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. These Resolutions contain the last set of proposals the Commission will submit to the House for its consideration.

In August 2012, the Commission proposed – and the House adopted – six Resolutions. Those Resolutions were 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. The Resolutions addressed a wide range of topics, including confidentiality in a digital age,[1] ethics issues arising from new forms of advertising,[2] outsourcing,[3] and issues relating to lawyer mobility.[4]

Since August, the Commission has focused on several discrete ethics-related issues arising out of globalization. In particular, the Commission has examined choice of law problems related to conflicts of interest as well as the practice authority of foreign lawyers in the U.S. who are asked to advise clients on foreign or international law issues. As a result, the Commission is submitting to the House the accompanying Resolutions and Reports, which are described in more detail below.[5]

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[1] ABA Commission on Ethics 20/20, *Revised Resolution 105A* (Aug. 6, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf.

[2] ABA Commission on Ethics 20/20, *Resolution 105B* (Aug. 6, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.authcheckdam.pdf.

[3] ABA Commission on Ethics 20/20, *Resolution 105C* (Aug. 6, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.authcheckdam.pdf.

[4] ABA Commission on Ethics 20/20, *Resolution 105D* (Aug. 6, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d.pdf; ABA Commission on Ethics 20/20, *Resolution 105E* (Aug. 6, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e.pdf; ABA Commission on Ethics 20/20, *Revised Resolution 105F* (Aug. 6, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105f.pdf.

[5] The Commission also referred to the Standing Committee on Ethics and Professional Responsibility several choice of law issues that are arising with increased frequency due to globalization. As explained in more detail later this Report, those issues include the meaning of the phrase "predominant effect" in Model Rule 8.5(b)(2) (Choice of Law); whether a law firm in a jurisdiction that prohibits nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers may divide a fee pursuant to Rule 1.5(e) (Fees) with a different law firm in which such ownership or fee sharing occurs and is permitted by the Rules applicable to that firm; and whether lawyers can share fees with nonlawyers within their own firms in a manner that is consistent with Model Rule 5.4 (Professional Independence of a Lawyer) when those nonlawyers are located in a jurisdiction where such fee sharing is permissible.

The Commission's Process

The Commission's process has involved broad outreach and frequent opportunities for input. In November 2009, the Commission released its Preliminary Issues Outline,[6] and subsequently released for comment a wide range of documents, including issues papers, draft proposals, and draft Informational Reports. We held thirteen open meetings where audience members participated; conducted public hearings and roundtables, domestically and abroad; created webinars and podcasts; and received and reviewed over 400 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.

Early in its process, the Commission created seven Working Groups with participants from relevant ABA and outside entities.[7] 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 input received from the profession and the public, and we 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.

In August 2012, as a result of this process, the Commission submitted a slate of proposals that responded to two important trends: changes in technology and globalization. As explained above, the present Resolutions and Reports focus on issues relating to globalization.

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[6] ABA Commission on Ethics 20/20, *Preliminary Issues Outline* (Nov. 19, 2009), http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

[7] 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.

The Effects of Globalization

One important practical effect of globalization is that clients regularly expect lawyers in firms of all sizes to handle matters that involve multiple jurisdictions, domestic and international.[8] For example, many U.S.-based businesses operate in numerous jurisdictions and have legal problems that span several countries and continents. Similarly, many foreign-owned companies have substantial business and legal interests that involve numerous jurisdictions, including in the U.S.[9]

Related demographic shifts have increased the number of individuals in the U.S. who have legal needs that cross national lines. In 2000, the foreign-born population in the U.S. was 31,107,899. By 2009, the total U.S. foreign-born population had risen to 36,750,000, approximately 12% of the U.S. population.[10] These 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.[11]

Lawyers can no longer assume that their practices will be contained by national borders. Lawyers in all practice settings, from solo practitioners handling divorces for foreign-born clients to law firms handling international business transactions, may encounter work that involves or relates to the law of other nations.

SUMMARY OF COMMISSION PROPOSALS AND REFERRALS

The Resolutions accompanying this Report, along with several referrals to the Standing Committee on Ethics and Professional Responsibility, respond to these developments and ensure that the ABA retains its leadership role in developing model regulations for the legal profession.

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[8] *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.

[9] *See, e.g.*, ABA Task Force on International Trade in Legal Services, *International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience* (Feb. 4, 2012) [hereinafter ABA Task Force on International Trade in Legal Services, *International Trade in Legal Services*], *available at* http://arbitrateatlanta.org/wp-content/uploads/2011/08/FINAL-ITILS-toolkit-2-4-12.pdf (noting that "[o]ver 3,600 foreign businesses from more than 60 countries have established operations in Georgia [alone]"); Texas Office of the Governor, *Foreign Investment in Texas: The Industries and Countries Leading Current Growth* [hereinafter Texas Office of the Governor, *Foreign Investment in Texas*], www.governor.state.tx.us/files/ecodev/Foreign_Investment.pdf (last viewed Nov. 12, 2012) (finding that more than 2,000 foreign multinationals have established locations in Texas). According to the Illinois Department of Commerce & Economic Opportunity, foreign direct investment "is a major contributor to the economic vitality of the state. Illinois ranks number one in the Midwest as a destination for foreign investment. Illinois is home to nearly 1,600 foreign firms with 6,416 locations, employing 323,362 Illinois residents. *See* Illinois Department of Commerce and Economic Opportunity, *Foreign Direct Investment in Illinois*, http://www.ildceo.net/dceo/Bureaus/Trade/Foreign_Direct_Investment/ (last visited Nov. 12, 2012).

[10] *See* U.S. Census Bureau, Table 40, Native and Foreign–Born Populations by Selected Characteristics: 2009 (2011), http://www.census.gov/compendia/statab/2011/tables/11s0040.pdf.

[11] *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).

Proposal Regarding Choice of Law and Conflicts of Interest

The Commission proposes to:

- **add new language to Comment [5] of Model Rule 8.5 (Choice of Law) that would, subject to several important limitations, authorize lawyers and clients to specify a particular jurisdiction as within the scope of Rule 8.5(b)(2) for purposes of interpreting the phrase "predominant effect";**

  and

- **ask the Standing Committee on Ethics and Professional Responsibility to draft a Formal Opinion that provides greater guidance on how to resolve conflicts-related inconsistencies in the absence of the kinds of agreements anticipated by the proposed new Comment language.**

For the reasons described above, clients are increasingly asking their lawyers to handle matters that implicate multiple jurisdictions, both within the United States and abroad. The Commission heard from lawyers who are regularly retained on these matters and learned that they confront a variety of ethics-related choice of law problems that are particularly acute in the conflicts of interest context. The problem is that, in order to determine which jurisdiction's conflict of interest rules apply to these matters, a lawyer often has to determine the jurisdiction where the lawyer's conduct has its "predominant effect." *See* Model Rule 8.5(b)(2) (Choice of Law). This determination may be difficult when the lawyer's work affects multiple jurisdictions, as is often the case.

This lack of clarity does not reflect a flaw in Rule 8.5(b)(2). Choice of law analyses are often fact-intensive, making answers difficult to determine. This unavoidable ambiguity, however, can leave clients, lawyers, and law firms with insufficient guidance about which jurisdiction's conflict rules should apply in commonly encountered situations.

The Commission is proposing a solution that is commonly used in other contexts where choice of law principles do not – and cannot – yield definitive answers: the use of choice of law agreements. The proposal, however, contains a number of limitations that reflect the distinct nature of the lawyer-client relationship and the deference afforded to the regulatory authority of courts over lawyers. For example, the agreements can only be used in the context of conflicts of interest, and the selected jurisdiction must be one that is reasonably specified. Moreover, the proposed Comment makes clear that these agreements are not binding on disciplinary authorities or on courts and that they merely "may be considered."

The Commission is also recommending that the Standing Committee on Ethics and Professional Responsibility draft a Formal Opinion that provides greater guidance on how to resolve conflicts-related inconsistencies in the absence of the kinds of agreements anticipated by the proposed new Comment language. The Commission believes that a Formal Opinion could be useful in clarifying the appropriate analysis under Rule 8.5(b)(2) and that such a Formal Opinion,

in combination with the proposed new Comment language, will enable lawyers, clients, and courts to predict with greater certainty which jurisdiction's conflict rules apply to a particular matter.

Proposals Regarding Inbound Foreign Lawyers

Clients are encountering an increasing number of legal issues and problems that implicate foreign or international law and for which the assistance of foreign lawyers can be valuable. The Commission is proposing three related Resolutions that would allow clients to utilize the expertise of foreign counsel, while ensuring appropriate limits on what they may do. The proposed changes, which are described below, reflect policies that a number of U.S. jurisdictions already have adopted without any adverse effects on clients, the public, or the courts of which the Commission is aware.

- **Amendments to the Model Rule on Pro Hac Vice Admission (permitting judges, at their discretion and subject to numerous limitations, to authorize foreign lawyers to appear pro hac vice)**

There are increasing instances in which litigation in U.S. courts involves issues related to international or foreign law. There are also increasing instances in which foreign entities or individuals find themselves in U.S. courts. One consequence is that litigants occasionally seek to retain foreign lawyers who can assist U.S. counsel on relevant issues. These clients may feel the need for help from a lawyer who knows the client's operations abroad. A foreign lawyer may also have knowledge about a country's laws, language, and customs that may help U.S. courts, lawyers, and juries better understand a litigant's position.

The Model Rule on Pro Hac Vice Admission does not currently provide judges with any guidance regarding the authority of foreign lawyers to appear *pro hac vice*. The ABA Commission on Ethics 20/20 concluded that this omission should be addressed so that judges have guidance when determining whether to exercise their discretion to grant foreign lawyers a temporary and limited *pro hac vice* practice authority.[12]

This proposal has ample precedent. A form of *pro hac vice* authority for non-U.S. lawyers is already permitted in at least fifteen states,[13] and is allowed in the U.S. Supreme Court.[14] Numerous federal courts also have rules or other authority that permit foreign lawyers to be specially admitted to appear before them in a particular matter.[15] Notably, the Commission has not learned of any resulting difficulties.

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[12] MODEL RULE ON PRO HAC VICE ADMISSION (2002), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/rule_prohac.authcheckdam.pdf.

[13] *See* ABA Center for Professional Responsibility, *Comparison Chart of ABA Model Rule for Pro Hac Vice Admission With State Versions and Amendments Since 2002* (last updated Aug. 16, 2012), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac_admin_comp.authcheckdam.pdf.

[14] SUP. CT. R. 6(2). *See also Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

[15] *See, e.g.*, CT. OF MILITARY COMM'N REVIEW RULES OF PRACTICE R. 8(f) (2008) ("Foreign Attorneys"); *DataTreasury Corp. v. Wells Fargo & Co.*, Slip Copy, 2010 WL 3912498 (E.D.Tex., 2010) (Canadian lawyer admitted *pro hac vice* in patent infringement case); *Rudich v. Metro Goldwyn Studio, Inc.*, No. 08-cv-389-bbc,

The Conference of Chief Justices has endorsed, in principle, this change. On July 28, 2010, after reviewing an early draft of the Commission's proposal, the Conference adopted a Resolution urging the ABA House of Delegates to add the Commission's "carefully limited" language about foreign lawyers to the Model Rule on Pro Hac Vice Admission.[16]

As the Conference suggested, the Commission is proposing numerous restrictions on *pro hac vice* authority for foreign lawyers. For example, the Commission's proposal lists factors – well beyond those applicable to a U.S. licensed lawyer seeking to appear *pro hac vice* – to guide a judge in determining whether to grant a foreign lawyer's application and, if so, how to determine the scope of the authority. These factors include, but are not limited to, the legal training and experience of the foreign lawyer, the foreign lawyer's familiarity with the law of the jurisdiction applicable to the matter, the extent to which the foreign lawyer's relationship and familiarity with the client or the matter will facilitate the fair and efficient resolution of the litigation, and the foreign lawyer's English language facility. The foreign lawyer also bears the burden of demonstrating to the judge and to local counsel (who must support that application) that he or she satisfies the conditions for such authorization. Disciplinary counsel and an opposing litigant may object to the application.[17]

The foreign lawyer could only appear as a co-counsel or in an advisory or consultative role, alongside an in-state lawyer and only for purposes of that particular proceeding. As a result it is a temporary and limited practice authorization. Moreover, the in-state lawyer would be responsible to the court and the client for the conduct of the proceeding, for independently advising the client on the substantive law and procedural issues of a United States jurisdiction, and for advising the client whether the in-state lawyer's judgment differs from that of the foreign lawyer. The Commission believes that these conditions and limitations, as well as others described in the report, provide abundant protection to the courts, litigants, and the public.

In sum, by adopting the Commission's proposal, the ABA would retain its leadership role in setting the standards for *pro hac vice* appearances, just as additional jurisdictions are considering this and related issues.[18] Moreover, the Commission's proposal would foster greater uniformity and ensure that jurisdictions adopt appropriate, and carefully limited, rules on the role of foreign lawyers in U.S. courts.

- **Amendments to Model Rule 5.5(d) (authorizing foreign lawyers to serve as in-house counsel from a continuous and systematic presence in the U.S.)**

Opinion and Order (Aug. 28, 2008) (admission *pro hac vice* of Israeli lawyer in copyright case); *U.S. v. Black*, No. 05 CR 00727 (N.D. Ill. Dec. 1, 2005) (Canadian lawyer admitted *pro hac vice* in criminal case).

[16] *See* Conference of Chief Justices, *Resolution 13 Endorsing in Principle the Recommended Changes to the ABA Model Rules Regarding Practice by Foreign Lawyers*, http://ccj.ncsc.dni.us/InternationalResolutions/resol13ABA.html (last visited Nov. 12, 2012).

[17] For example, according to the 2010 Report of the Office of General Counsel to the Board of Governors of the State Bar of Georgia, between May 1, 2009 through April 30, 2010, the Office of the General Counsel reviewed 763 *pro hac vice* applications; it objected to only fourteen of them.

[18] *See, e.g.*, Supreme Court of Texas, *Task Force on International Law Practice in Texas*, http://www.supreme.courts.state.tx.us/ilptf/about.asp (last visited Nov. 10, 2012).

and

- **Corresponding Amendments to the Model Rule for Registration of In-House Counsel (to provide a mechanism to identify, monitor, and hold these lawyers accountable)**

These amendments are designed to permit a foreign lawyer to serve as in-house counsel in the U.S., but with the added requirement that the foreign lawyer may not advise on U.S. law except in consultation with a U.S.-licensed lawyer.

These proposed amendments respond to the increasing number of foreign companies with substantial operations and offices in the U.S. as well as U.S. companies with substantial operations abroad.[19] These companies routinely encounter legal issues that implicate foreign or international law and want the advice of lawyers from non-U.S. jurisdictions. They often find that this advice can be offered most efficiently and effectively if those lawyers relocate to a corporate office in the U.S.

Global organizational clients sometimes need to employ in-house foreign lawyers in their U.S. offices. This development is evidenced by the seven U.S. jurisdictions – Arizona, Connecticut, Delaware, Georgia, Virginia, Washington and Wisconsin – that already permit foreign lawyers to work as in-house counsel in the U.S. offices of their clients.[20] The Commission inquired and is aware of no adverse consequences in these jurisdictions from such authority.

Notably, the proposed amendments to Model Rule 5.5(d) and the related Resolution to amend the Model Rule for Registration of In-House Counsel would not authorize the licensing or full admission of foreign in-house lawyers. Rather, the amendments would provide a limited authority to practice for the foreign lawyer's employer on matters that do not involve U.S. law, unless the foreign lawyer consults with a U.S. lawyer authorized to provide such advice. This limitation is consistent with the Model Rule for the Licensing and Practice of Foreign Legal Consultants.

It is critical to note that foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S.,[21] but are subject to little oversight. The Commission concluded that adding foreign lawyers to both Model Rule 5.5 and the Model Rule for Registration of In-House Counsel has the benefit of ensuring that those lawyers are identifiable, subject to monitoring, and accountable for their conduct. The proposals also ensure that the foreign lawyers are subject to the professional conduct rules of the jurisdiction where they are

[19] *See* ABA Task Force on International Trade in Legal Services, *International Trade in Legal* Services, *supra* note 9; Texas Office of the Governor, *Foreign Investment in Texas*, *supra* note 9.

[20] *See, e.g.*, ABA Center for Professional Responsibility, *Comparison of ABA Model Rule for Registration of In-House Counsel With State Versions* (last updated Jan. 11, 2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in_house_comp.authcheckdam.pdf. Georgia does not require registration.

[21] *See, e.g.*, J. Charles Mokriski, *In-House Lawyers' Bar Status: Counsel, You're Not in Kansas Anymore*, Boston Bar J., Jan.-Feb. 2008.

employed, contribute to the client protection fund, are subject to sanctions if they fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements. Their employers would have to attest to their compliance with these requirements, and the lawyers could be referred to appropriate authorities in their home jurisdictions of registration and licensure in the event of a violation. Clients and lawyers would benefit from consistency across jurisdictions on this issue.

The definition of who would qualify as a foreign lawyer follows the definition used in longstanding ABA policy, including the ABA Model Rule for the Licensing and Practice by Foreign Legal Consultants,[22] which state supreme courts have adopted with no adverse consequences.

If adopted by the House of Delegates, the changes proposed in these Resolutions would provide state supreme courts with an approach to this issue that protects clients and the public while allowing global organizational clients to employ in-house foreign lawyers of their choice to work in their U.S. offices.

Referrals Regarding Nonlawyer Ownership Issues

Having been asked to look at the effects of globalization on the practice of law in the United States, the Commission took note of the increasing number of jurisdictions (UK, Australia, etc., in addition to D.C.) that permit nonlawyer ownership. As a result, the Commission considered a proposal to permit a limited form of nonlawyer ownership,[23] but concluded that the case had not been made for a change to existing policy.[24]

That decision left two choice of law questions arising from inconsistencies among jurisdictions with regard to the permissibility of nonlawyer owners and partners. The first question concerned the permissibility of fee-sharing among lawyers in a single firm where the rules applicable to one of the firm's offices permit nonlawyer owners and the rules applicable to another of the firm's offices do not. The Commission announced in September 2012, that it had referred this issue to the ABA Standing Committee on Ethics and Professional Responsibility.[25]

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[22] The ABA Model Rule on Temporary Practice by Foreign Lawyers and the August 2012 Model Rule on Practice Pending Admission also contain this definition.

[23] ABA Commission on Ethics 20/20, *For Comment: Discussion Paper on Alternative Law Practice Structures* (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf.

[24] ABA Commission on Ethics 20/20, *Press Release: ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms* (Apr. 16, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf.

[25] ABA Commission on Ethics 20/20, *For Comment: New Drafts Regarding Choice of Rule Agreements for Conflicts of Interest and Choice of Law Issues Associated with Fee Division Between Lawyers in Different Firms* (Sept. 18, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_co_chair_cover_memo_comment_drafts_on_fee_division_model_rule_1_7_final_posting.authcheckdam.pdf.

The second question concerned a narrow and technical issue related to Rule 1.5(e) – whether a lawyer in a jurisdiction that prohibits nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers may divide a fee with a lawyer in a different firm in which such ownership or fee sharing occurs and is permitted by the Rules applicable to that firm. This question has limited practical significance, though it has arisen from time-to-time.

The consensus of the Commission was that, subject to the prohibition of Rule 5.4 (Professional Independence of a Lawyer), the authority to divide fees between those two independent firms currently exists in Rule 1.5.[26] We noted, however, that there would be very few occasions for lawyers to make use of that authority, as two firms can send separate invoices to the client for their work in the matter in most instances.

Given the prior referral to the Ethics Committee, the Commission concluded that the Ethics Committee is in the best position to address this question.

In deciding which proposals to bring to the House of Delegates, the Commission has considered (a) the importance of the issue to the profession, (b) whether there is confusion as to the application of the rules that we can helpfully address, and (c) whether a change in the rules is necessary and helpful to address changes in the legal environment. Thus, for example, we have proceeded with proposals on outsourcing, the use of technology in marketing, the impact of technology on confidentiality, lawyer mobility (practice pending admission, admission by motion, and detection of conflicts), choice of law and conflicts of interest, foreign lawyers serving as in-house counsel, and foreign lawyers' admission pro hac vice. We have not proceeded with proposals on alternative litigation financing, law firm ranking services, and alternative business structures.

We have used our best judgment as to which issues are worthy of debate and consideration in the House and capable of making a difference for the profession. Given the time and energy that will be appropriate for the House and for Commissioners to spend on the important issues before the House in February 2013, the Commission decided not to proceed with the proposed change to Rule 1.5.

Referral Regarding Virtual Law Practice and Model Rule 5.5

Currently, Model Rule 5.5(b)(1) requires a lawyer to obtain a license in a jurisdiction if the lawyer has an office or a "systematic and continuous" presence there, unless the lawyer's work falls within one of the exceptions identified in Rule 5.5(d). The increased demand for cross-border practice and related changes in technology have raised new questions about the meaning of the phrase "systematic and continuous presence" in Rule 5.5(b). In particular, technology now enables lawyers to be physically present in one jurisdiction, yet have a substantial virtual practice in another. The problem is that it is not always clear when this virtual practice in a jurisdiction is sufficiently "systematic and continuous" to require a license in that jurisdiction.

[26] At least one bar association has so held. Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op., 2010-7 (2010).

Currently, Comment [4] to Model Rule 5.5 identifies these issues, but provides limited guidance as to how to resolve them. The Comment states that a lawyer's "[p]resence may be systematic and continuous even if the lawyer is not physically present" in the jurisdiction. Neither the Rule nor the Comment provides any clarity as to when a lawyer who is "not physically present" in a jurisdiction nevertheless has a systematic and continuous presence there.[27]

The Commission released an issues paper, seeking feedback on a number of possible options for addressing these issues, including the identification of relevant factors when analyzing when a presence becomes "systematic and continuous" and referring the issue to the Standing Committee on Ethics and Professional Responsibility for a Formal Opinion on the meaning of "systematic and continuous presence" in the context of virtual law practice.[28]

The Commission, after considerable deliberations, concluded that these issues may be best addressed in the future as the nature of virtual law practice becomes clearer and as relevant technology continues to evolve.

Conclusion

As in August 2012, 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.

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 globalization, while preserving necessary public protections and providing lawyers with greater clarity regarding their ethical obligations in a 21st century legal marketplace.

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[27] Conversely, a lawyer may be licensed in one jurisdiction, but live in a jurisdiction where the lawyer is not licensed. If the lawyer conducts a virtual practice from the latter jurisdiction and serves clients only in the jurisdiction where the lawyer is actually licensed, there is a question of whether the lawyer has a "systematic and continuous" presence in the jurisdiction where the lawyer is living and thus violates Rule 5.5(b) in that jurisdiction. The Rule is unclear in this regard as well.

[28] ABA Commission on Ethics 20/20, *For Comment: Issues Paper Concerning Model Rule of Professional Conduct 5.5 and the limits on Virtual Presence in a Jurisdiction* (June 19, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120619_draft_release_for_comment_rule_5_5_comment_4_virtual_practice.authcheckdam.pdf.

As we did in August, we want to express our thanks to 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 Wm. T. (Bill) Robinson, III, ABA President Laurel G. Bellows, and ABA President Elect James R. Silkenat for their insights and guidance; 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 and that the Commission has not addressed all possible ethics-related issues relating to globalization and technology that are likely to arise. The Commission exercised judgment as to the issues that deserved the most urgent attention. We hope that we have used the clear "20/20" vision that was our mandate, but fully expect and encourage the ABA to continue studying these and related issues in the future.

Respectfully submitted,

ABA Commission on Ethics 20/20[29]
Jamie S. Gorelick, Co-Chair
Michael Traynor, Co-Chair

February 2013

[29] In addition to Co-Chairs Jamie S. Gorelick and Michael Traynor, members of the Commission on Ethics 20/20 have included Stephen Gillers, Jeffrey B. Golden, William C. Hubbard, George W. Jones, Jr., Linda A. Klein, Hon. Elizabeth B. Lacy, Carolyn B. Lamm, Judith A. Miller, Hon. Kathryn A. Oberly, Roberta Cooper Ramo, Herman Joseph Russomanno, Theodore Schneyer, Carole Silver, Frederic S. Ury, and Hon. Gerald W. VandeWalle. Liaisons to the Commission have been Kenneth G. Standard (ABA Board of Governors), John Skilton (ABA Board of Governors), 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 and Professional Responsibility), and Youshea A. Berry (ABA Young Lawyers Division). The Commission's Reporters are Andrew M. Perlman (Chief Reporter), Paul D. Paton, Anthony Sebok, and W. Bradley Wendel. Jeanne P. Gray (Associate Executive Director), Ellyn S. Rosen (Commission Counsel), Marcia L. Kladder (Policy & Program Director), Natalia Vera (Senior Paralegal), Kimley Grant, (Paralegal), and Annie Kuhlman (Committee Specialist) from the ABA Center for Professional Responsibility provide staff support to the Commission.