

AMERICAN BAR ASSOCIATION

**Standing Committee on Ethics
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MEMORANDUM

To: Jamie S. Gorelick and Michael Traynor,
Co-Chairs, ABA Commission on Ethics 20/20

From: Robert H. Mundheim, Chair, Standing Committee on Ethics and
Professional Responsibility

Date: December 16, 2009

Cc: Ellyn Rosen, Commission Counsel
Keith Fisher, Commission Reporter

The Standing Committee on Ethics and Professional Responsibility has reviewed the comprehensive Preliminary Issues Outline of November 19, 2009. As you pursue your study, we hope that you will consider the following additional points.

1. Issue I(C) of the Memorandum, "Conflicts of Interest," states that, in light of the emergence of larger and global law firms, Model Rule 1.7 should be reexamined. Although we agree, the Model Rules also apply to government lawyers, lawyers who work for a broad range of non-profit organizations, and the legal departments of corporations and other entities. It would be useful to consider how the Model Rules impact lawyers who work for those employers. For example, it is not clear how conflict of interest rules apply to government lawyers (e.g., how broadly the disqualification of a particular government lawyer could be imputed to other government lawyers).
2. Model Rule 1.7 (a) (1) provides that a conflict exists where a lawyer represents a party adverse to a current client whom she represents in an unrelated matter. That provision often limits a client's choice of lawyer and the conflicts it covers are at times not readily discovered. Situations triggering this provision come into play more often as law firms become larger, and for global firms the absence of comparable provisions in the ethics rules of many foreign jurisdictions creates difficult choice of law issues. The Commission could usefully examine whether reliance on 1.7(a)(2)'s standard (significant risk that representation of one client will be materially limited by responsibilities to another client) might adequately protect clients.
3. The ABA's Lawyer Statistical Report states that the large majority of all lawyers in private practice are employed in law firms with fewer than twenty lawyers, and half are in solo practice. It would be useful to assess the impact of changes in the Model Rules and of ongoing technological advancements on this segment of the bar. In addition, it would be useful to understand the degree to which these changes may impact the availability of lawyers in regional, rural and more remote areas of the United States.

4. Section DI(i) points out a number of difficulties created by inconsistency in the rules on confidentiality among different states and countries in which a lawyer or law firm may practice. In addition to seeking to resolve the problems caused by such inconsistencies, the Commission could usefully consider whether the many exceptions to the obligation to maintain the confidentiality of client information require the bar to educate the public about the limitations on the wide-spread public assumption that everything told to one's lawyer will be held in confidence.
5. Another topic that might be addressed is the desirability of licensing paralegals or other licensed professionals, such as real estate brokers, accountants, etc., to provide certain legal services. Doing so might lead to greater availability and more efficient delivery of legal services without harming the public so served.
6. Section F addresses alternative business structures and the ethical and regulatory issues they raise. Since these structures take many forms, it would be useful to include in your analysis a comprehensive survey of such structures and the different issues they raise.