

**MINUTES**  
**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON ETHICS 20/20**  
**April 29, 2010**  
**10:00 p.m. - 5:00 p.m.**  
**April 30, 2010**  
**9:00 a.m. – 1:30 p.m.**  
**WilmerHale**  
**Washington, DC.**

**Commission Members Present:**

Jamie S. Gorelick, Co-Chair  
Michael Traynor, Co-Chair  
Stephen Gillers, Professor  
Jeffery B. Golden  
George W. Jones Jr.  
Hon. Elizabeth B. Lacy  
Judith A. Miller  
Hon. Kathryn A. Oberly  
Roberta Cooper Ramo  
Theodore Schneyer, Professor  
Carole Silver, Professor  
Frederic S. Ury  
Hon. Gerald VandeWalle

**Absent:**

Herman J. Russomanno  
Hon. Diane P. Wood

**Commission Liaisons Present:**

Youshea Berry, Young Lawyers Division  
Donald B. Hilliker, ABA Center for Professional Responsibility  
Steven C. Krane, ABA Board of Governors  
Robert E. Lutz, II, Professor, ABA Task Force on International Trade in Legal Services  
Phillip H. Schaeffer, ABA Standing Committee on Ethics & Professional Responsibility

**Commission Reporters:**

Keith R. Fisher  
Andrew M. Perlman

**ABA Center for Professional Responsibility:**

Jeanne P. Gray, Director (telephone)  
Ellyn S. Rosen, Commission Counsel  
George A. Kuhlman, Ethics Counsel  
Marcia L. Kladder, Policy and Program Director (telephone)  
Natalia M. Vera. Senior Research Paralegal (telephone)

**APRIL 29, 2010**

**1. Executive Session:** The Commission met in Executive Session with the Honorable Christine M. Durham, President of the Conference of Chief Justices from 9:00 a.m. until 10:00 a.m.

**2. Call to Order—Public Business Meeting:** Co-Chair Gorelick called the meeting to order at 10:00 a.m. She welcomed second Reporter, Andrew M. Perlman, from the Suffolk University School of Law. Commission members, liaisons and counsel introduced themselves. Co-Chair Gorelick welcomed audience members. She invited their participation in the discussion of substantive matters on the Commission's meeting agenda. She advised that, at this point, the Commission had not reached any conclusions regarding the subjects it is studying, nor has it prejudged any issues.

**3. Minutes:** The Commission approved the minutes from its February 4, 2010 meeting in Orlando, Florida as submitted.

**4. Co-Chairs' Report:** Co-Chair Gorelick directed the members' attention to the Report submitted to the ABA Standing Committee on Scope and Correlation of Work. Commission Counsel Ellyn Rosen explained that the Scope Committee, which reports to the ABA House of Delegates, studies the structure, functions, and work of sections, committees, and other ABA entities. Co-Chairs Gorelick and Traynor submitted a report detailing the Commission's work to date, its budget and staffing, and describing the manner in which it will proceed to accomplish its mission. Scope's report evaluating the Commission will likely be issued in June 2010.

**5. Report and Recommendation of the ABA Standing Committee on Client Protection re: Proposed Model Rules for Client Trust Account Records:** Ms. Rosen advised that the ABA Standing Committee on Client Protection is seeking comments on and support of proposed ABA Model Rules for Client Trust Account Records. The Committee will submit its Report and Recommendation to the House of Delegates for consideration in August 2010. The proposed Model Rules are intended to replace and update the 1993 Model Rule on Financial Recordkeeping to account for advances in banking technology and practices, such as the Check Clearing for the 21<sup>st</sup> Century Act. Commission Liaison Phillip Schaeffer queried whether the proposed Model Rules should better address the issue of cloud computing, the sale of a law practice and the death of the lawyer. After further discussion the Commission voted to take no action. Ms. Rosen will convey Mr. Schaeffer's comments to the Client Protection Committee.

**6. International Developments—Red Flags and Milavetz Case:** Ms. Rosen summarized recent international developments relevant to the Commission's work. The EU Commission will undertake a review of the EU Establishment Directive that permits lawyers who are EU nationals and admitted in one member state to establish a law practice in another. The review may address whether to extend these privileges to non-EU nationals, including U.S. lawyers. The Union Internationale des Avocats is considering development of a global code of conduct for lawyers. The International Bar Association (IBA) continues consideration of proposed commentary to its General Principles of the Legal Profession. Commission Liaison Steven Krane is involved in that initiative on behalf of the ABA.

In England and Wales, the Solicitors Regulation Authority (SRA) decided against liberalizing Rule 3 of the Solicitors Code of Conduct—Conflicts of Interest. The

proposed liberalization would have permitted sophisticated clients to waive, via informed consent, certain conflicts of interest. The SRA also plans to implement outcomes-based regulation and move away from what it calls “box-tick” prescriptive rules. The Bar Standards Board, the regulator for barristers, does not agree that principles-based regulation is sufficient to deal with certain conduct.

The Legal Services Board approved the SRA’s proposed Qualified Lawyers Transfer Scheme (QLTS) to replace the Qualified Lawyers Transfer Test (QLTT). The QLTS will be introduced in September with testing to begin in January 2011. The QLTS will provide a uniform set of standards under which international lawyers can qualify to become solicitors, and includes an English language test requirement.

The Law Society of England and Wales’ International Committee will release a report on outsourcing in June 2010. Allison Hook, the Law Society’s Director of International can discuss it with the Commission at the 2010 ABA Annual Meeting. Ms. Rosen will seek a copy of the report as it should be helpful to the Commission’s outsourcing group.

Australia is also studying principles-based regulation for the legal profession. On April 30, 2010 the Council of Australian Governments will release for public consultation a draft national law for uniform national regulation of the legal profession. The consultation period runs from May 14 through August 13, 2010. The proposed law will cover all aspects of the existing regulatory system, including education, admission and practice. Ms. Rosen noted that this initiative should be of interest to the Uniformity/Choice of Law Working Group.

Professor Robert Lutz and Mr. Schaeffer discussed the April 2010 lawsuit filed in India against foreign law firms and a legal process outsourcing provider. Like the previous lawsuit, this action objects to the presence of foreign law firms and also alleges immigration law violations. Professor Lutz stated that ABA President Carolyn B. Lamm met with the Society of Indian Law Firms to discuss the litigation and what, if any, understanding might be reached between the Society and the ABA. Discussions in that regard are ongoing. Roberta Cooper Ramo added that the U.S. Trade Representative (USTR) would have a role with regard to these issues. Co-Chair Gorelick suggested inviting a representative from the USTR to address the Commission.

Ms. Rosen summarized the Asia Pacific Economic Cooperation legal services initiative and responses submitted by ABA entities to the USTR through the ABA Task Force on International Trade in Legal Services. She, Commission member Carole Silver and Professor Laurel Terry will participate in a May 19, 2010 roundtable discussion organized by the U.S Department of Commerce’s International Trade Administration to focus on better data collection for cross-border legal services. This data will likely be of use to the Commission. The Center for Professional Responsibility is working with Professor Terry to increase the collection and availability of data and other information regarding global legal practice developments on its website.

Commission Reporter Keith Fisher discussed the implications for state-based judicial regulation of the profession based on the U.S. Supreme Court’s opinion in *Milavetz, Gallop & Milavetz, et. al. v. United States*. The Court held that lawyers are “debt relief agencies” under the Act, and upheld the applicability to lawyers of certain advertising disclosure provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act. The ABA filed an *Amicus Curiae* brief in that case. Professor Stephen

Gillers noted that the opinion resolves the question of whether Congress can regulate aspects of lawyer conduct, and that the Commission should not assume that Congress regulating lawyer conduct in an area of its competence is antithetical to regulation by the state supreme courts. The summary of listserv comments included in the agenda provides insights about federal versus state regulation of the legal profession for consideration by the Commission.

Reporter Fisher described the ABA's success against the Federal Trade Commission's (FTC) attempts to subject lawyers to the requirements of the "Red Flags" legislation. The FTC had attempted to include lawyers within the scope of the definitions of creditors in the Act, but U.S. District Court for the District of Columbia Judge Reginald Walton disagreed. Steven Krane, whose law firm represents the ABA pro bono in this matter, stated that the FTC is appealing Judge Walton's ruling and that no briefing schedule has been set. He further advised that the new deadline for the FTC to revise its regulations in this matter is June 1, 2010, although it may adjourn that deadline again.

**7. Commission Working Groups:** Co-Chair Michael Traynor reminded the Commission of the timeline for its work set forth in the agenda materials. He urged the Working Groups to adhere to that timeline and noted that the Commission may have to add information about coordination with other groups inside and outside the ABA.

**a. Inbound Foreign Lawyer Working Group:** Professor Steven Gillers stated that the Working Group had been asked to consider three questions:

- 1) Should the ABA include foreign lawyers within the scope of the ABA Model Rule for *Pro Hac Vice* Admission?
- 2) Should the ABA adopt a policy regarding registration of foreign lawyers practicing in-house in the U.S.?
- 3) Should the temporary practice provisions applicable to U.S. lawyers in Rule 5.5 of the ABA Model Rules of Professional Conduct be expanded to include non-U.S. lawyers? In 2002, the ABA adopted a Model Rule for Temporary Practice by Foreign Lawyers. Most jurisdictions that have adopted Model Rule 5.5 have not adopted the corollary foreign temporary practice rule.

Professor Gillers advised that the Working Group's approach was limited to proposing substantive not stylistic changes to the relevant existing ABA policies. During its research, discussions and drafting, the Working Group used the definition of "foreign lawyer" already adopted as ABA policy in the Temporary Practice by Foreign Lawyer Rule and the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. The Group's work product illustrates why and how foreign lawyers could be included within the current ABA Model Rules. The Working Group included representatives from the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professional Discipline, the Section of International Law, the Real Property, Trust and Estate Law Section, the Task Force on International Trade in Legal Services, and the Section of Legal Education and Admissions to the Bar.

Thirteen jurisdictions permit foreign lawyers to be admitted pro hac vice. Professor Gillers stressed that the judge overseeing the case, the Rule's requirement for associating with local counsel, the opponent in the litigation, and the application process would all serve to adequately protect clients and the public should foreign lawyers be allowed pro hac vice admission. The foreign lawyer would be subject to discipline for misconduct arising out of or relating to the application or the proceeding in which the lawyer seeks permission to appear. Professor Gillers also noted that the Working Group added "administrative" before each reference to an agency to ensure clarity, and brought to the Commission's attention a question raised as to whether the Office of Disciplinary Counsel should receive notice of and an opportunity to respond to all pro hac vice admission applications in its jurisdiction. Based upon its limited approach to amending the existing Pro Hac Vice Rule, the Working Group did not delete that requirement, but it will conduct additional research into existing state rules.

During its discussion of the Pro Hac Vice Rule, the Commissioners agreed with the minimalist approach taken by the Working Group. George Jones suggested that reference to "formal and informal" or "direct and indirect" contempt be removed, and that the reference simply be to "contempt." The Commission agreed.

Commissioners and audience members discussed the phrase "recognized legal profession, the members of which are subject to effective regulation and discipline." Professor Gillers and Ms. Rosen explained the history of the phrase's development during the course of the Multijurisdictional Practice Commission's work, and reiterated that it is current ABA policy. The comfort is, he explained, in granting limited authority to a foreign lawyer who is subject to sanction in his/her home country. It is a matter of ensuring that the foreign lawyer can be held accountable. Ms. Rosen noted that the burden is on the applicant to satisfy the judge that he or she is not a risk.

Center for Professional Responsibility Director Jeanne Gray suggested that, if the Commission wants further clarification it could provide such guidance via commentary to the Rule. Others, including audience member Professor Terry, posited whether additional resources could be created, separate and apart from the Model Rule, to provide judges with increased guidance and contact information for other countries' lawyer discipline systems. She agreed with Professor Gillers that the purpose is to demonstrate accountability.

Professor Gillers described the proposed changes to the Model Rule for Registration of In-House Counsel. Justice Elizabeth Lacy noted that Virginia adopted such a rule and that it had not experienced problems. Professor Gillers then explained the Working Group's alternate proposals for merging the provisions of the Model Rule for Temporary Practice by Foreign Lawyers into the Model Rules of Professional Conduct. The first proposal describes how the provisions of the Temporary Practice Rule could be incorporated into Model Rule 5.5; the second proposes a new Model Rule 5.5A. He noted the more limited scope of practice authority for foreign transactional lawyers. Further study of client protection issues would be needed should the Commission consider providing foreign lawyers with same practice authority as U.S. lawyers.

At the conclusion of its discussion of the work product of the Inbound Foreign Lawyers Working Group, the Commission took no position regarding the three questions set forth above, agreeing only to disseminate the Working Group's memoranda and templates for public input and comment.

**b. Legal Process Outsourcing Working Group:** Working Group Co-Chair, Judge Kay Oberly, discussed the Working Group's study of the ethical and regulatory implications of domestic and international outsourcing. Members of the Section of International Law and the Standing Committee on Ethics and Professional Responsibility serve on the Group and the addition of a representative from the Litigation Section is anticipated. The Working Group met to discuss the extent to which the ABA Model Rules of Professional Conduct adequately address outsourcing of legal and law related services. Several Commissioners noted that the ethics rules have not caught up to the proliferation of outsourcing and the types of new relationships between those involved, including between lawyers and their clients. The Working Group has expressed an initial preference for having one set of ethics rules and comments applicable to outsourcing, as opposed to developing separate rules for domestic and international outsourcing or based upon differing practice areas. The Working Group is focusing on issues relating to a lawyer's or law firm's supervisory authority under Model Rules 5.1 and 5.3, as well as the application of Rule 1.2 relating to scope of representation. Mr. Krane, who co-chairs the Working Group with Judge Oberly, noted that questions the Group is grappling with include: 1) what is the conduct to be regulated; 2) where do lawyers' and law firms' obligations start and end; and 3) what should lawyers and law firms be responsible for when they delegate tasks to be performed outside of the law firm? Mr. Jones raised a number of hypothetical scenarios to guide the Working Group's and Commission's evaluation of these and other issues in the context of Rule 5.1's reference to lawyers within the firm, and instances where the client hires the outsourcing provider first, then retains the lawyer/law firm and insists that the lawyer/law firm use that provider.

The Working Group approved for posting on the Commission's website questions developed by Professor Carole Silver and Ms. Rosen directed to outsourcing providers, lawyers and law firms, and clients. Responses will be collected and provided to the Working Group. The Working Group remains sensitive to ensuring a careful study of the outsourcing industry, how lawyers and law firms outsource and to the clients' involvement in the process. In addition to considering possible amendments to the Model Rules and commentary, the Working Group will determine whether to recommend to the Commission any policies or practice guidance related to outsourcing.

On April 17, 2010, Commission liaison, Professor Robert Lutz, participated in a public forum on outsourcing held by the Section of International Law. Outsourcing provider Integreon provided materials and a representative from the company testified. A question raised at that forum related to the status of an outsourcing provider under the law of the jurisdiction in which it sits. The Section also held an educational panel about outsourcing that he attended, as did Ms. Rosen. Ms. Rosen stated that the transcript of that forum will be made available to the Commission. The Commission will hold a public hearing on outsourcing at the 2010 Annual Meeting in San Francisco. At the Commission's request, Professor Silver and Ms. Rosen will prepare questions indicating areas where it would like additional information and testimony. These questions will accompany the broad dissemination of the notice of hearing.

**c. Third Party Litigation Finance Working Group:** Mr. Schaeffer co-chairs this Working Group with Jeffrey Golden. Mr. Schaeffer advised that the Working Group met and divided itself into three subcommittees to study the consumer and client

protection issues, divided loyalty issue for lawyers and law firms, and other professional responsibility concerns.

The Group will collect information and hear from relevant witnesses. Thanks to Co-Chair Traynor, a number of Working Group members and Commissioners will be able to attend a May 20 - 21, 2010 conference on the subject being presented by the RAND Institute. Professor Terry noted that the American Association of Law School's Professional Responsibility Committee will hold a program on this topic on June 12, 2010.

**d. Entity Regulation/Alternative Business Structures Working Group:**

Professor Ted Schneyer, who co-chairs this Group with Mr. Jones, indicated that the Group initially decided to focus first on issues relating to law firm/entity regulation. It will also move forward contemporaneously with its study and analysis of developments relating to alternative business structures. With regard to law firm and entity regulation, Professor Schneyer described developments in the UK and Australia that have shifted the earlier focus from law firm discipline to more proactive, compliance based forms of regulation. The system in Australia stresses systemic controls designed to foster development of an ethical culture in the firm, accompanied by a self-assessment, audit and compliance mechanism that is technology driven. The U.S. system remains complaint based.

Professor Schneyer does see piecemeal developments in the U.S. that indicate a subtle inching toward more proactive entity regulation. He cited to the Delaware line of cases following *In re Bailey*, and to the writing of ethics opinions in New York directed to the responsibilities of law firms. New York and New Jersey are the only two U.S. jurisdictions that have law firm discipline.

With regard to alternative business structures, Professor Schneyer reminded the Commission that there is a range of structures under study, not just those that may involve multidisciplinary practices. For example, in the U.K., more than 100 law firms have applied to become legal disciplinary practices, where up to 25% of the law firm's partners can be non-lawyers. Rule 5.4 in Washington, DC, has permitted non-lawyer partnership in law firms for decades. Firms enter into strategic alliances or operate ancillary businesses, demonstrating that certain alternative business structures are already permitted in the U.S. The Working Group will examine what has changed since the issuance of the report of the ABA Commission on Multidisciplinary Practice ten years ago. It will focus on client needs, the potential for increasing access to justice and other client benefits, and how solo and small firm practitioners would be impacted by rule changes permitting new forms of capitalization and structure.

**e. Technology Working Group:** Co-Chair Gorelick advised that, to avoid duplication of effort, the Technology Group will address confidentiality and data security concerns associated with cloud computing. Fred Ury explained that the Working Group had broken down the issues on its agenda into categories such as the use of technology in client development (e.g. internet advertising), the formation of the lawyer-client relationship and client service (e.g., virtual law offices, cloud computing). Center for Professional Responsibility Counsel Sue Michmerhuizen is preparing a memo about the formation of the lawyer-client relationship. Legal Services Division lawyer Will Hornsby is preparing a memo about client-development issues. Professor Silver noted that a significant challenge facing the Group is the rapid pace at which technology is

advancing. Professor Fisher noted the caution of the Business Law Cyberspace Committee's comments about the need for rules to be technology agnostic.

**f. Conflicts of Interest, Uniformity, and Choice of Law:** Professor Gillers reported that, based on preliminary conversations, the Group indentified a number of issues and will divide into sub-groups. With regard to these issues, the Group is working to identify the most difficult problems facing law firms, particularly in the area of the conflicts rules and screening lateral lawyers. The Group is considering whether lawyers would benefit from further explanation of "predominant effect" in Rule 8.5. The issue does not seem to be disappearing. Mr. Schaeffer agreed, noting the additional complications that arise in a global context, citing similar concerns regarding Rule 1.7, and noting that the courts have seemed increasingly troubled by these issues. As an example, he noted the recent California decision in *Kirk v. First American*. Professor Gillers referenced a recent Delaware case.

The Working Group will consider whether the lawyer/law firm and client can or should be allowed to identify in the retainer agreement which ethics rules will govern their relationship. Would this be consistent with principles of client protection? Is there an alternate regime that could be developed to address these conflicts of interest issues?

Variations in state and international rules as to the types of permitted business structures pose immediate concerns. Some jurisdictions (domestic and foreign) allow non-lawyer partnership in law firms, ancillary businesses, outside equity ownership or multidisciplinary practices. What can be done to help the lawyers and law firms based in a restrictive jurisdiction who have branch offices in or work with lawyers and law firms in jurisdictions with more liberal rules? By way of example, Professor Gillers cited to the ABA formal ethics opinion issued after the District of Columbia adopted variations to its version of Model Rule 5.4.

In the context of uniformity issues the Commission discussed addressing increased demands for mobility within the U.S. and abroad. The Commission acknowledged the complex and sensitive nature of this subject. It was noted that the courts are beginning to look at implementing the Uniform Bar Examination, some states have regional agreements, the issue of a "driver's license model" arose during the tenure of the Multijurisdictional Practice Commission, and comments responsive to the Commission's Preliminary Issues Outline indicate that the issue has not gone away. Professor Andrew Perlman questioned whether studying changes to the existing ABA Model Rule on Admission by Motion offers a narrower approach to addressing mobility concerns. Professor Gillers reminded the Commission that it is examining, in various contexts, how physical place has become less important, what the fading of borders means to the profession and to regulators, and what might be done to address it. The Commission agreed to continue to gather information about these issues to inform later discussions and stressed that it had reached no conclusions about any of them.

**g. Confidentiality and Data Security:** Judith Miller reported that the Group has developed a useful issues outline and will be meeting subsequent to the Commission's meeting.

**h. Law Firm Ranking Group:** Co-Chair Gorelick advised the Commission that she had recused herself from this topic. She is member of the Best Lawyers Advisory Board. Roberta Cooper Ramo Roberta stated that she spoke with Vincent Buzard from the New York State Bar Association (NYSBA). He advised her that a primary concern of



the NYSBA with regard to the upcoming U.S. News and World Report rankings was that other providers do not rank firms in order. He also stressed to her the impact of US News rankings on law schools. Ms. Cooper-Ramo and Group co-chair Donald Hilliker sent a letter to the President of the NYSBA advising them of the Group's undertaking and seeking copies of the studies and documents that it compiled regarding this issue.

The Working Group is looking at all rating/ranking providers. It is working to identify the ethical issues that arise relating to lawyers' and law firms' participation in these processes and with regard to their use of the ratings/ranking. The Working Group is cognizant of the serious First Amendment implications associated with these issues. It is preparing to send letters seeking information to the providers. The Group will also seek data regarding how the public uses these ratings/rankings.

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**8. Communications:** In discussing the Commission's outreach efforts, members agreed that development of a data rich template power point for use at presentations and educational panels would be helpful. Because technology is driving many of the changes to and challenges facing the profession, the initial Power Point template should focus on that subject. Co-Chair Gorelick asked each Working Group co-chair to provide suggestions for slides to Ms. Rosen. Ms. Rosen will send Fred Ury's Power Point to the members to assist them and will provide a copy of the ABA Law Practice Management e-Lawyering Task Force's Guidelines. The Commission also discussed developing individual packets of information and web pages relating to its areas of study that will be used to generate questions and input. These will also help educate the profession and the public about the developments that are shaping the future. These developments, Professor Gillers noted, will happen around the profession's existing regulatory system or in conjunction with it.

Co-Chair Michael Traynor reported on his presentations at the ABA 2010 Midyear Meeting. He addressed the House of Delegates and a number of state delegations. He reminded the Commissioners of the significance of its outreach responsibilities to the varied audiences that are interested in and will be impacted by the Commission's work. Carole Silver described her presentation to the Bar Leadership Institute (BLI). BLI programming is directed to the incoming presidents of state and local bar associations and their executive directors. She spoke on a technology focused panel that sought to prepare attendees for changes in the profession. Justice Lacy suggested that the Commission also seek speaking opportunities with the American Inns of Court, National Defense Lawyer's Association and similar organizations. Jeff Golden recommended enhancing outreach to consumer organizations. Youshea Berry, liaison from the Young Lawyers Division, added that today's young lawyer will retire in sixty-five years and that the Commission should consider how its work will impact that demographic.

**9. Liaison Reports:** Mr. Krane reported that the Board of Governors would be meeting in June 2010 regarding the Associations' budget. Mr. Hillker, liaison from the Center for Professional Responsibility, stated that the Commission would hold a roundtable discussion on June 4, 2010 in conjunction with the ABA National Conference on Professional Responsibility. He and Professor Gillers will moderate that discussion.

Ethics Committee liaison Mr. Schaeffer provided a preliminary report about the Commission's work to the Ethics Committee in February 2010. He will provide a fuller presentation at the Committee's June 2010 meeting. Professor Lutz updated the Commission on the work of the ABA Task Force on International Trade in Legal Services.

**10. Invited Speakers:**

**a. Alan Davidson, Director of Public Policy, Google, Inc.:** Mr.

Davidson identified a number of technology trends. First, he reported that computing power, including data storage, is increasing exponentially. By way of example, he noted that the printed works of the Library of Congress would take up ten terabytes.

Consumers can now purchase computers with one terabyte of memory. He stressed that storage has become cheap and that it is permanent.

The second trend is the increased volume of people connecting on-line and doing so via mobile communication devices. Approximately 90% of new on-line connections are through broadband. Data shows that while it took ¼ of the U.S. population 26 years to adopt television technology and 16 years to use personal computers that time to adapt to new technology has shrunk to 2 -3 years for Facebook and similar services. More frequently, mobile devices have integrated location services (GPS) to allow users to access information based upon where they are. The user's locations are stored, but users do have some control over that information. In response to questions from Commissioners, Mr. Davidson agreed that concerns exist with regard to data storage and who has access to that information. There also are issues relating to where the data is stored and how storage location is determined given the practices of providers to disaggregate it for security reasons. From a legal perspective he agreed that jurisdictional issues are complex, as are the varying national regulations relating to data, such as the EU Data Protection laws.

Mr. Davidson described for the Commission the tremendous innovation in the development and use of social media. Social media providers continue to study uses for data contained in the user's "social graph." In this area there remain open questions regarding the rules/laws to be applied to such usage, how the information is kept, as well as litigation considerations. Co-Chair Gorelick observed that this is an area that the Commission is studying and that lawyers need to understand the implications of using social media with regard to client confidentiality.

With regard to cloud computing, Mr. Davidson noted that the architecture of computers is what drives change. When the personal computer (PC) model predominated data was stored physically on-site. Now computing and storage are being done on the Internet. According to a study by the Pugh Research Center for the People and the Press, 67% of Americans are regular internet users. This use includes services like Flickr, YouTube, G-Mail, and Google Docs. People are using the "cloud" without knowing it. Clouds are discreet. They do not interact yet, but that cannot be ruled out for the future.

Mr. Davidson discussed generally the nature of the contracts between cloud service providers and customers, including provisions relating to security, outages, access to data, and customer control over what data is and is not maintained or deleted by the provider. He addressed disaggregation of data and geo-redundancy of servers, as well as moving from one provider to another and how data is transferred. He suggested to the

Commission that, due to the speed at which new technologies are being developed and launched, that its ultimate proposed policies and rules be specific technology neutral.

**b. Susan Hackett, Senior Vice President and General Counsel, Association of Corporate Counsel (ACC):** The Association of Corporate Counsel (ACC) has 26,000 individual in-house counsel members from every industry, small and large, representing 10,000 companies. Sole practitioners/small departments comprise the single largest segment of its membership, even though the association includes members from all of the Fortune 500 and most of the FTSE 100.

Ms. Hackett identified for the Commission a number of ways in which she believes that the current ethics rules and professional regulations have been outpaced by a new legal practice paradigm, in particular with regard to in-house counsel. The vast majority of corporate work, Ms. Hackett noted, is done outside the court system and in an international practice context. She provided a power point presentation highlighting those areas. While modern transactional and cross-border practice discussions taking place with the ABA Commission on Multijurisdictional Practice focused on issues related more to domestic cross-border practice, current challenges sharpen our focus on the influence of technology and globalization- making borders increasingly irrelevant; there is no reason to believe this will not continue. ACC supports rule reforms that are conducive to cross-border practices, both making U.S. reforms more comprehensive and implementing international cross-border practice authorizations. While ACC has no position as to whether there should be different standards for sophisticated clients, it is studying the issue. ACC supported the recent changes to Rule 1.10 of the ABA Model Rules of Professional Conduct adopted by the House of Delegates. Ms. Hackett suggested that changes might also be appropriate for the rules relating to current and former clients.

The profession, she explained, also has to respond to different client expectations. Based upon ACC's experience, lawyers are expected to provide a broader array of business service in teams that include business people and non-lawyer service providers including outsourcing providers. ACC is seeing client demand for integrated solutions and increased rates of responsiveness. Clients are demanding greater cost-effectiveness and greater predictability for legal costs. She provided the Commissioners with a draft report prepared by ACC entitled "Navigating Professional Ethics Issues in the Changing Legal Services Paradigm." She asked that the Commission not disseminate this draft further, and she will provide it with the final version of the Report upon completion.

**11. Continued Discussion of Commission Working Groups:** The Commission continued discussion begun on April 29, 2010 regarding the impact of outside change on the profession. Professor Gillers reiterated that the "borderless" elements associated with the Commission's work pose the greatest challenges, challenges that may require structural changes to the existing regulatory regime. He characterized one of the most significant questions facing the Commission as whether and how the edifice of regulation needs to evolve in the face of globalization and advancing technology. How are events beyond our control changing how lawyers and law firms behave? Does the profession seek ways to accommodate the 21<sup>st</sup> Century by adjusting its regulatory structure in a manner consistent with historical professional values or does it try to vote about whether the future happens?

The Commission discussed generally but made no determination about the form that its work product might take. While acknowledging that it will likely propose some necessary changes to the Model Rules, other options include more general policy recommendations or recommended templates for courts and bars, referral of matters to the Ethics Committee for the development of formal ethics opinions, development of practice guidance and other resources, and White Papers.

**12: Future Meetings:** Ms. Rosen will circulate to the Commission proposed dates for meetings in 2011. She advised that the Commission will meet in conjunction with the ABA 2010 Annual Meeting on August 5 and 6, 2010. The business meeting will be held on August 5<sup>th</sup> and the public hearing and invited international guests will address the Commission on August 6<sup>th</sup>.

Respectfully Submitted,

Ellyn S. Rosen  
Commission Counsel