtemplate.authcheckdam.pdf). The Commission also studied competition authority and consumer movements abroad that have pushed for structural change from outside of the profession, including consumer claims of dissatisfaction with access to legal services and disciplinary enforcement.

<sup>7</sup> *See* ABA Comm’n on Multijurisdictional Practice Report to the House of Delegates: Report 201A (2002), <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201a.authcheckdam.pdf>.

<sup>8</sup> ABA Commission on Ethics 20/20 Preliminary Issues Outline (November 19, 2009), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/preliminary\\_issues\\_outline.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf).

wide range of documents, including issues papers, draft proposals, and drafts of Informational Reports. We held eleven open meetings where audience members participated; conducted public hearings and roundtables, domestically and abroad; created webinars and podcasts; received and reviewed over 350 written and oral comments from the bar, the judiciary, and the public. To date we have made more than 100 presentations about our work, including presentations to the Conference of Chief Justices, the House of Delegates, ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, and local, state, and international bar associations.

The Commission created seven Working Groups with participants from relevant ABA and outside entities.<sup>9</sup> Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Section of Litigation, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Section of Law Practice Management, and the National Organization of Bar Counsel. The Commission thanks the individuals from these entities for their time, expertise and wisdom.

We are grateful for the truly global input received from the profession and the public, and thank all individuals, organizations and bar associations that identified issues that needed to be addressed and offered possible ways of addressing those issues. All of those comments, testimony, and suggestions helped shape the Commission's work.

### **Changes in How We Practice**

The Commission's Resolutions and supporting Reports respond to two important trends. First, technology has irrevocably changed and continues to alter the practice of law in fundamental ways. Legal work can be, and is, more easily disaggregated; business development can be done with new tools; and new processes facilitate legal work and communication with clients.<sup>10</sup> Lawyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve. Second, coupled with technology, globalization continues to transform the legal marketplace, with more clients confronting legal problems that cross jurisdictional lines and more lawyers needing to respond to those client needs by crossing borders (including virtually) and relocating to new jurisdictions. Together, these trends have fueled and continue to spur dramatic changes to the legal profession and have given rise to new ethics issues that the Commission's proposals seek to address.<sup>11</sup>

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<sup>9</sup> Those Working Groups were tasked with studying and developing recommendations regarding the following topics: Implications of New Technologies; Domestic and International Outsourcing; Conflicts of Interest, Uniformity, and Choice of Law; Alternative Litigation Financing; Law Firm Ratings and Ranking; Alternative Law Practice Structures; and Inbound Foreign Lawyers.

<sup>10</sup> See, e.g., Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 Fordham L. Rev. 2137 (2010).

<sup>11</sup> See generally NEIL RICKMAN & JAMES M. ANDERSON, INNOVATIONS IN THE PROVISION OF LEGAL SERVICES IN THE UNITED STATES: AN OVERVIEW FOR POLICYMAKERS (Rand 2012).

These trends are attended by economic forces, especially the movement of capital into new areas, e.g., investment in law firm equity in countries that permit such investment; alternative financing of litigation; and unbundling and outsourcing many of the services that once formed the pyramid of services performed by traditional law firms. The economic pressures are dynamic and varied. They amplify the challenges our profession must confront in a technologically advanced and globalized era. These trends and forces also foster uncertainty about where the profession is headed, and what opportunities lawyers, especially younger ones, will have to perform professional services and earn a livelihood.

### ***Technology***

Technology affects nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and market legal services. Even more fundamentally, technology has transformed the delivery of legal services by changing where and how those services are delivered (e.g., in an office, over the Internet or through virtual law offices), and it is having a related impact on the cost of, and the public's access to, these services.

Several developments are particularly notable. In the past, lawyers communicated with clients by telephone, in person, by facsimile or by letter. Lawyers typically stored client confidences in paper form, often inside locked file cabinets, behind locked office doors or in offsite storage facilities. Even when confidential client information was maintained electronically, the information was stored on desktop computers that remained within the firm or on servers typically located in the same office. Today, lawyers regularly communicate with clients electronically, and confidential information is stored on mobile devices, such as laptops, tablets, smartphones, and flash drives, as well as on law firm and third-party servers (i.e., in the "cloud") that are accessible from anywhere.<sup>12</sup> This shift has had many advantages for lawyers and their clients, both in terms of cost and convenience. However, because the duty to protect this information remains regardless of its location, new concerns have arisen about data security and lawyers' ethical obligations to protect client confidences.

Technology is also having a related impact on how lawyers conduct investigations, engage in legal research, advise their clients, and conduct discovery.<sup>13</sup> These tasks now require lawyers to have a firm grasp on how electronic information is created, stored, and retrieved. For example, lawyers need to know how to make and respond to electronic discovery requests and to advise their clients regarding electronic discovery obligations.<sup>14</sup> Legal research is now regularly and often more efficiently conducted online.<sup>15</sup> These developments highlight the importance of keeping abreast of changes in relevant technology in order to ensure that clients receive competent and efficient legal services.

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<sup>12</sup> ABA, LEGAL TECHNOLOGY SURVEY REPORT: EXECUTIVE SUMMARY 18-22 (2011) (documenting lawyers' usage of various devices and noting changes over time).

<sup>13</sup> ABA, LEGAL TECHNOLOGY SURVEY REPORT Vol. III 52-56 (2011) (reporting the results of a survey documenting the pervasive need to use and respond to electronic discovery).

<sup>14</sup> See, e.g., Fed. R. Civ. P. 26(b)(2)(B) & 26(f)(3)(C).

<sup>15</sup> ABA, LEGAL TECHNOLOGY SURVEY REPORT: EXECUTIVE SUMMARY 81-89 (2011) (reporting the results of a survey of lawyers that found that nearly 80% of respondents start their legal research by going to online sources; and that fewer than half of respondents use print materials regularly).

In some situations, a matter may require the use of technology that is beyond the ordinary lawyer's expertise. For example, electronic discovery may require a sophisticated knowledge of how electronic information is stored and retrieved. Thus, another development associated with technology is that lawyers are increasingly disaggregating work by retaining other lawyers and nonlawyers outside the firm (i.e., outsourcing work to lawyers and nonlawyers) to perform critical tasks. Technology also permits the integration of these otherwise disaggregated workstreams, encouraging clients and lawyers to outsource elements of a representation.

Technology is changing the way that clients find lawyers. The Internet provides immediate access to information about lawyers through search engines, websites, blogs, and ratings and rankings services.<sup>16</sup> Lawyers are using various Internet-based client development tools, such as pay-per-click and pay-per-lead services,<sup>17</sup> as well as social and professional networking sites.

Technology continues to reshape the form of law offices and change how legal services are delivered. Some firms now exist solely online as virtual law practices.<sup>18</sup> Other firms exist as continuously evolving collaborations of lawyers who come together to handle discrete legal matters for particular clients.<sup>19</sup> Firms use online law practice management systems that are inexpensive and particularly useful to solo practitioners and lawyers in small firms.<sup>20</sup> The Internet also has enabled clients to access law-related services at a very low cost through websites that are not run by lawyers, creating new competitive pressures and potentially transformative consequences for the practice of law.<sup>21</sup>

Technology also has given rise to an increasing number of cross-jurisdictional issues. Lawyers can easily provide legal services to clients wherever they may be. This ability to provide services virtually has raised new ethical issues.

### ***Globalization and Cross-Jurisdictional Practice***

Technology has facilitated the increasing globalization of the economy generally and the legal services marketplace specifically.<sup>22</sup> Clients regularly expect lawyers in firms of all sizes to

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<sup>16</sup> See generally ABA Standing Comm. on the Delivery of Legal Services, *Perspectives on Finding Personal Legal Services* (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/20110228\\_aba\\_harris\\_survey\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/20110228_aba_harris_survey_report.authcheckdam.pdf).

<sup>17</sup> See, e.g., N.J. Sup. Ct. Comm. on Att'y Advertising, *Internet Advertising, Misleading Content, and Impermissible Referral Services*, Ethics Op. 43 (2011); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 897 (2011).

<sup>18</sup> See generally STEPHANIE L. KIMBRO, *VIRTUAL LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES ONLINE* (2010).

<sup>19</sup> See, e.g., Axiom Law, <http://www.axiomlaw.com/index.php/overview> (last visited April 26, 2012). See also Regan & Heenan, *supra* note 10.

<sup>20</sup> *Supra* note 18, at 3-4.

<sup>21</sup> See generally RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008) (describing how technology is revolutionizing the delivery of legal services and predicting how those changes will affect the legal profession in the future).

<sup>22</sup> See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE 21<sup>ST</sup> CENTURY* (2005). See also Laurel S. Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 Nw. J. Int'l L. & Bus. 527 (2008); Susskind, *supra* note 21.

handle matters that involve multiple jurisdictions, domestic and international.<sup>23</sup> For example, in family law matters, lawyers increasingly must address issues involving a spouse who is a citizen of another jurisdiction, domestic or foreign, or assets that are located in another U.S. jurisdiction or country.<sup>24</sup> Many business clients operate in multiple jurisdictions. An Internet-based company may encounter legal issues throughout the country or the world simply as a result of its online presence.

Globalization has not only affected the broader economy, producing more matters that impact multiple jurisdictions, but it also has affected legal employment and professional mobility. A decade ago, the MJP Commission found that, “The explosion of technology and the increasing complexity of legal practice have resulted in the need for lawyers to cross state borders to afford clients competent representation.”<sup>25</sup> In response to this practice reality, the MJP Commission proposed – and the ABA House of Delegates adopted – a regulatory framework that allowed lawyers, subject to certain limitations, to practice law on a temporary basis in jurisdictions in which they were not otherwise authorized to do so.<sup>26</sup> That framework included mechanisms that allowed lawyers, sometimes with limitations, to establish an ongoing practice in a jurisdiction in which they were not otherwise authorized to practice, without the necessity of sitting for a written bar examination.<sup>27</sup> This framework has been widely adopted<sup>28</sup> and has enabled lawyers to represent their clients more effectively and efficiently, provided clients with more freedom regarding their choice of counsel, and afforded lawyers more personal and professional flexibility.

We reviewed this framework in light of the accelerated pace of change and the growing proportion of legal work that involves more than one U.S. jurisdiction. Unsurprisingly, we found that the U.S. legal employment market has been affected by the same forces that have made employment throughout the broader economy more tenuous and unpredictable. As a result, both newer and more experienced lawyers regularly seek employment outside their original jurisdiction of licensure, sometimes because of personal needs, including the relocation of a

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<sup>23</sup> See, e.g., Emile Loza, *Attorney Competence, Ethical Compliance, and Transnational Practice*, 52 *The Advocate*, no. 10, 2009 at \*28, available at <http://isb.idaho.gov/pdf/advocate/issues/adv09oct.pdf>.

<sup>24</sup> See, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families*, 44 *Fam. L.Q.* 4 (2011); Allison Maxim, *International Parental Child Abduction: Essential Principles of the Hague Convention*, Vol. LXIX *Bench & Bar of Minnesota*, no. IV (2012).

<sup>25</sup> See Report of the ABA Commission on Multijurisdictional Practice, *Client Representation in the 21<sup>st</sup> Century* (2002),

[http://www.americanbar.org/content/dam/aba/migrated/final\\_mjp\\_rpt\\_121702\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_121702_2.authcheckdam.pdf).

<sup>26</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (2011) [hereinafter Model Rule XX]; ABA MODEL RULE FOR PRO HAC VICE ADMISSION.

<sup>27</sup> See, e.g., MODEL RULE 5.5(d); ABA MODEL RULE FOR ADMISSION BY MOTION.

<sup>28</sup> For example, since August 2002, forty-four jurisdictions have adopted some form of multijurisdictional practice that is similar to Model Rule 5.5. Chart, *State Implementation of ABA Model Rule 5.5* (2010),

[http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick\\_guide\\_5\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf). Forty jurisdictions have adopted a version of the ABA Model Rule on Admission by Motion. Chart, *Comparison of ABA Model Rule on Admission by Motion With State Versions* (2011),

[http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission\\_motion\\_comp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf).

Thirty-one jurisdictions have adopted a version of the Model Rule for the Licensing and Practice of Foreign Legal Consultants. Chart, *Foreign Legal Consultant Rules* (2010)

[http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for\\_legal\\_consultants.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for_legal_consultants.authcheckdam.pdf).

spouse or the loss of a job, but also because of client demands.<sup>29</sup> Consequently, several ethical issues are arising with greater frequency, such as how conflicts of interest should be detected when lawyers seek new employment and how to better facilitate admission in a new jurisdiction while protecting clients and the public.

These same trends, and related demographic shifts within the U.S., also have produced more legal work that involves foreign law and foreign jurisdictions. In 2000, the foreign-born population in the U.S. was 31,107,899. Between 1990 and 2000, every jurisdiction except five had at least a 30% increase in the number of foreign born residents.<sup>30</sup> By 2009, the total U.S. foreign born population had risen to 36,750,000, approximately 12% of the U.S. population.<sup>31</sup> Foreign-born residents have family law, estate planning, and business relationships in their countries of origin or the countries of origin of their spouses or business associates. Foreign-owned companies are involved in multinational litigation that involves U.S. courts and in cross-border transactions and regulatory issues.

In light of these changes, we concluded that additional modifications to the Model Rules and other policies are necessary. These changes will help lawyers continue to ethically serve their clients, who rightfully expect their lawyers to respond nimbly to legal problems that arise in a 21<sup>st</sup> century marketplace.

## **SUMMARY OF COMMISSION PROPOSALS**

The Commission on Ethics 20/20 believes that the principles underlying the Model Rules of Professional Conduct remain relevant and valid, so most of our recommendations are clarifications and expansions of the Model Rules as well as other existing Model Court Rules and policies.<sup>32</sup> In developing these recommendations, the Commission sought to address the needs of clients and lawyers in a technology-driven global economy while protecting the public and our system of justice. The Commission is presenting the accompanying Resolutions by subject matter rather than by Rule because the context in which they were developed is crucial to understanding their substance.

### ***Technology and Confidentiality***

As noted above, technology has transformed how lawyers communicate with their clients and store their clients' confidences. This shift has created new concerns and questions about

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<sup>29</sup> See, e.g., Ronit Dinovitzer et al., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 54-60 (Am. Bar Found. & NALP Foundation for Law Career Research and Education 2009), <http://www.americanbarfoundation.org/publications/338>; ABA Resolution 108 (Feb. 2012), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2012\\_hod\\_midyear\\_meeting\\_108.doc](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_108.doc).

<sup>30</sup> U.S. Census Bureau, *Census 2000 Brief, The Foreign-Born Population: 2000*, at 3 (Dec. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> & U.S. Census Bureau, *Profile of Selected Social Characteristics: 2000* (2000), [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_00\\_SF3\\_DP2&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF3_DP2&prodType=table).

<sup>31</sup> See Table 40, Native and Foreign-Born Populations by Selected Characteristics: 2009, <http://www.census.gov/compendia/statab/2011edition.html>.

<sup>32</sup> Also, because technology outpaces the process by which Resolutions are developed and brought to the House of Delegates, the Commission's recommendations include those described at page 2 above.

lawyers' obligations, including their duty to protect confidential information. The following proposals are intended to offer lawyers the guidance that they need.

- Because new modes of communication create challenges as lawyers try to fulfill their obligation to protect client confidences, a new paragraph (c) in Model Rule 1.6 (Confidentiality of Information), as well as new language in Comment [16], would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. This obligation is referenced in existing Comments [16] and [17], but we concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter of Rule 1.6 and described in more detail through additional Comment language.

The Commission recognizes that lawyers cannot guarantee electronic security any more than lawyers can guarantee the physical security of documents stored in a file cabinet or offsite storage facility. Our proposal would not impose upon lawyers a duty to achieve the unattainable. Instead, it identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable. The factors, which include the cost of the safeguards and the sensitivity of the information, recognize that each client, lawyer or law firm has distinct needs and that no single approach should be or can be applied to the entire legal profession. The proposal makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.

The Commission is also proposing that the ABA create and maintain a regularly updated user-friendly website to provide more specific and timely guidance than the Model Rules can provide regarding lawyers' use of commonly encountered technology. The Commission believes that the proposed amendments to Model Rule 1.6, along with the website, will ensure that lawyers understand their ethical obligations to protect client confidences in a digital age and give them sufficient guidance to fulfill that obligation.

- Because of the sometimes bewildering pace of technological change, the Commission believes that it is important to make explicit that a lawyer's duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] of Model Rule 1.1 (Competence) implicitly encompasses that obligation, but it is important to make this duty explicit because technology is such an integral – and yet at times invisible – aspect of contemporary law practice. The phrase “including the benefits and risks associated with relevant technology” would offer greater clarity regarding this duty and emphasize the growing importance of technology to modern law practice. As noted in ethics opinions, such as those relating to cloud computing,<sup>33</sup> this obligation is not new. Rather, the proposed amendment emphasizes that a lawyer should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent in a digital age.

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<sup>33</sup> See, e.g., Ala. State Bar Office of Gen. Counsel, Formal Op. 2010-02 (2010); Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 09-04 (2009); and N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 842 (2010).



- Model Rule 4.4 (Respect for Rights of Third Persons) and its Comments currently describes a lawyer’s obligations when in receipt of inadvertently disclosed “documents,” a word that has left lawyers with limited guidance when they receive inadvertently sent electronic information. To address this important ambiguity, the Commission is proposing to add language to Model Rule 4.4 to make clear that electronically stored information, in addition to information existing in paper form, can trigger Rule 4.4(b)’s notification requirements if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase “inadvertently sent” in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise, including when they receive metadata that was inadvertently sent in an electronic document. The Commission believes that these updates to the Rule will provide more guidance to lawyers who now regularly receive misdirected information, particularly information contained in electronic form.
- The screening of individual lawyers from access to certain information in a firm must now address not only documents but also electronic information. Amendments to Comment [9] of Model Rule 1.0 (Terminology) would make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. This proposal recognizes that advances in technology have made client information more accessible to the whole firm, so the process of limiting access to this information should require more than placing relevant physical documents in an inaccessible location; it necessarily requires appropriate treatment of electronically stored information as well.
- The Commission also proposes to update the existing definition of a “writing” in paragraph (n) of Model Rule 1.0 (Terminology) by replacing the word “e-mail” with the phrase “electronic information.” This change will ensure that the definition more accurately reflects the various ways that a “writing” can occur, both today and in the future.
- The last sentence of Comment [4] to Model Rule 1.4 – which currently says that, “[c]lient telephone calls should be promptly returned or acknowledged” – has become overtaken by technology. The Commission would replace that admonition with the following language: “Lawyers should promptly respond to or acknowledge client communications.”

### ***Technology and Client Development***

As lawyers use new marketing services – such as law firm websites, blogs, social and professional networking sites, pay-per-click ads, pay-per-lead services, and online videos – they are encountering a wide range of ethics-related issues. We examined these issues and concluded that the principles underlying the existing Rules – preventing false and misleading advertising, protecting the public from the undue influence of solicitations, and safeguarding the confidences of prospective clients – remain valid. However, specific language in the Rules should be updated to provide necessary guidance.

- When a lawyer’s first substantive contact with a potential client was face-to-face, it was relatively easy to determine when a communication gave rise to a prospective client-lawyer

relationship. Now such a relationship can arise in many different ways: a lawyer’s website might ask a person to send information about his injury; a lawyer might exchange information with someone on a blog; and a lawyer might use her social networking page to provide advice to “friends.”

The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship through amendments to Model Rule 1.18 (Duties to Prospective Client) and its Comments, including a new Comment [3]. The current Rule requires a “discussion,” which implies a two-way verbal exchange (e.g., an in-person meeting or telephone conversation), and does not capture the idea that Internet-based communications can, in some situations, give rise to a prospective client relationship.<sup>34</sup> We propose to replace “discusses” with “consults” and include new Comment language that identifies the circumstances under which a “consultation” triggers Rule 1.18’s duties. These amendments will help lawyers identify the precautions that they should take to prevent the inadvertent creation of a prospective client-lawyer relationship in a digital age and help the public understand the consequences of communicating electronically with a lawyer. The Comment would also make clear that a person who communicates with a lawyer to disqualify that lawyer from a matter is not a prospective client.

- New marketing tools allow lawyers to pay to have their names listed in response to Internet-based queries by people who use certain search terms as well as through other methodologies. Because the application of the Rules to these new forms of Internet-based client development is sometimes unclear, the Commission concluded that lawyers need better guidance.

For example, confusion arises out of the prohibition against paying others for a “recommendation.” Model Rule 7.2 (Advertising) was designed to prohibit a lawyer from paying others – such as “runners” or “cappers” – to recommend them. The Commission’s proposal explains how the prohibition applies to modern forms of client development, clarifying that a recommendation occurs when someone endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional language in Comment [5], is intended to ensure that the public is not misled when lawyers use tools such as pay-per-click and pay-per-lead services, and that the restrictions on fee sharing with nonlawyers are observed.

- Amendments to the title and text of Model Rule 7.3 (Direct Contact with Prospective Clients) and its Comments would clarify when a lawyer’s online communications constitute the type of direct “solicitations” that are governed by the Rule. For example, proposed language in Comment [1] notes that advertisements automatically generated in response to a person’s Internet searches about legal issues are not “solicitations.”

### ***Lawyer Mobility***

Traditionally, lawyers practiced in a single jurisdiction for their entire careers and had little need to relocate to other jurisdiction or serve clients who had multijurisdictional needs. Times have

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<sup>34</sup> See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010) at 4.

changed. Globalization and technology have transformed the legal marketplace and fueled more cross-border practice and lawyer mobility.

- In today's legal marketplace, lawyers licensed in one U.S. jurisdiction more frequently need to relocate to new U.S. jurisdictions, sometimes on short notice. Such moves may be for personal reasons, including the need to find employment or to better serve a client. The admissions process in the new jurisdiction, however, can take considerable time. In February 2012, the ABA House of Delegates recognized that lawyer spouses of military personnel frequently encounter this issue and adopted a policy designed to help those lawyers relocate to new jurisdictions.

The Commission's proposed new Model Rule on Practice Pending Admission builds on the House of Delegates' recent decision. With layers of client and public protections, the new Model Rule would enable a lawyer who has been engaged in the active practice of law for 3 of the last 5 years to practice from an office in a new jurisdiction while that lawyer diligently pursues admission there through an authorized procedure, such as admission by motion or passage of that jurisdiction's bar examination. The new Model Rule would give clients their choice of counsel and permit lawyers to practice for a limited period of time without the risk of engaging in the unauthorized practice of law.

- In another proposal recognizing the reality of an increasingly mobile profession, the Commission recommends reducing the "time in practice" requirement in the ABA Model Rule on Admission by Motion from 5 of 7 years to 3 of 5 years. The Commission believes this change responds to client needs and market demands in an increasingly borderless world, where lawyers frequently need to gain admission in other U.S. jurisdictions.

The Commission determined that a reduction of the active practice requirement to 3 of 5 years would have particularly salutary effects for less senior lawyers, who are most likely to need to move from one jurisdiction to another.

A number of jurisdictions have not yet adopted an admission by motion process or have processes with extensive restrictions and requirements. Thus, the Commission is also proposing a resolution that encourages the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions with admission by motion procedures to eliminate restrictions, such as reciprocity requirements, that do not appear in the Model Rule.

- When a lawyer explores the possibility of joining a different firm or organization or when firms consider a merger, lawyers must identify possible conflicts of interest. The Model Rules, however, do not provide sufficient guidance as to how to do so in a manner consistent with a lawyer's duty of confidentiality. Consequently, firms have developed practices that vary widely. The Commission's proposed amendments to Model Rule 1.6 (Confidentiality of Information) – consistent with ABA Formal Opinion 09-455 and other state ethics opinions – will give lawyers limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. The amendments make clear, however, that even these limited disclosures are not permissible if they would "compromise the attorney-client privilege or otherwise

prejudice the client.” The Commission is also proposing a change to Comment [7] to Rule 1.17 (Sale of Law Practice) because that Comment addresses conceptually similar issues.

These proposals serve two important goals. First, reflecting the reality that these disclosures are already taking place, the proposals seek to ensure that the disclosures are properly regulated and provide more, rather than less, protection for client confidences. Second, the proposals offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

### ***Outsourcing***

As noted above, lawyers are increasingly outsourcing legal and law-related work, both domestically and offshore. In 2008, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that provides guidance to lawyers about how to outsource ethically and in a manner that is consistent with the profession’s core values.<sup>35</sup> State and local bar associations also have offered guidance in this area.<sup>36</sup> To date, however, the Model Rules and their accompanying Comments have not incorporated this guidance.

The Commission concluded that, although changes to the text of the Model Rules are not necessary, the Comments to some of those Rules should be clarified to help lawyers better understand how ethically to retain outside lawyers and nonlawyers to perform legal and law-related work for a client.

- Proposed new Comments to Model Rule 1.1 (Competence) identify the factors that lawyers need to consider when retaining lawyers outside the firm to assist on a matter, including that they will contribute to the competent and ethical representation of the client. The Comment also provides that, ordinarily, a lawyer should obtain a client’s informed consent before retaining nonfirm lawyers to assist on a client’s matter.
- The Commission is also proposing amendments to both the title of Model Rule 5.3 (changing it from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance”) and its Comments to underscore that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer’s own professional obligations, including the lawyer’s obligation to protect client information. The changes also alert lawyers that they have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers.

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<sup>35</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008).

<sup>36</sup> See, e.g., State Bar of Cal., Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2004-165 (2004); Colo. Bar Ass’n, Formal Op. 121 (2009); Fla. State Bar Prof’l Ethics Comm., Formal Op. 07-2 (2008); N.C. State Bar, 2007 Formal Op. 12 (2008); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 762 (2003); N.Y.C. Bar Ass’n Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006); Ohio Sup. Ct. Bd. of Comm’rs on Grievances & Discipline, Advisory Op. 2009-06 (2009); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Responsibility, *Report on the Outsourcing of Legal Services Overseas* (2009); Council of Bars and Law Societies of Europe, *CCBE Guidelines on Legal Outsourcing* (2010), [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_Guidelines\\_on\\_leg1\\_1277906265.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf).

- Finally, proposed amendments to Comment [1] of Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice) would make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

## **Conclusion**

The Commission's objective has been to develop recommendations that respond to a rapidly changing legal marketplace while preserving the legal profession's core values. We pursued this goal through a highly collaborative and deliberative process that was commensurate with the seriousness of our task and that will continue as we consider our remaining proposals.

In this process, we have had the honor of serving with an extraordinarily dedicated and talented group of people who have devoted substantial time, energy, and attention to the Commission's work. We came to this work from various backgrounds, including small firms, large firms, government work, in-house counsel positions, the judiciary, and academia, and with different perspectives on the practice of law and the challenges that lawyers face. We engaged in vigorous debate and research. Despite a diversity of perspectives and views, we reached, through a collaborative process, a consensus as to how to approach all of the issues set forth in these Resolutions and accompanying Reports.

We benefited from the invaluable input of members of the bar and the public who responded to our requests for feedback and testified at our hearings and other venues. This highly participatory process was necessary to inform the work of the Commission in assessing and responding to the changes wrought by technology and globalization, while preserving necessary public protections and providing lawyers with greater clarity regarding their ethical obligations in a 21<sup>st</sup> century legal marketplace.

On behalf of the Commission, we thank ABA Past President Carolyn B. Lamm for her foresight in establishing the Commission and her commitment to ensuring that the Association retains its leadership role in developing and promoting the highest standards of professional conduct to protect clients and guide lawyers; ABA Past President Stephen N. Zack, current ABA President Wm. T. (Bill) Robinson, III, and ABA President-Elect Laurel G. Bellows for their support of the Commission's work throughout its tenure; our Reporters, Andrew M. Perlman (Chief Reporter), Paul D. Paton, Anthony Sebok, and W. Bradley Wendel for their diligence and insights in researching and drafting the many reports, resolutions, papers, and other documents that the Commission produced; Commission Counsel Ellyn S. Rosen for her leadership and good counsel with respect to every facet of the Commission's efforts; Jeanne P. Gray, Associate Executive Director and Director of the ABA Center for Professional Responsibility for her support; and to the many Center lawyers and ABA Staff who assisted us.

It is important to note that the proposals set forth in these Resolutions reflect the state of the profession during a snapshot in time. Technology and globalization will continue to produce new challenges and opportunities. Indeed, the pace of change has quickened, making it likely that the ABA will want to reexamine the Model Rules and related policies with greater frequency in the years ahead.

In the meantime, it is our hope that our efforts will advance the profession's core values, give lawyers more guidance regarding their ethical obligations, and most importantly, benefit the clients and the public that we are privileged to serve.

Respectfully submitted,

**ABA Commission on Ethics 20/20  
August 2012**

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