AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20

Friday, February 5, 2010

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SPEAKERS:

REPORTER: Pamela S. Hardy, RMR, CRR, FPR

P R O C E E D I N G S (8:58 A.M.)

MICHAEL TRAYNOR: Good morning, everyone, members of the Commission and guests. Our agenda this morning will be a short supplementary comment by Steve on the report he gave yesterday and then we'll turn to part IV of our agenda on strategic communications. And then at 9:45 we'll begin hearing witnesses. And then if we have further Commission business agenda to take care of, we'll do that as hearing schedule permits during the course of the day. So the first item would be Steve.

PROF. STEPHEN GILLERS: Thank you. George asked me yesterday why the scope of the fly-in, fly-out authority for foreign lawyers is today narrower than the scope of the fly-in, fly-out authority for domestic lawyers. This is a situation in which a lawyer from either New York or France might fly into Illinois on a, quote, temporary basis to work on a matter. And that smaller scope has been carried over in the draft language of the working group. We haven't changed it in substance.

The reason why it's narrower goes back to the discussions of the MJP Commission. As I said

yesterday, the transactional lawyer FIFO or the counseling lawyer FIFO, nondispute lawyer FIFO, has always seemed to be the biggest pill to swallow. It's hard to constrain the scope of the work that a lawyer might presume to do under a FIFO authority. When the work is dispute related it has a natural boundary. In the dispute itself there's often if not always already in place a neutral or a judge and there's an adversary. Where work is transactional, counseling or advisory, there may not be an adversary; in any event there's no neutral or judge, so the challenge for us was how to limit the authority against the possibility of abuse.

We did it in two ways. One way, of course, was to limit the authority to temporary presence, and that's in both versions, but temporary was seen as inadequate as a single limitation. And so in the version of 5.5(C)(4), the domestic lawyer transactional counseling FIFO language, we also said that the work that causes you to travel to the other jurisdiction has to arise out of or be reasonably related to your practice in your home jurisdiction, and that covered three, at least three predicates. One is you have a client in

your home jurisdiction on behalf of whom you're traveling or you have a matter within your home jurisdiction on behalf of which you're traveling, or the situation in which you're an expert in a particular area of law and a potential client in the host jurisdiction calls you to come in and confer with it, so you don't have a matter or a client in your home jurisdiction, but you've been called because of your expertise. And we say in the comment that that expertise is sufficient to fall within the language of the rule. It arises out of your practice, your practice as an expert in your home jurisdiction.

When it came to foreign lawyers, we agree that the matter predicate, the matter in your home jurisdiction and the client in your home jurisdiction should be carried over, that is, either of those predicates should appear in the foreign lawyer FIFO, but we did not advance the proposition that the foreign lawyer's presence in the host jurisdiction need be only, need only arise out of or be reasonably related to his or her practice. That was seen as too broad.

For example, a lawyer in Europe whose specialty is trade law might say, well, my

specialty is trade law, and just as a lawyer in New York whose specialty is trade law can travel to Illinois to advise a potential client, so can I. The practice, the word "practice" alone did not circumscribe the scope of the potential word. We were worried about that. We were worried about how that would be seen by a House of Delegates. So the language of the foreign FIFO omits practice as sufficient predicate for travel to the host jurisdiction. It has to arise out of a client or a matter in your home jurisdiction.

Last point, two last points. There's one exception to that, and that is when the matter for which you're traveling is governed by international law. They always said international law is the same all over the world, and if a potential client in New York calls an international lawyer in London, though there's no matter or client in London, that lawyer can come to New York under foreign FIFO.

What the working group did on the telephone, which will be discussed tomorrow, is as regards foreign FIFO, foreign pro hoc vice, and in-house counsel was simply to -- with the exceptions I just mentioned, the foreign FIFO, was simply to

give the foreign lawyer the same authorities under the three rules that domestic lawyers have. And we use the definition of foreign lawyer that is well established in ABA documents. That's what we did. We made some cosmetic changes but we made no substantive changes. We didn't think we were authorized to recommend that.

And finally we're going to be -- we have not finally decided whether or not the foreign lawyer FIFO rule should be merged into 5.5. I talked about this yesterday. It creates a rather lengthy rule and comment or there ought to be separate freestanding rules for the foreign lawyer FIFO which would be 5.5(a), and we have drafts of both versions that we're going to discuss tomorrow. So that's the beginning and the end of it.

MICHAEL TRAYNOR: Thank you, Steve. Any questions before we move on?

Let's turn then to item Roman numeral VI and B, the 2010 mid year meeting schedule and I'll ask Ellyn to begin the discussion of that and the succeeding issues on scheduling.

ELLYN S. ROSEN: Thank you, Mike. We provided to everybody an updated mid-year meeting schedule. It's just really for your informational

purposes. It lets you know in addition to the Commission meetings where some of the other meetings relevant to the Commission's work are, in particular if anybody would like to come. Carole, I know you raised some questions yesterday regarding the inbound lawyer which we will discuss with the working group and of course you're welcome to join us as well. So that is for your information.

As Mike mentioned earlier, he will be addressing the House of Delegates. He's also going to be addressing some of the state delegations and other delegations as will Steve Krane, and Herman is going to talk about the Florida delegation just to give them a brief update on the Commission's work and what happened at the meeting today.

With respect to the draft schedule of Commission meetings, public hearings and speaking engagements, that's the document that you saw at our September meeting. It's a live document and will be continued to add to it and supplement it. But for the sake of efficiency when you take a look through that, if there are any other meetings or events that you do not see on there that you

think we should add and seek an opportunity to attend, just either email me or give me a call and we will take care of adding that.

The next item is the June 4th roundtable that we're going to be holding in conjunction with the ABA National Conference on Professional Responsibility in Seattle, Washington, and this will be the first of all roundtable discussions. And what I was hoping we would do would be to address possible topics for that so that we could provide that information with the promotional materials for the National Conference.

My suggestion, and it's certainly open to others and for discussion, is that since there is a large group of disciplinary counsel and/or lawyers who represent other lawyers in either disciplinary or professional liability matters, that we direct the topic to areas of interest to them and solicit their input. My suggestion is that perhaps we not pick a topic today, but I can reach out to the NOBC, Gene Shipp who is here, as well as to the Association of Professional Responsibility Lawyers and see what areas are of particular interest to them and we can then pick two or three of those topics and that would be the

subject of the roundtable. Does that make sense to everybody?

Also, it would be helpful, because we're not having a full Commission meeting, if anybody knows now whether or not they will be attending the National Conference just so I have a sense of the number of commissioners who will be present. Steve? Okay. Great. Thank you.

I should also mention that we are looking to set up some type of a forum, whether it be a mini public hearing or another roundtable in conjunction with the ABA Tech Show which is being held in Chicago March 25th through the 27th. Given the impact of technology on the Commission's work agenda we thought it would be particularly useful while we've got these types of additional experts in addition to those, the two we have presenting here today, to see if we can get their input on any matters that would impact the Commission's work as well as other lawyers in the Chicago area and Illinois.

The other issue that we have to talk about today would be topics for the Commission's public hearing in August in conjunction with the annual meeting. And before I touch base about that, we

did notice -- the Commission is scheduled to meet Friday, August 6th and Saturday, August 7th at the annual meeting and it's come to our attention that perhaps that Saturday meeting day, because that's a heavy meeting date for a lot of people, might not be optimal, and I wanted to take a quick poll of the Commission. What we'd like to try and do is move it to our usual Thursday-Friday meeting time which would be August 5th and August 6th which is that Thursday and the Friday. Does anybody have a problem with that?

PROF. STEPHEN GILLERS: I have a problem with Thursday, but you shouldn't not do it because of that.

ELLYN S. ROSEN: We will have a dial-in number just in case. But I think it will be better for the Commission's business if we push that back. It looks like we are agreed. So I will send out a notice and we will amend the calendar on the Web site and take care of that.

And at the annual meeting we'll be having another public hearing and we need to start thinking about a topic for the public hearing or topics for the public hearing at that meeting. One suggestion I had is due to the expedited study

of the outsourcing issue and concerns that have been raised about the issue, I was thinking that outsourcing should be at least one topic that we have addressed at that public hearing. Does that sound -- yeah. Okay.

And my other thought is that as we proceed to get comments, we may be able to better assess what would be another topic or if we should leave it open as we are with this public hearing. Yes?

JEFFREY B. GOLDEN: I mentioned yesterday that there's considerable interest outside the U.S. Bar Associations and the like in contributing to the discussions. The August meeting is one occasion where a number of parties will participate as distinguished guests. Should we think about something like alternative business structures or some topic where we know we want to collect information from abroad? And if not, the question I keep getting asked is will there be other opportunities, will the Commission or any part of it be on the road in the way it will facilitate people from outside the U.S. looking in?

ELLYN S. ROSEN: Yes. I do know that there are a lot of foreign leaders from the

international community who will be at the August meeting. I am wondering if it might not make sense for us to try to have a separate gathering with those Bar leaders, instead of a public hearing, to have whoever is available at that particular time to sit down and meet and have a more focused discussion with them than in a public hearing setting. And that would also allow for more lawyers who are attending the annual meeting from around the country to be able to provide the Commission with its thoughts.

JEANNE P. GRAY: Ellyn, I just note, though, whenever you invite the international guests to speak about what's going on it will be in a public forum.

ELLYN S. ROSEN: Oh, absolutely.

JEANNE P. GRAY: I kind of agree with what Jeff is saying, that we do have a captive audience at the annual meeting which traditionally come and some of them are people that are very knowledgeable, so I know there's a lot of knowledge there. So my inclination would be that, we don't have to say necessarily we're looking at ABS, but simply we're looking at what's going on internationally, so it's not a lightning rod per

se and have people come in and talk to their expertise. But that's just a thought.

ELLYN S. ROSEN: Sure. And it may be that just logistically I think, I'm wondering if it doesn't make sense to separate them because there are going to be a number of lawyers attending the ABA meeting who would like the opportunity to address the Commission at that point. So we can work on logistics. But I think definitely arrange to --

JEFFREY B. GOLDEN: Yes, we will. We also should pay attention to the schedule that's already set for the distinguished guests.

ELLYN S. ROSEN: Right. Bob?

PROF. ROBERT E. LUTZ, II: I might add that the task force on ITLS, International Trade in Legal Services, is looking at the possibilities of also having forum for international guests to discuss the issues around the International Trade in Legal Services. So although nothing has been set, we traditionally have what we call summits focusing on Asia, focusing on Europe and so on. So there might be some coordination.

ELLYN S. ROSEN: And Jeff and Bob, do you often have the same international guests who

attend the sections spring meetings or fall meetings?

JEFFREY B. GOLDEN: The sections forum meeting as it turns out, the next forum meeting will be in Paris, so it will be one of those rare occasions when we take the show on the road to them. And there had been expressions of interest of doing something that -- but, yes, we will have some, but not necessarily the same ones. The Bar Association presidents, for example, would more likely turn up at the annual meeting than our seasonal meeting.

PROF. ROBERT E. LUTZ, II: I think the focus will be on Europe in particular, that meeting. I know there's a number of programs that are designed to look at, for example, legal education in Europe and so on.

ELLYN S. ROSEN: So maybe what is best is when I get back to Chicago we'll check on the schedule that they have with our international liaisons office to find out how these folks are already scheduled and we will work to either accommodate them as part of the public hearing or in a separate public forum.

We are also going to be meeting, not a formal

Commission meeting, but there will be attendants, we've have been invited to the State Bar of California Annual Meeting and we're going to have a public hearing event then. I think my suggestion is again once Keith further hones the outline and we get some more input as we take a look at the topics and make a selection at a later date.

PROF. ROBERT E. LUTZ, II: It's in September.

ELLYN S. ROSEN: In September, September 23 through 26.

MICHAEL TRAYNOR: I've been in communication with Howard Miller, the president of the State Bar of California and with members of the State Bar executive staff. In addition to that, are there communications with you, Ellyn, and this California State Bar? Because right now we're thinking about my being on a panel as part of their program with the State Bar. But are we going to have a separate hearing, you think?

ELLYN S. ROSEN: I think we had talked about having a separate hearing. I have not heard from anybody at the California State Bar, but we can follow up with them.

MICHAEL TRAYNOR: We'll need to get the

communications coordinated then. That's great.

I've been asked to remind every speaker to move the mike closer when speaking. We have a court reporter here today who will need to have that. Are you doing okay so far?

THE COURT REPORTER: A little bit. I just need everyone to speak in the mike.

ELLYN S. ROSEN: Great. And now the other piece that we need to address is we have been -- our program submission for the Annual Meeting Showcase, the Presidential CLE Showcase has been accepted and the acceptance letter is contained in your agenda materials. And today, because the deadline for providing the SOC with the program title, our speakers and the description of the program is due at the end of this month instead of the end of March as initially indicated. I wanted to talk a little bit about that and see if we could nail down some additional speakers. We had initially, because we had to put down some speakers, suggested George. Would you be willing to participate? It's on August 5th at the annual meeting.

GEORGE W. JONES, JR.: That's my 32nd wedding anniversary. I'll probably need to talk to my

wife about that.

ELLYN S. ROSEN: We were hoping Carolyn would be able to --

KEITH R. FISHER: That's an anniversary gift.

ELLYN S. ROSEN: Pending checking with the spouse. We had also Jamie or Mike would be participating as well.

KEITH R. FISHER: Ellyn, since we're looking for an opportunity to have some distinguished foreign guests speak, could we conflate the two, maybe have one or two foreign speakers at that showcase program?

ELLYN S. ROSEN: I think that would probably not be a bad idea. Yes.

KEITH R. FISHER: It will generate a lot of interest.

ELLYN S. ROSEN: Yes. And one of the other suggested speakers I had would be Jim Jones from Hildebrandt. When we held a conference this past May in Chicago about globalization and ethics and professional responsibility issues for State Supreme Court Chief Justices, Jim had a great PowerPoint Presentation that focused on why these developments are relevant for every lawyer in the United States regardless of practice size,

regardless of nature of practice, and I think that would be a very good introduction to the panel as we move forward into more specifics to have him do that broader overview. And I see some nodding to that. We'll check with Jim Jones as well.

Wonderful. And if it's all right with the Commission, what we'll do is we'll work and put together a brief description of the panel and what we'll focus on, we can circulate that to the Commissioners for a quick up or down via email and solicit suggestions.

Jean, did you want to talk a little bit about the ILEC in July?

JEANNE P. GRAY: Is this the Stanford conference?

ELLYN S. ROSEN: Yes.

JEANNE P. GRAY: I think -- and actually we probably should ask Art to come up and talk about that because I've not been really that much involved in the program. You want to come up and talk? This is Art Garwin. He's the deputy director of the Center and is helping us. The Stanford Center on the Legal Profession at the law school is the principal host and sponsor of what is the Fourth International Legal Ethics

Conference. It's the first time they are having it in the United States. They have it every two years. And through Deborah Rhode the Center was able to become a sponsor, and so we now have some influence in some of the programming and we certainly wanted to have representation from Ethics 20/20 to attend but also to have a panel that would in fact talk to some of the issues that are important to us and Art has been taking the lead.

ART GARWIN: Actually, Ellyn and I have been putting together ideas for a couple panels, and I might ask Carole about that, too. She's going to be involved in one of them. A lot of the information about the speakers that are going to be at that conference is already posted at the Stanford site, but there's no specific schedule yet. They are going to start working on that I think next week actually. But there's a ton of people that are going to be there and speaking and presenting papers. And we suggested a couple panels, one dealing with the differences in confidentiality rules around the world, if you will, and then also -- Carole, maybe you want to say something about it. You know more about it?

No?

PROFESSOR CAROLE SILVER: I don't know what --

ELLYN S. ROSEN: We haven't had a chance to talk about that.

PROFESSOR CAROLE SILVER: Fill me in.

ART GARWIN: Anyway, we anticipate having two panels that are related to the work of this Commission and undoubtedly there will be other panels, but there will be speakers going on throughout those three days and it will be involved also, and Don is going to be moderator of the panel that I mentioned on the confidentiality.

ELLYN S. ROSEN: And we actually as part of that panel, Jonathan Goldsmith, the Secretary General of the CCBE is going to be participating as well as Ramon Mullerat who I think you both know, and Paul Paton to give a Canadian perspective.

JEANNE P. GRAY: And also I might add that Carolyn Lamm has agreed to give opening remarks for the program. So my thought would be that she certainly will be talking about the scope and the important work of the Commission as well.

PROF. THEODORE SCHNEYER: I'm going to be

there and --

MARCIA L. KLADDER: Ted, we can't hear you.

PROF. THEODORE SCHNEYER: I'll be there and I'm reading a paper that's related to our work. It has to do with the kinds of materials, the literature that was being looked at and developed in Australia and the UK as they march towards recognizing alternative business structures and firm-based regulation. I have no idea what panel they are going to place that on, but that's just for your information.

JEANNE P. GRAY: Good.

ELLYN S. ROSEN: Thank you, Art. Carole, I was wondering if you want to tell the Commissioners a little bit about the Bar Leadership Institute that's coming up in March that you'll be participating on?

PROF. CAROLE SILVER: I don't have much to say except I'm participating in something on March 11th in the afternoon and it's for the Bar Leadership Conference, but I honestly haven't had substantive discussions about what it is I'm going to do and I'm going to pick Fred Ury's brain about the way he described the work of the Commission which I think puts it in -- first sets out the

contact step and need to think about these issues and then talks a little bit about what the Commission is doing or will be doing, and I'm hoping to get some good comments and questions from people who are there.

ELLYN S. ROSEN: Okay. Great. I think that finishes the -- I'm sorry? Yes.

MICHAEL TRAYNOR: As all of the members of the Commission know, we are making extensive outreach efforts, and I want to ask any members of our audience if they have any suggestions of meetings or forums that they think we ought to be making some appearance at. I wanted to give them an opportunity to give us a suggestion. If you do, just come up and take the mike.

Okay. Thank you. And we welcome any suggestions at any time.

KEITH R. FISHER: Actually, Mike, there is a program that's going to be taking place the beginning of April, end of March beginning of April in Steamboat Springs sponsored by the Center for International Legal Studies out of Salzburg and international legal ethics will be on the last two days of a five-day program there. So I think that's maybe the 1st and 2nd. And so anybody that

might be interested in coming to that can email me for more details. They will also welcome some additional speakers. So let me know if you're interested in that, especially if you're a skier. Thank you.

MICHAEL TRAYNOR: Thank you. Let's go to the next item on our agenda then which is current outreach efforts. It's under Part D as part of the schedule starting with the mention of Carolyn's January 31st speech. Anything to be said about that other than noting it?

ELLYN S. ROSEN: The chief justices.

KEITH R. FISHER: Carolyn I think gave an excellent overview, I know that Justice VandeWalle was there, an excellent overview of the Commission's work and its charge and the scope of its efforts and generated a lot of interest, I think, among the chief justices, many of whom are pursuing some similar topics in committees of their council. So I think that -- she didn't say anything that she hasn't said before, but she went into considerably more detail on this occasion than she has in the past. And so I think there's a tremendous amount of interest in this now around the country, and hopefully we'll be getting --

we've invited considerable feedback from some of the committees at the Council of Chief Justices. I have spoken with, in addition to Justice Shepard in Indiana, I spoke with Eric Washington who is the Chief Judge of the District of Columbia Court of Appeals who will be the host of that meeting, that February meeting next year, and he and I will be talking about some things that perhaps we could do at that meeting because he's extraordinarily interested in the work of this Commission and so I'll be following up with him as well.

ELLYN S. ROSEN: Keith, if you want to give a brief summary of the business law leadership meeting?

KEITH R. FISHER: The business law section has a leadership meeting every January and this year Ellyn and I were there. Carolyn Lamm also was there and she gave a brief overview of the Commission's work, although she had a lot of other ABA business to discuss with the business law leadership, and then I gave an abbreviated tour of some of the issues that I thought might capture the interest of those who practice in the business area and invited their participation and their comments since we really hadn't received any

comments from any of the business law section entities, and sure enough within a couple of weeks of that meeting we did get, as I mentioned yesterday, the comments of the cyberspace committee, and my hope is that we'll be getting some additional comments from other organizations of the business law section as time go by.

But a lot of people came up to me afterwards and expressed a lot of interest. They also have their own professional responsibility committee and will be working with them, too, and hopefully getting some comments from them as well.

MICHAEL TRAYNOR: Thank you. The next items connote the two written comments. I also want to note that Joan Rogers is in the audience who wrote a very nice piece about the project in the ABA/BNA Lawyers Manual on Professional Conduct. Joan, do you want to add anything or say anything while you're here?

JOAN ROGERS: I'm soaking it all up.

MICHAEL TRAYNOR: Okay. I want to report briefly on the October 31 report I made at the Board of Governors meeting. This was shortly after our first Commission meeting. When the Board of Governors met in Vermont it had a very

heavy agenda of a lot of matters during that weekend, so when I appeared it was probably less than five minutes that it took to -- that I had and just gave a brief status report about our first Commission meeting and how we were organizing ourselves and what we had on our immediate agenda, and there were no questions. And I felt that we really do need to continue the outreach effort in every part of the ABA including particularly the Board of Governors. And Jamie is here this morning. I think there's been since some elevation of interest and questions. MDP, for example, has come up, as people get aware of what we're what we're doing. But it's just a very brief statement, and again not in any particular controversy or questions. But I think that reflects more a need on our part for elevating the discussion and keeping people informed.

The next item is Bob Lutz's report on the section of International Law Council.

ELLYN S. ROSEN: From October.

PROF. ROBERT E. LUTZ, II: From October?

ELLYN S. ROSEN: Remember? Jeff? Bob had the opportunity to address the section of the international law's council in October, and we

have had a very generous offering of support from the section for a number of the topics under consideration. Certainly we talked about the outsourcing piece yesterday, but also with regard to the international arbitration and mediation and with respect to the third-party financing of litigation.

PROF. ROBERT E. LUTZ, II: And the section has indicated that, as indicated in the discussion of the issues, that it's well organized to participate and contribute in many ways to the work of this Commission.

ELLYN S. ROSEN: Thank you, Bob.

MICHAEL TRAYNOR: I think if there's nothing more to take up under this part of D, we might take just -- Don or Phil or Bob, are you going to be here the rest of the morning? We might defer the liaison reports in order to do them orderly rather than try and cram them in right now if that's agreeable.

PHILIP H. SCHAEFFER: Fine.

MICHAEL TRAYNOR: Why don't we take a short five-minute break and we'll begin with the testimony as soon as we get back at 9:45 or before.

(Recess).

MICHAEL TRAYNOR: Our first speaker this morning is Richard Granat which is Co-Chair of the eLawyering Task Force of the ABA Law Practice Management Section and President of DirectLaw, Inc., and he's also given us some written statement that's in our materials. But without further introduction, let's call on him and hear what you have to say, Mr. Granat.

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RICHARD GRANAT: Thank you, Michael. I think I'm going to run through some ideas for about 20 minutes or so and leave some time for some questions.

By way of introduction of full disclosure, if you will, let me just give you some idea of the different hats that I wear. President Paul of the ABA set up this eLawyering Task Force in 2000 with the idea that, his thought was at the time, which turned out to be an impression, that the Internet would transform every industry: the travel industry, the banking industry, the brokerage industry, and therefore would have a legal impact on the legal profession. So his idea was we should have some group which would help lawyers

figure out how to deliver legal services online. And we've been running this group through the law practice management section issuing standards and running educational programs actually since 2000, since the Dot Com Bust, if you will. And things have been quiet for about seven or eight years, but in the last three years we've noticed a real acceleration in interest among lawyers and figuring out ways to deliver legal services online.

I'm also a member of the President's Committee on the Delivery of Legal Services which is the one place within the ABA that focuses on access to justice for people with moderate means. I know from hearing this discussion, there's a lot of interest here on what I call the issues that big law faces in terms of multinational practice. But my own particular practice interest is for solos and small firms, and some of the issues really I think really affect both classes.

I also run my own little virtual law firm out of Maryland from where I live in Florida, and I can talk about that. And my big activity and what I do mostly every day is I run a company which provides a virtual law firm platform to solos and

small firms and medium-size firms to enable them to deliver legal services over the Internet. So I have a number of different perspectives that I really want to share with you today.

I really want to focus on three things. First, what do clients want? What do consumers want? What do the lawyers really want? And this subject of online legal services, what are the opportunities and what are the obstacles? Three things: Clients, lawyers and online legal services.

Let's talk for a minute about what I call the consumer problem. We soon will have what we know as the Web generation who has, what I call digital DNA, will come to a point where they have legal problems. This is the generation that's grown up with the Internet. This is the generation that spends 50 hours a week online, this is the generation that will want to deal with their lawyers online, and if they can't they are going to look for another alternative. They are not going to want to come to your office, sit around for two hours, come back three days later, get another result. They have a sense of speed. They have a sense of efficiency. They think

differently than all of us here in this room. All of us as I look around the room, not everybody, but many of you are about my age. We are disconnected from this generation. We don't know what they want or how they operate and how they expect to be able to deal with their lawyers. The legal profession will have to change to deal with this generation online and over the Internet or they are going to look for other alternatives.

We see -- and there's more detail in the written statement -- what I call the latent market for legal services, and this is mostly the services that solos and small firms provide to small business and to individuals. We come to this number through an analysis, this is probably about a 100 billion dollar market for legal services generally. This 45 billion dollar number is the estimate of all the problems that go unserved because consumers choose not to go to lawyers for a variety of reasons. They don't trust lawyers, they don't like the pricing, they go to self-help books, they turn to software.

So what do clients want? Let me run through this quickly. Clients actually want fixed prices. They hate the hourly rate. That's true of big

firms, it's true of corporations, and it's true of solos and individuals as well. Clients want speed. The new generation wants speed. They want it now. They want what we call transparency. They want to have a better understanding about how lawyers produce their product and they want to have a better understanding of what's going on to be able to manage the case load, manage the work.

Certainly among the broad middle class they want convenience. They want it on their time, not on the lawyer's time. They want service. They want better technology. They know that there's good technology out there and they don't think necessarily that lawyers use that technology. And in our own analysis, when we go back to what President Paul thought, which was certainly the case, that every other industry would be transformed by the Internet. The last industry to have really not to be transformed is, in my view, is the legal profession. So because we had many thousands, millions of people turning away from lawyers, we have a new environment that the Internet craves which we call a much more competitive environment.

What do we mean by competition? Take a

company LegalZoom, privately-held company, not a law firm, funded with 25 million dollars in venture capital, achieving nationwide branding as the dominant legal brand, producing a million wills, thousands of incorporations, thousands of LLCs. Where do you think that business comes from? It comes away from lawyers. Solos and small firms are being eaten for lunch by a company like LegalZoom.

There's more than 1,000 legal Web form sites. There are independent paralegals. There are independent tax preparers. There's a tremendous amount of competition that's happening because of the reach of the Internet and because of some other characteristics of the Internet which have now created what I call new players in the legal market.

So what do I mean when I talk about online legal services? Online legal services happen when a client relates to a lawyer through a secure client portal through the lawyer's Web site so that the lawyer's Web site becomes a major conduit for the delivery of legal services to the client. By secure it means that it travels over what we call the HTTP protocol which all data is

transferred between the Web site and the client is totally encrypted and the client has a user name and a password. Through this environment many things can happen in terms of communication, collaboration, specialized legal applications. A whole variety of things happen which make the Web site now empowered as an online legal service delivery mechanism, the main way in which the client relates to the lawyer.

We call this virtual lawyering. Virtual lawyering is not, it's not just having a physical office. Sometimes you hear, well, I'm working out of my house, therefore, I'm a virtual lawyer and I send email to my clients. That's not what we call a true virtual law firm. Just having a Web site is not virtual lawyering. Most lawyers today have some form of Web site which is really the form of a Yellow Page ad in the sense that all it has is their bio and lots of legal information but it's not interactive and it's not in any way connected to delivering actual legal services over the Internet and through the Web. Using email is not virtual lawyering. Using email is not delivering what we call -- even email itself obviously is not encrypted, but it's not part of the total concept

of delivering legal services over the Internet.

When we talk about the concept of virtual lawyering we talk about the development of new Internet technologies like web advisors, what we call know-how systems, the idea of automated document automation. What happens in automatic document automation is the client registers for a site, they log on to have their own secure web space, they actually fill out an online questionnaire, the attorney then reviews the questionnaire and has a discussion with the client, maybe amends it, maybe reviews it -- this is I'm talking about the legal document itself -- provides legal advice by telephone, by Skype and through a secure space.

What's happening in this environment is very different than what happens in LegalZoom because the lawyer is actually involved in providing the legal advice. The lawyer is fully engaged. There's an attorney-client relationship. All the core professional ethics that now are required are adhered to such as checking conflicts of interest, confidentiality, and the lawyer is totally accountable for the result. This is a very different process than just buying a legal form

from a legal form site which millions of people are now doing at the expense of the legal profession.

In our own case we provide a technology, self disclosure, to make this happen. We started this in January of 2009. And our most recent version of this, we now have about 100 law firms that have signed up for it. So we know that it works and we know that it is satisfying in many different ways, both from a consumer point of view and from a lawyer's point of view.

We believe that this concept, the virtual law firms, must also be ethically compliant. Wearing another hat we've issued standards for our eLawyering Task Force for minimum requirements for virtual law firms. We've included a copy of that in the written statement that I submitted, and I think it's in the appendix, so you can take a look at what some of those requirements are which we believe need to be more widely accepted so that malpractice insurers, when they come to make a decision about whether a law firm is delivering legal services online, they don't just shoot it down because it's something they haven't seen before.

My notion of the way this concept evolves of online legal services is that there's a need to level the playing field, that the technology is actually evolving so rapidly the lawyers need to be enabled to compete more effectively, to institutionalize these innovations and improve the client experience.

I see, and this is the subject of this Commission, that there's some ethical points or rules that have the impact of impeding innovation in the delivery of legal services, and I believe this is happening not only for solos and small firms but also for large firms as well, since the rules will have to apply to both solos and large firms. And what I'd like to do is just pick up a couple of issues and share with you some of my own perspective about why they impede innovation of the delivery of legal services and, therefore, have a deterrent to innovation that must happen if particularly solos and small firms need to survive and to thrive.

Now, this is a little bit contraindicated by what I just said. But I think there is an issue that you discussed which is alternative business structures and the ownership issue. We think that

certainly among solos and small firms it is hard for them to innovate on the technology side being mostly under-capitalized mom and pop operations without some change in ownership structure which enables capital to aggregate solos and small firms into networks which bring to bear on those networks capital and management methods.

I'll leave it at that.

There's this issue of the cloud. You've heard about cloud computing. What cloud computing means is that applications are sitting up in the Internet which law firms can access without having to install them locally. The advantage of that model is that innovation can take place and then the cost of innovation, the cost of software development, the cost of software applications can be amortized over a much larger number of units and therefore brings the cost down.

The model for that is Salesforce.com which developed basically sales management software which was made available to small business units at a very low cost, and those small business units couldn't really access that technology because they didn't have the budgets to do it. But by enabling this technology in the cloud, it was

possible to bring the cost of the technology way down. That means that all the data, the company sales data was kept on the Internet someplace. In the legal environment it means that client data can also be kept someplace, just like your bank data is up on the Internet, and there are issues about confidentiality of client data and protection of client data which is particular to our profession.

My point here is that we need to be more precise and clearer about ways both to protect the integrity of that data and to permit operating in the cloud. Because if you can't operate in the cloud, innovation in my view doesn't really happen either at all or as fast as it needs to happen. In the next three or four years you will see major shifts of large companies moving their technology, not locally in terms of internal networks, but up into the Internet because it's cheaper. The legal profession needs to do that as well if it's going to remain competitive. If it doesn't, it will continue to remain less competitive than other industries and maybe law firms operating in other countries.

Then we have this issue about legal referral.

My point about legal referral is that there needs to be some clarification of what legal referral is so that lawyers can take advantage of new models of marketing to clients on the Internet. There's been a recent controversy, for example, around Total Attorneys because some lawyer attacked their model and endangered the representation of the lawyers who subscribed to the Total Attorneys model and the complaints were made to ethics commissions, grievance commissions all over the United States most of which have now been dismissed.

So my question is, why do you have to go through all that? Why is it possible for somebody to make a complaint and that the lawyers have to defend themselves before a grievance commission because the rules are really so unclear that nobody knows what they mean? Plus from a structural point of view one could ask, why does a legal referral agency always have to be a nonprofit? Why can't it be profit making? Why can't we have new models? Now we're not talking about the typical legal referrals the Bar Association does through a telephone, charges the client $35 to call. That model is frankly

obsolete. We're talking about new models that connect lawyers with clients over the Internet and making it clear, whatever rules you want to apply, let's just make them clearer so that people are really not confused and that we can have innovation in this space which really deals with the client access issue.

Fourth issue, this is unbundling legal services. I think as many of you know there's this new emerging development of offering limited legal services to individuals, mostly small business and to individuals, which enables the individual to enter into a limited retainer agreement and buy just the legal services they need when they actually need it. Something like 29 to 30 states have already passed some form of rules which permit and facilitate limited legal services. But there's another 25 states that haven't. In my view this trend needs to be accelerated.

The ABA in its Model Rules has already provided a framework for delivering legal services. But why is it that 25 other states really lag behind in this kind of a development? It's really inexcusable in my view, particularly

since we know that clients/consumers really like this model of delivering limited legal services. So there needs to be a more urgent pressure on states to adopt this model, because if they don't, you know, clients/consumers go elsewhere. Forget the law firm. I don't need it. Forget the lawyer, I'll go elsewhere. I'll buy my services from some other new player in the marketplace.

Then we come to UPL. So the lawyer says, well, we'll go after LegalZoom. We'll persecute, prosecute them for unauthorized practice of law as one Connecticut lawyer recently said. How far do you think that's going to get when we see the legal profession prosecuting these new players in the marketplace for UPL? That will be popular with consumers. That will be a good way to consolidate the legal profession's reputation among the broad general public. UPL is not an answer. We need to have some more clarity. We need to have some clarity so that it's clear that a software innovation or an expert system is not the practice of law. One would think by using common sense that a piece of software is not a lawyer. The District of Columbia Bar defines the practice of law as a relationship of trust

between, you know, and confidentiality between a person and a client. There needs to be a better and clearer definition, not the broad definition that the last Commission came up with which basically prohibits anything that has to do with law as being the practice of law. That's not going to get anyplace in an Internet world. It didn't protect the publishing industry, it didn't protect the newspaper industry, it didn't protect the music industry. It's not going to protect the legal profession from new entrants into the legal profession, into the legal industry from serving clients in the way in which they want to be served.

We live in a very big world. We can put our services in the British Virgin Islands or we can put them in the Dutch Antilles and we can provide bankruptcy forms in Texas and we won't even have to figure out where we are, and we'll scoop that business away from the bankruptcy attorneys. It will be hard to touch us. So there needs to be a way of what I call again level the playing field in a number of different ways, in that case enabling lawyers to be more competitive without being overly threatened.

There's another set of issues which deals with client identification and what I call establishing the client-attorney relationship. I've had a number of people say to me in doing a will online, there's a requirement for a face-to-face meeting because we must make a judgment on whether there's undue influence or we must make a judgment about whether the person is competent to make a will. There are innovative ways in order -- there are ways to actually achieve that objective without having a face-to-face meeting. In some cases you may want to have a face-to-face meeting. But there needs to be, there needs to be some clarity about when there needs to be a face-to-face meeting and when there shouldn't be a face-to-face meeting.

At the present time, for example, our money laundering rules don't really apply to transactions between individuals and lawyers for common legal transactions, although I've had lawyers tell me that they do. So, again, there needs to be some education and clarification about client identification, because when you deal with clients over the Internet, how do you know you're not dealing with a dog or somebody else? If you

know what I mean. So there's a lot of concern when you're dealing with somebody over the Internet. From a more naive point of view, how do you really authenticate that person? There are ways to authenticate the person. You can authenticate their email, you can call them on the telephone. It should not be seen as a barrier to the delivery of online legal services.

Now, let's talk for a minute about what lawyers want. We talked about what clients want. Here is what I think what lawyers want. I think what lawyers want is happy satisfied clients which means they really need to meet those clients' or those consumers' perceived needs. I think what lawyers want is a better work/life balance; that lawyers don't necessarily have to work 80 hours a week or they need some way of striking a balance between their work and the rest of the things that they are really interested in. I think lawyers if they could would like to make money when they sleep. They like to make more money without actually doing more effort. And I think a solution to some of this, some of these needs both on the lawyer's side and the client's side is enabling the delivery of online legal services

without going through too much detail. I tried to go through more detail in the written statement. But this is a short presentation.

So my feeling is, to sum up, what I call level the playing field, we want to level the playing field so that lawyers can compete with new players in the legal environment and new players, and not only the LegalZoom, but there are going to be international law firms that will want to serve corporations in the U.S. from an offshore environment. And leveling the playing field means enabling lawyers to be more competitive without compromising what we call core professional values, the core professional values that make us into a profession and not a business.

But there's some disconnect going on right now which put lawyers at a disadvantage on very little things. Like, for example, asking a lawyer to archive a Web site every time the Web site page changes or some states require a physical office. New Jersey recently had a requirement for a physical office. Maryland doesn't. So I happen to live in Florida and serve clients, you know, full-time in Maryland. But there are little things like that that make it really hard for

lawyers to innovate and make it really difficult for lawyers to respond to the new players in the marketplace.

The Internet -- I go back to that competition point -- has spawned lots of new players both locally, like the LegalZoom, and will also internationally. We've got to take a look at that competition problem and make it easier for lawyers to compete without compromising core professional values. Questions? I know you had a question for me. Stephen? I woke you up.

PROF. STEPHEN GILLERS: Richard and I have had Internet exchanges and conversed online about living in Florida and practicing virtually in Maryland where he's admitted. And one complaint, rather absurd permutations -- Richard knows that I support the legitimacy of what he does even though he's in Florida, because his clients are in Maryland and he's advising under Maryland law. But one can imagine a Marylander who is wintering in Florida going on Richard's Web site maybe living next door to Richard and using his services. And is he engaging in the practice of law in Maryland when the client happens in that instance to be in Florida? All of which

highlights something of the absurdity of the geocentric models for Bar admission in some instances.

But my question, my question that I told Richard I was going to ask him is this. Much of what you have told us aims at leveling the playing field, your term, our term, by making the business model that you describe easier for lawyers to do ethically in part by changing the rules for lawyers and thereby better to compete with LegalZoom-type businesses. I used that generically, who are not lawyers, who are not law firms. One could also level the playing field in another way instead or in addition and that is to make life harder for LegalZoom so that they don't have the advantages that lawyers don't have by virtue of the ethical constraints you described. Would you speak about that?

RICHARD GRANAT: Yes. I think a couple of issues there. Personally I don't have a problem with Web sites that offer let's say legal forms as long as there is a disclaimer which says it's not a law firm. My problem with LegalZoom is that we have Robert Shapiro of O.J. fame on cable television all the time saying the law is on your

side and if you come to me you can save thousands of dollars over going to a lawyer, which to me is a material misrepresentation because you're comparing apples and oranges. I think they should be, they should hit a standard of full disclosure about what's going on, and I think a fair -- there should be a fair representation about what they do because it's a misrepresentation.

I don't think you can go the direction of -- I think it's a slippery slope which Texas tried to do which said that legal forms are the equivalent of the practice of law. So I don't think that gets you very far because there are other ways to get around those rules. That was the point I was trying to make before. People will figure out ways to get around it.

PROF. STEPHEN GILLERS: How do you view groups like Axiom.com?

RICHARD GRANAT: Axiom.com is really what I call a distributed law firm meaning that the lawyers really work out of their homes and they have a central meeting place. And I haven't noticed on their Web site this concept which I'm talking about which is a client portal where clients can actually sign on and relate to their

lawyers over the Internet. I think they could do that. But that's what our definition would be of really online legal services or virtual lawyering.

Some people would call Axiom a form of a virtual law firm. I don't really call it that because they are not really operating on the Internet. They really have a distributed model. So instead of having the lawyers all in a central law office, they are really working out of their homes and they are still relating to each other, but they are not relating to clients through the client portal, and it's the client portal which needs to respect certain standards and certain technologies like figuring out ways to check conflicts of interest, maintaining confidentiality data. There's another whole set of standards which come into play when clients relate to their law firms through the Web site. And our eLawyering Task Force has issued a set of minimum requirements for those law firms which we've included in the written statement as a way of coming up with what we call ethically compliant virtual law firms under the existing ethical rules. So they can only serve clients, there must be a way they only should serve clients which they

are legitimately authorized to serve other than your little hypothetical. Question? Go ahead.

PHILIP H. SCHAEFFER: I'm Phil Schaeffer. I'm curious, how do you protect the integrity of the lawyers in the law firm, the virtual law firm? By that I mean, you'll have a number of lawyers presumably who the information would go to, you have some system of ensuring that their credentials are appropriate, that they are acting with integrity, that in fact they are doing a conflict check.

RICHARD GRANAT: You talking about in our environment? What we're doing in our environment is providing what we call this virtual law firm technology that our existing law firm which it's quite clear what their credentials are.

Interesting you raise that question. Let me cite another model, you should take a look at it. It's called -- I was talking to George about it before the presentation -- it's called JustAnswer.com. JustAnswer.com solicits questions from consumers, and lawyers, it turns out, it is in 20 different categories, but the legal category is the largest one. They have recruited several thousand lawyers to answer questions. The lawyers

answer questions not necessarily from a client in the state in which they are a member of the Bar, because they say that the answers to the questions is legal information rather than legal advice. There's a difference, a theoretical difference.

They do check the credentials of the lawyers because I went through the process and they actually outsource it to Lexis through a contact to verify that the lawyers were actually lawyers. What was interesting about it is they are getting thousands of inquiries, thousands a day of people asking legal questions just to get answers. And the legal category they told me is the largest category, even larger than health. I just find -- and this is not a law firm. It's a company called JustAnswer.com, venture capital backed, based in San Francisco, growing like lightning. And it's just very interesting that you see this kind of a development and there is no conflict of interest check and there's no establishment of the lawyer-client relationship because they say there's no need to have one because legal information is being provided rather than legal advice. That's not an answer to your question. I'm just giving another example of the

developments that I see out there that need to be addressed in some way.

PHILIP H. SCHAEFFER: You're greatly, obviously greatly experienced in that. Do you see any methodology of assuring the integrity of the communications with the lawyers? That is, that the lawyer is qualified, that the lawyer is not conflicted, that the consumer will be adequately serviced by using these technologies?

RICHARD GRANAT: I think it's hard to monitor third-party entities from a technology point of view. I think the model that we've chosen is we have a technology built into an individual law firm which requires a conflicts of interest check, which requires that all data be encrypted, which requires the security of the data. So our own model is we consider ethically compliant which is the way to do it.

Then you have what I call sloppy models. Another sloppy model is, you'll like this one, RocketLawyer.com, backed by Lexis, 2.9 million dollars. Consumers register, they get into their own particular consumer space, big directory of law firms. If they want to relate to a law firm, they can somehow connect directly to the law firm

and they can have an interchange, but there's no conflict of interest check, there's no credentialing of the lawyer. When the lawyer registers, I mean it's just a case that you were making which I see a flagrant disregard if you will of core professional values, yet backed by Lexis 2.9 million because they see this as a way of appealing to consumers.

So we have these discontinuities in the whole legal industry. I mean, they could have done other things which would require the client to jump off that site, go to the law firm's site, reregister at the law firm site, sign a limited retainer agreement which doesn't happen on that site, make sure the conflicts of interests are checked, make sure that there's confidentiality and data and so forth. So there are models which are ethically compliant and they are models which are not ethically compliant and we're trying to develop that idea through the standards that we're developing through the eLawyering Task Force. And Stephanie Kimbro who is now part of that group and also has a company which does virtual law firm technology has developed a model of ethically compliant ways of delivering legal services over

the Internet. And she will speak after I will, so you'll get the whole picture.

KEITH R. FISHER: Richard, can I ask you to elaborate on a couple other points that you made? The first one is your suggestion that innovation was being impeded by the existing ethical structure. And what I was wondering is innovation -- and I think the implication was that innovation on the part of solo practitioners in small law firms. But are they the folks that really do the innovation? Innovation by whom here? The examples you gave were of outside firms that were providing technological platforms and innovating in that area, but those presumably are nonlawyers who are providing a product that lawyers can then use.

RICHARD GRANAT: That's correct. I thought that statement would catch your attention actually.

KEITH R. FISHER: You were right.

RICHARD GRANAT: I saw that some of the ethical rules kind of act as a little bit of a chill is a way to describe it. Individual law firms, when they come to us, have all sorts of questions. What I would like to see is the law

firm itself doing these kind of innovations. We had an award of the eLawyering Task Force called the James Keane Award in Excellence in eLawyering. They try and go out and find law firms that are truly innovating on their own, and we've given the award twice before; we'll give it again this year at ABA legal tax show.

We have a hard time finding those firms. We find sometimes there's more innovation going on in big law firms because they have the capital and management to do it. There's Brian Kaye, for example, out in St. Louis who has done a really good job of developing some form of expert systems that his clients can use in a certain area, and we've seen a lot of innovation among big law firms, internationally in Australia and UK, but we find very little of that happening in small law firms that serve the average consumer in the U.S.

KEITH R. FISHER: But is the innovation being done by the lawyers or is it being done by nonlawyer technology experts?

RICHARD GRANAT: Well, in most cases it's being done by the law firms with technology experts inside, and they are usually the lawyer technology experts because often you need a new

kind of category of person to do it. You really need to have a legal background to do it. You need to kind of be a legal engineer. Obviously small firms don't really have that. So when I'm talking about innovation, I'm talking about the jump, for example, from -- let's put it this way. The jump to go from a typical traditional office space practice, not just having a Web site, but delivering legal services online. Lawyers see this as very problematic because the Bar might object to it, the underwriter won't approve it, they don't know whether data is -- there are a couple -- if you just take the innovation of going from the traditional office practice to being online, it's problematic because the lawyers have so much concerns about that model for delivery of legal services.

We have seen law firms, individual lawyers who are quite brilliant who have come up with very innovative new tools to reach out to clients. I mean, one could expand and say legal education is a barrier to innovation too because it's training lawyers primarily to work in big law firms and become clerks to the Supreme Court practices except for the fact that most of the graduates

will end up being solo practitioners and don't know how to practice law. That's a different riff.

MICHAEL TRAYNOR: About five minutes before our next speaker. I know there's a --

KEITH R. FISHER: Can I add my second question? You also, what my second question is if you can elaborate on what you see as wrong about however many 25 states that harbor concerns about unbundling. And I presume that in many instances those concerns are that the clients simply don't know enough to be able to choose, I just want services A and B and not C and D. We received a comment letter from someone who was involved in family law that raised that very issue where the lawyer was being engaged solely to deal with child custody. And the question then is, is that lawyer then precluded or should that lawyer not ask, cross examine witnesses on questions that relate to other things about the divorce?

RICHARD GRANAT: It definitely depends on the case. It depends on the situation. I'm not really sure why those other states have dragged. It may just be internal inertia and a way of building consensus within the states. We had two

Supreme Court Justices from Illinois and New Hampshire who recently wrote an op-ed piece in the New York Times about the positive development of offering limited legal service because that's what consumers want for certain kinds of cases. It's still case based.

I mean, I do family law and there are definitely instances where in the sense that when this is not appropriate, it needs to be referred and I won't take it in this particular niche practice that I do. But that doesn't mean you throw the baby out with the bath water because there's definitely very positive ways of reaching out to consumers with a limited legal service, providing more reasonable fees and opening up access to justice in ways that really prohibited them from -- I mean, we have, even today we have no-fault divorce lawyers quoting $1,500 no-fault divorce because they have to be at the hearing and waste a half a day. For those people who can really represent themselves, they can cut their cost down to 300. Another $1,200 saving is not only a lot, but it prevents them from turning away to some other alternative.

So like anything else there's got to be

nuance. I'm not suggesting it should not be nuance. It should not be treated lawyer-like with some careful categories about what works and what doesn't work because we are a profession and this retains the integrity of the profession. But there should be some carve-outs in new ways which for our group of people open up access to justice and enable lawyers to serve a broader array of this latent legal market that we've been discussing.

MICHAEL TRAYNOR: George?

GEORGE W. JONES, JR.: I wanted to follow up on that point on serving the legal market or the latent legal market. Do you have a sense or do you have any way of knowing whether the organizations like or services like LegalZoom or JustAnswer are serving that market, whether those entities are providing services to who would otherwise not have legal representation or not have legal advice at all?

RICHARD GRANAT: I think they serve both. I think they serve the broad middle class. They serve moderate income folks. They may not serve well low income because to really work on the Internet today you need to be literate, to print

medium, you need to be able to follow instructions. If you're filing your own documents, you need to be able to follow it exactly. So it doesn't really work as well for low income. But if you have a language problem it doesn't work well unless it's a Spanish site.

But to answer your question, I think there's a broad spectrum. The broad middle class is definitely moderate income. It's definitely people -- we know this. We see emails, correspondence that people are frustrated and they are looking for another alternative. We're trying to capture that. We're trying to bring that back from a LegalZoom back to the legal market. That would be the goal, to offer a true value-added service. A little bit of legal advice really is a huge difference, huge difference than just -- I assumed everybody knew that LegalZoom was simply a legal document preparation service where they were selling forms and had paralegals filling in and they were not giving any legal advice. So in that respect it's a little bit of a higher-priced legal form site. We know that people need legal advice, not everybody, but certain points and it can make a huge contribution.

In my own practice it makes a huge contribution. It's gratifying to actually be able to talk to people -- that's why lawyers get to be lawyers, they like to talk to people and help people. It's gratifying to put them on the right path, to say, yes, I do a lot of divorce, you're going to have a conflicted divorce, you need full service representation, here are four lawyers I suggest that you can go to. That kind of thing.

MICHAEL TRAYNOR: We can take a question from Bob and we'll move to the next speaker after that.

PROF. ROBERT E. LUTZ, II: Thank you for your very interesting presentation. I was wondering whether you would like to comment on another phenomenon that you didn't mention and that's online dispute resolution. Have you found that that's been particularly successful? Has it threatened some of the innovation issues that you consider are threatened in the other context? Are there the same ethical issues? Is there an access to justice that's really made available through this process that wouldn't be made available otherwise?

RICHARD GRANAT: Interesting question. I ran an online mediation project at the University of

Maryland Law School before 2000. It turned out to be too early. It was people who are -- I had this idea if people had a custody dispute or a child support dispute in different parts of the country, we could get them together online to resolve it. Turned out most people who used the service lived two blocks from each other, couldn't stand being in the same room. So I had this unanticipated consequence, and it didn't work as well then because we didn't have high speed connections. The technology has changed for online disputes settlement and it's gotten very efficient for certain kinds of disputes. There's no question it's become efficient for certain kinds of disputes. I think the ethics would be the same as you're off-line dispute settlement.

I worked for a company called Fed R which has federal judges doing dispute settlement, but the dispute settlement is in that physical office but everything else is online in terms of management. So I'm not so sure that the cost would be different. I think -- let me put it this way. I think the simpler the dispute the easier it is to do online dispute settlement. The more complex it is you have to be off-line. There's a company

that does disputes for eBay which are very narrow disputes and it does thousands of disputes because the issues and the facts are very narrow. If you have a very wide fact-based controversy I don't see that as easily mapping to an online environment. It's too complicated.

MICHAEL TRAYNOR: Thank you, very much, Mr. Granat. I really appreciate your written and your oral presentation being with us today. And I hope you stay in touch for more ideas that you have.

RICHARD GRANAT: Thank you, very much. Thank you for inviting me.

MICHAEL TRAYNOR: Our next speaker is Stephanie Kimbro who has received the Keane Award for Excellence and has her own virtual law practice and has given us some materials. The bios of each of our speakers are in our materials so I'm not going to go into it at length in introducing them. We look forward to your comments, Ms. Kimbro.

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STEPHANIE KIMBRO: Thank you. I appreciate the opportunity to speak to all of you. I'm humbled by this. I recognize so many names of

well-known people. I appreciate this opportunity.

My name is Stephanie Kimbro and I operate a completely web-based law practice. I am licensed to practice in North Carolina and I've been doing that for the last four years, completely web-based practice. And I'm the cofounder of Virtual Office Technology or VLOTech. My husband is a computer programmer, and out of need, we came up with this software and the company was acquired in the fall, and I work, in addition to being a solo practitioner who practices law online, I also work with other solos in small firms, attorneys, to help them set up virtual law practices. So I have both experiences with my own clients in my own practice but then also listening to the concerns and issues of these other attorneys and wanting to do the same thing.

And my talk may overlap a little bit with some of the things that Richard was saying. And in those areas where it does I think those are especially important concerns that we have and I want to share.

First of all, I want to distinguish what is a virtual law practice and what is not a virtual law practice, because there's some differentiation in

the terminology that's used so I want to be clear what I'm talking about. A virtual law practice is a professional law practice that's located online, has a secure portal, and the clients and the attorneys are working together online anywhere they can access the Internet. And some features of the virtual law office might include online attorney-client discussion, filling out forms, legal form document automation, events calendaring, a lot of the things you do in a traditional law practice but they are all online, conflict of interest check, jurisdiction checks, being able to import in-person and online clients and run a jurisdiction check on both. So there's a lot of malpractice and ethics check built into the system. A lot of things that you would term as eLawyering, different methods of eLawyering are all handled within a virtual law practice. And some of the terms you may have heard of are VLO, virtual law firm, web-based practice or online practice. These are all different forms of a virtual law practice.

Okay. What I'm not talking about here today, and we need to be clear on this distinction, is we're not talking about LegalZooms or other

online companies selling legal forms without attorney review. That's not what a virtual law practice is. These are solos and small firm practitioners providing their services, legal services. We're not talking about a law firm Web site with an email Contact Us form. Those Contact Us forms where attorney Web sites will have the prospective client, fill out, tell them what their legal needs are, that's actually not secure. That's sent through unencrypted emails. We're not talking about that unencrypted method of collecting that Contact Us form on a Web site. Communication by email, email is unencrypted, that's not a virtual law practice. Rented office space, Regus is the one we've heard of probably the most often, or a client who just works from home, that's also not a virtual law practice. VPNs, extranets, attorneys using Go To My PC and log me in, those are services where the attorney can access their computer remotely. Again, that's really working with online clients, retaining those clients and working with them online. And we're not talking about Axiom Legal here or Virtual Law Partners. That's more of a conglomeration of attorneys. Again, I think

Richard talked about this a little bit where they are all communicating themselves online but perhaps they are not retaining, working with their clients online. And we're also, if any of you are familiar with Second Life, we're not talking about a law practice based in virtual reality world. That is something completely different. I want to be clear. Maybe that's another presentation we should talk about another time.

And another thing, too, is that there are a lot of legal softwares and service products that are being released for attorneys out there. Not all of them create virtual law practices. A lot of them just are creating little smaller functions of law practice management such as time and billing, accounting, calendaring, but those in themselves do not create a full virtual law practice. What I'm talking about here is the establishment of the attorney-client relationship through to, you know, service, providing service for payment and rendering to the client. That full process.

How are attorneys using virtual law offices? And this comes from my experience in working with a lot of different solos and small firms that are

asking to set these up. They are usually completely web based, and that's where they are providing the unbundled or limited legal services or they are integrated into a traditional brick and motar law practice, and that is a unique situation where they are perhaps having some in-person clients and they are offering the virtual law office features to those in-person clients as an amenity to the existing in-person representation, and then they are also having some online clients to generate some additional client revenue, you know, expand their client base. So that's another trend that I'm seeing.

Also attorneys are using virtual offices as a transition method to allow them to continue to practice law while meeting other professional and personal needs. To raise families, that's the whole reason why I went into this myself. The birth of my daughter was the birth of my virtual law office. I work with a lot of especially young women who want to be able to stay in the game with their careers. This is an option for them that allows them that flexibility.

To care for ill and aging parents. I speak with a lot of baby boomer generation attorneys who

are having to take time off of their traditional practice to care for their parents right now, and so this is an option for them that gives them that flexibility to work with their clients while they take the time they need to handle their family needs.

Easing into retirement. I'm speaking with a lot of older attorneys who want to take one or two clients out of their traditional firm and slowly ease out and work with those clients but work with them online.

And then unfortunately I'm seeing a lot of young attorneys wanting to use the virtual law office as a way to, you know, they have gone through layoffs, they don't know how they are going to find another job in a large law firm, so what they are doing is they are opening a virtual law practice as a solo and while they are looking for another job, and they may continue to operate it as their own web-based practice or they may transition it into one these integrated firms where it's got a traditional practice in addition to a virtual office. So those are just some of the people I'm working with, other attorneys who are trying to use a virtual law practice.

Why is this important? Well, I'm here today not just for the attorneys that I work with and myself, but for my clients as well. For the public, virtual law practice provides greater access to justice. And I wish you could hear some of my clients' comments. They probably would not go to a traditional law firm. There might be an intimidation factor there, taking time off of work, paying for child care, travel. This really does give them more affordable and accessible legal sources for the lower to moderate income individuals.

In addition to that market, there's also pro se litigants. Providing -- you know, the courts are overburdened right now with pro se litigants and they are having to hand hold for those clients. So what this does is this lets those pro se litigants go to a virtual law practice and for a minimum fee be able to get that hand-holding guidance, takes the burden off the court systems and, you know, on a case-by-case basis obviously. But that's another area that virtual law practice can serve.

And also pro bono opportunities. Because the process is so streamlined it really allows the

attorney to handle more quantity of clients and it gives them the opportunity to take on pro bono cases. And I know in the system that I use we actually have that as an option in the billing section as to provide pro bono. So this is another way to use technology to provide access to justice.

And then for the legal profession I think we've touched on a lot of these: better work life balance, flexibility. Lets the attorney practice law so much, and all the automated features, it takes care of a lot of that for you. It helps you prevent malpractice through these automated checks and processes. The attorney cannot proceed until a jurisdiction check has been handled, the conflict of interest check has been handled. These are built into the technology and may actually help to prevent malpractice through those set processes. Lower overhead, less office waste, echo friendly, expands the client base across the states where the attorneys practice license law and increases competition which Richard spoke about a little bit earlier.

What are the concerns that we have? And I submitted materials and also a video walk-through

of the software that I'm helping set up other attorneys on so that you have an idea of what those processes are that they kind of help mitigate some of these concerns. But many of these risks are going to be similar to the ethics and malpractice risks you're going to see in a traditional law practice, but the technology is built in again to address those. These issues might be unauthorized practice of law in other jurisdictions. That's where you have multijurisdictional law practices, attorney's licensed in more than one state, so they are practicing law virtually in those two states. Or two attorneys and a license in two different states and they are opening one virtual law firm. And then UPL by nonlicensed professionals, attorneys who are not in good standing opening up a virtual office or a paralegal trying to open up a virtual law practice and provide legal services.

Competency, this is the issue of on a case-by-case basis, can the client's legal needs be handled online or do they require a full service law firm. Establishing the attorney-client relationship, defining the scope online, again, is this something making it really

clear to that prospective online client what services will be provided and will not be provided online.

And what I want to spend a little bit more time on is the security issue, and in this next slide I will, because that's what is really unique to a virtual law practice are protecting client confidentiality when it is in the cloud and software as a service. But the bottom line for security is that no hosting company is ever going to be able to guarantee that there will be no confidentiality breaches of office staff. They would be lying if they said that. Nobody can do that 100 percent. But even your other business relationships, your banking, where you store your physical law office records in that facility, they also can't guarantee you 100 percent that there's never going to be a breach of security of some kind, whether that's human, you know, theft, or that that's natural disaster such as a hurricane. There's not 100 percent security in any of those methods.

So what do I think should be the response to these concerns? And again I'm going to talk a little bit more about the security risk. But I

think it should be the responsibility of the individual attorney to do the following when they are operating a virtual law practice. They need to make the determination on a case-by-case basis, can I competently handle the legal matter online or does it require full service representation. That's key. That's step one. And if they can't, they need to refer them to a full-service law firm. If they are a virtual law office that has a brick and mortar practice then they may be able to handle that client if it makes sense geographically.

They need to understand the technology of security risk. This is the responsibility of the attorney operating a virtual law practice. They need to thoroughly question any prospective software and service provider on these issues: Data return and retention policies. Privacy policy, who has access to the law firm data. Making sure there's confidentiality, nondisclosure statements. What is their customer support? What are the terms of the license or service agreement? And is this software designed for attorneys or the general public? Is sharing or security the primary focus? And the reason I put those last

two there is we have a lot of attorneys who come that I talk to who are trying to piecemeal, create virtual law practice. This is solo, a lot of them fresh out of law school. They are trying to create virtual law practices in piecemeal applications like Google Free Apps trying to save some money. And they really need to understand the difference. There needs to be some guidance here as what is a secure application and what was created to be used by friends and family for sharing. There are two different levels there. Law office data requires so much more security than a lot of these apps provide. So those are issues that the attorney needs to understand before they open up a virtual law practice.

And then any response should be, to avoid a chilling effect on future innovation, any regulations on virtual law practice, they need to be broad and easily adaptable to the advancements in technology. This technology changes so quickly, but they need to be kept brought to keep up with it. Because I'm working with a lot of attorneys who are showing me ethics opinions that deal with faxes and cell phones and emails and there's how do I apply this to what I want to do

and that's all they have. So maybe in these opinions, you know, not limit them to specific types of technology but more broad forms.

And then how can we support virtual law practice? I think the key here is education. The committee for the delivery of legal services has an entire section on unbundled legal services. That's key. Malpractice insurance carriers need to have an idea of what is a virtual law practice, how does it operate, how does it have those malpractice checks in place. And then State Bars, the education needs to be there for the law practice advisors and ethics advisors to answer the questions of these attorneys that are coming to them and saying does my State Bar approve this? How do they feel about that? And the State Bar doesn't know what a virtual law practice is or understand it themselves. So I think education here on these levels is very important.

And then again broad updated guidelines for the tech and security, keeping them broad. And then emphasize the access to justice key. Encouraging, providing legal services online if this is an option. I know that I have been working with several legal aid services to, you

know, emphasize that this is a way if they can connect with attorneys to provide pro bono opportunities, other more affordable legal services, and I just think that that's another way you could support virtual law practice.

And then looking ahead, a virtual law practice, it's going to expand beyond what we can imagine right now, beyond what I can show you, what we can talk about, but the core function is going to be the same. It's going to be the ability to securely deliver legal services online, work with clients in that secure portal. That's not going to go anywhere.

The growth of online legal services, this is largely consumer driven. And again this is what I see from my clients. If you weren't there I probably would have gone to Google and cut and pasted and put a will together myself. That's really scary. But that's what I hear all the time from the public, from the clients that find me online. They are going to do that regardless. So I think it's really up to the legal profession to step up there and meet that consumer need and be the responsible party that sits in control of this trend. And legal professionals, they are seeking

guidance from the ABA, from the State Bars about how to safely operate a virtual law practice, so we really need to provide them with well-informed and updated guidance.

And I think that's all have. I'm actually writing a book for the law practice management, ABA's law practice management section, so I'm doing research right now state by state how are attorneys providing, creating virtual law practices, what are the ethics opinions that they are referring to, so I'll be more than happy to share some of the that research with the Committee when I get it compiled.

MICHAEL TRAYNOR: Thank you, very much. We have time for questions. Yes, Carole?

PROF. CAROLE SILVER: Thank you, so much. This was really fascinating, your comments, written comments also really fascinating, very helpful. And I think for me as sort of a very traditionally-minded lawyer, I get stuck on an initial issue which is how do you decide that a client's problem or a particular client is appropriate for virtual law office practice and not? What's built-in either to your technology or what's your practice? What can you tell us about

what you've learned about that?

STEPHANIE KIMBRO: Well, I think it's very similar to that of a traditional brick and motar when they walk into your law office. Because I did practice with a small firm before I went on my own. It's similar to when they walk in the door and you say to yourself, I only have two years of experience in this and that's a very complicated issue, I think I need to send them to someone more experienced. For me it's the same way when I practice law online. The client comes in, I read the legal matter -- I do estate planning, by the way. And If they are requiring trusts, and I know that I don't have a great deal of experience in complex estate planning, then I refer them to a full-service law firm in their area. The technology, the system that I use has a referral database, so I built it up over the past couple years with regular people, full-service firms and full-service firms with virtual offices that I refer them to. So I have that set up. I click a button, the button provides them with the referral name, who to call, where to go, and it's that simple. But again I think it's a case-by-case determination of do I have the experience to

handle this, is it something that can be unbundled like Richard mentioned, or you mentioned, if it's a child custody matter, you may not be able to do that. But it's, you know, a case-by-case decision.

PROFESSOR CAROLE SILVER: One little follow-up question, which is, my understanding, and maybe I'm wrong, is that virtual law practice you're defining as no phone calls, no contact other than through the Internet?

STEPHANIE KIMBRO: No, ma'am. I think it should be kept flexible in that part of the definition because there are instances where I have some I'll say older-generation clients, they are retirees -- I live in North Carolina by the coast -- so they have rental property down there in North Carolina and they will call me first to make sure I'm human, that the picture on the Web site is really there and they will chat with me for a while, but then they will go back online for the rest of the process. So I don't think it should be limited to -- if I had a matter where I questioned what the person when they fill out the worksheet on my Web site, if I'm not sure they are sure about something, I'll give them a call or

I'll say let's schedule, there's a calendaring section, let's schedule a phone conference. For some of the younger clients who may want to do web conferencing, that's voice and visual. I think it's a combination of those methods, but again on a case-by-case basis.

PROFESSOR CAROLE SILVER: Thanks very much.

MICHAEL TRAYNOR: George.

GEORGE W. JONES, JR.: Thank you, very much for a very interesting presentation both in writing and orally. But what I wasn't quite sure about is whether the system, the virtual law office system that you sell, provide, is scalable. Is it solely for sole practitioners or can it operate with multiple lawyers in multiple physical sites providing service to different sets of clients?

STEPHANIE KIMBRO: I think that's probably in the future. Right now we have two, three-person firms so it's small. But that's because of the security. It was built to be very secure. The larger and the more individuals you put into that kind of technology the less secure it becomes, so a system would have to be designed to, you know, with those considerations in mind. I have talked

to many attorneys who want to use the software for that purpose. And there are additional concerns with multijurisdictional practices online especially with the unauthorized practice of law which you're doing the jurisdiction check. But that would have to be built into the software for a more complex, larger firm. But that's in the future, very near future.

ELLYN S. ROSEN: Stephanie, you spoke about how your clients want to contact you over the phone or otherwise to make sure that there's a person attached to the picture. And I'm wondering about the converse with respect to ensuring that your client is who in fact who they say they are, especially when we're talking about security issues and data security issues. Is there something in the software that helps you do that or are there other steps that you take?

STEPHANIE KIMBRO: There are other steps that you can take it and it depends on how the attorney is operating the virtual law practice. And there are two different answers here. I guess the first is that I don't know that it's necessarily my responsibility to verify who they say they are. I don't know that a lot of, you know, attorneys do

that in a traditional law practice either. Sometimes they will check a driver's license. But all that may be handled online as well, if the attorney wants to be careful, have them scan and upload a picture of their driver's license with a signature underneath, let's say, upload it to you for verification.

There's also the issue that before they can execute any of the final legal documents to make them, you know, valid and enforceable, they are going to have to in most cases, at least in North Carolina, have two witnesses and a notary public signing them that they are over the age of eighteen, you know, they are competent to handle these legal matters. So there's those three other individuals signing before they are enforceable. So I think there are different ways of verifying. There's also I think there are other softwares online that you can use in addition to verify that the person is who they say they are, but I'm not sure that's really the responsibility of the individual attorney to do that.

PROF. STEPHEN GILLERS: Thank you. In your work either in your firm or in VLOTech, have you ever encountered a rule of ethics or other

regulatory rule that you looked at and said this impedes what we want to do, this really should be changed to recognize the kind of work that lawyers like me are doing?

STEPHANIE KIMBRO: I can't think of a specific ethics opinion. More the problem is that the ethics opinion, like I said, refer to fax or email so that they are having to go back -- it's usually electronic communication, but in the comment section they are being specific about emails and cell phone usage, and then the attorney is saying, well, how do I use a software program, so they are trying to apply it and make sure it applies to those opinions. Again, that's why I said things are kept pretty broad so that those issues can be -- the attorney is not having to make that interpretation of the opinion.

PROF. STEPHEN GILLERS: So you would like greater clarity about how the regulatory system applies to what you do, but you haven't hit up against a ceiling that has made it impossible for you to do what you want to do?

STEPHANIE KIMBRO: Mostly it's education is where I run into the biggest problem, talking to the malpractice insurance carrier, you know, they

are not aware of the law practice, the ethics advisors of law practice directors and individual State Bars. They are usually fascinated, but it's an education, what is software as a service and how does it work. So that's the biggest impediment in my opinion.

MICHAEL TRAYNOR: Jeff and then Keith.

JEFFREY B. GOLDEN: Steve actually asked the question that was in my mind. But, first of all, I'd like to take the opportunity to compliment you and the previous speaker on what are both interesting and I think helpful presentations. And I guess it's an invitation to you and the previous speaker because you mentioned the need for regulations which would be broad and easily adaptable, and we heard earlier that we need better rules and clearer rules, and the request of the invitation is to point us in the direction of any rule or draft rule that you've seen which addresses some of the concerns that you might have that we would find useful as a precedent, whether it's been adopted in another jurisdiction or is just out there as a draft.

STEPHANIE KIMBRO: The ABA Task Force has come up with a draft minimum standards for virtual

law practices. I believe that's correct, Richard, is what it's titled, and that is, you know, provides some broad guidelines. I do think that's something to look at. I don't know if Richard has something else he wanted to add. He's the expert. I'll defer to him on those types of issues.

KEITH R. FISHER: I had a question it occurred to me on your slide of what a virtual law practice is not. If a group of lawyers who otherwise comply with all the elements of your definition of virtual law practice, a conglomeration, why would they not be considered by you to be a virtual law practice? Is it the issue of the software not being ready yet to deal with a larger group?

STEPHANIE KIMBRO: I haven't seen that those larger practices like Axiom Legal, that they are actually retaining the clients online, working with them online. They are not, as a firm, they are not taking it all online in that secure portal and working with their clients. That's why I wouldn't include them as a virtual law practice. Does that answer your question?

KEITH R. FISHER: It's not an a priori exclusion; it's just the ones you've seen don't

meet your definition?

STEPHANIE KIMBRO: Right. I think it's in the future. I really do. The security has to be there before, and that's key, before these attorneys go out and start these firms. Like I was talking about the piecemeal application, the security has to be there for their clients' protection as well as their own. It's coming.

MICHAEL TRAYNOR: Other questions? I had one but I wanted to make sure. This happens more in litigation and transactional practice perhaps than estate planning, but often a client or prospective client or referring lawyer will want to tell the story in the first conversation when what you really need in that first conversation is just to make the conflict check and that takes sometimes two steps. Is that an awkward phenomenon for a virtual law firm to do that?

STEPHANIE KIMBRO: No, not at all. My clients register, prospective client, they go through their jurisdiction check and make sure -- it sends me a red flag if they are not within my jurisdiction, so I know to double check that legal issue to make sure it's something I can really handle. And then I read what they have asked,

their request for legal services. And if I need to ask additional questions, because I'm really not sure, then I just go ahead and do that. It has a thread in the discussion that has date and time stamped, can't be deleted by them so they can't go back and say, well, I mentioned this. It's all there on record. So I just ask questions or sometimes I will ask them to fill out like a client intake sheet, a form, online HTML form, too. So there's different ways to gather that data before you start the initiation of the online engagement letter. There's a process for that where they are clicking to accept. So, yes, you can gather all that information. And then the data is never, just like in a traditional law firm, a lot of states require to you keep that client that you turned away, you know, disengagement letter, the prospective client you didn't work with. Same thing on-line. That file is just marked did not take or referred to another party and it's kept within a secure server. So it's accessible to run against the conflict of interest check and it's kept just like an in a traditional law firm there with the other data.

MICHAEL TRAYNOR: Ellyn?

ELLYN S. ROSEN: I was hoping maybe you could follow up with a little more detail on your discussion about the data security and what a virtual practitioner might and ought to consider when negotiating the agreement with the clouds or the service provider who is going to be maintaining all of that data in the server.

STEPHANIE KIMBRO: Oh, gosh. I need my book for this. I have an entire chapter on this section what to look for in the user agreement. I guess the key would be is there geo-redundancy of the servers. That's an important feature for softwares for service. Geo-redundancy means the server, if something happens to the server location, let's say a hurricane wipes it out and it's in Florida, your office data is backed up in another geographic location so it will be secure there. What is the data return and retention policy in terms of can you get your law office data back anytime you need it? You know, how accessible is that? What happens if the company goes under? Who has your law office data? How do you get it back? And all of that needs to be laid out in the user agreement. The attorney has to be comfortable with that. Who has access to the law

office data is a big one. Encryption is key.

But like Google, for example, if you read Google's user agreement, they don't have any terminology in there that says they can't go in and look at what's in your Google document and what you have saved. So with the softwares service company provider you'd want to see that that the junior admin and the senior admin cannot unencrypt your law office data and read it unless you provide them written instructions, you know, permission to do so. I'm try to think off the top of my head what all these little issues are. A lot of security matters like that, like I said, I can provide you more detail on that. Those are the key ones I can think of.

GEORGE W. JONES, JR.: Do you have a sense of whether particular kinds of practices are more amenable, more susceptible to virtual law office practice than others? To my mind it sounds like the service that you provide is, could be used with any kind of legal practice. I think that for people with national specialties, immigration or securities or bankruptcy, it might work also, but there's different problems on that side. But any kind of small firm practice in any jurisdiction in

the country I would think could use this type of service to provide service to its clients. Is that your sense or do you have a different view?

STEPHANIE KIMBRO: Yes. With the completely web-based practices such as my own, if it's a solo or small firm it tends to be more transactional, so it's estate planning, you know, contracts, business law, business setup, more transactional. But then the virtual law offices that are integrating with traditional brick and mortar practices, then there are attorneys who are doing litigation. Again, they are having their in-person clients come online, do a lot of that work online and show up at their office for the other matters or show up at a court hearing or a date. So there's a combination. There's a lot of flexibility in the way that it's being used.

And I have seen, what's interesting, are the attorneys who want to handle federal law. So let's say they have an IP practice. Well, technically they can expand their jurisdiction across the entire country if they want. I mean, from a marketing standpoint, that's not that practical. It's not affordable to do that. But, you know, but they could. You know, IP law, I get

that a lot. But then the issues that come up there are the conflict of laws issues. I can write you a patent, I can do copyright for you because that's federal, but you're out in California and I'm only licensed here in North Carolina and I can't write a basic contract for you because that's California law. So, you know, little nuances like that come up with those types of practices. Did that answer your question?

GEORGE W. JONES, JR.: Yes. But I would bet you that there are lots of lawyers throughout the country who are licensed in a particular jurisdiction where they happen to live who are called upon frequently to give advice or to answer questions about questions of state law that arise in the course of the matter but relate to states in which they are not admitted to practice, and as long as they don't go there to that jurisdiction, they are probably not practicing law in that jurisdiction. And so it's not -- to my mind it's not necessarily the case that every time a lawyer advises about or has occasion to consider the state of the law in a particular jurisdiction that he needs to be licensed in that jurisdiction or that he is risking unauthorized practice of law

prosecution if he answers a client's question.

STEPHANIE KIMBRO: It's the document drafting I think in the state for the potential unauthorized practice of law again with the federal practice there, you know, if they are drafting a document, selling the client a contract that's drafted in California -- under California law enforceable by California law for that client but they are licensed only in North Carolina. And that's even though -- they can handle the federal aspect but not the state specific aspect on the virtual law office.

MICHAEL TRAYNOR: Suppose the California client would be willing to have a choice of law clause for North Carolina forum. Would that be okay?

STEPHANIE KIMBRO: I'm not a UPL expert on that. But I know some attorneys are saying what if they have counsel out in California that drafts the legal document, uploads it to the VLO, to the virtual office, and then the attorney in state reviews it, I think that would be okay. Or, you know, a paralegal prepares it in North Carolina and then that California attorney reads what the paralegal did, says, yes, it's okay here, uploads

it back and the North Carolina attorney can sell it. So perhaps new referral relationships can develop between attorneys with virtual law offices to provide that service and avoid the UPL.

PROFESSOR CAROLE SILVER: Do you have a sense of who else is using at least the software that you've developed in terms of practice areas, in terms of their locations, anyone who is practicing overseas, for example? So can you just give us a little more information about the kinds of uses that have been made so far of the software?

STEPHANIE KIMBRO: Well, of the particular kind that my husband and I developed we just had about 30 law firms, we have a database of 500, it's just the two of us. But that's how much interest there is in this. But we have a firm in Australia, a Canadian firm consultant out in the UK who is about to launch a UK virtual law office as well. So a lot of different other countries are interested in, especially UK because of the way their legal system has recently changed being able to use virtual law offices. So, yes.

GEORGE W. JONES, JR.: Is there something in your -- I mean, I suppose it's always possible that people will abuse whatever technology there

is and it's not a reason not to make it, make the service, make the product available because somebody may misuse it. But there are a couple of issues that arise in this context that worry me a lot and I wonder if you've given any thought to them. One of them is the anonymity of the person providing the service. The person who buys your product can then provide the service, market the service anywhere in the country from anywhere in the world. And if the client, wherever that client happens to be located has a problem, it would be extremely difficult for the client ever to find the person who provided the service. And Gene Shipp and the Bar Council people might have substantial concerns about how to keep track of people providing services over the Internet.

STEPHANIE KIMBRO: Sure. And I'll respectfully disagree there a little. I know when we set up Web sites we asked the attorneys to look at the ABA's own guidelines for Web site creation that require, you know, and the minimum requirements are contact information, where are you licensed, what is -- some states even require a physical office location or P.O. Box. So I think that any online client going to a Web site

is going to be able to find out who the attorney is behind there. I mean, that would be the best practices. Again, that's where I refer our clients to is the ABA's guidelines for setting up Web sites so they will know who they are dealing with. But I think the responsibility there is the state, the individual State Bars to govern their own, their own licenses, licensees if they are not in good standing, you know, just as they would with traditional firms to crack down and enforce on attorneys who are not in good standing who have not passed the Bar to step in. And so I think they do the same things with those virtual law office Web sites, you know, you're not providing the client contact information.

I know that before I could set up my law firm the North Carolina Bar required me to register my URL with them. It had to be approved. And then a lot of the states where I'm setting them up for other attorneys the State Bars are requiring approval of the Web sites first. And one of the issues is, is the contact information on there, you know, how is this person going to get in touch with you. So I'm seeing a lot of concern from the State Bar ethics advisors about that issue, and

they are coming up with ways to require their attorneys to provide that.

MICHAEL TRAYNOR: Any other questions? Thank you, very much, Ms. Kimbro, for your written and oral presentation.

(Clapping).

MICHAEL TRAYNOR: Let me make a scheduling note. We'll go right now into our liaison reports, and then if time permits, the remainder of our agenda. Then we'll take a break and we'll have a lunch break for the Commission. It will still be open. And then we'll reconvene at 1:00 p.m. for the public hearing where we have Larry Fox scheduled to speak.

Because of the weather problems, we had a scheduled speaker had to cancel so I wanted to let the members of the Bar and the public here know that we have a time slot after Larry Fox concludes and before 2:00 p.m. when we might hear from you if you would be interested in saying anything. And we may have some time at the conclusion of the last witness who is going on at 2:45 before we adjourn the meeting at 3:30. So if you do want to say or anything please let me know or let Ellyn Rosen know who is staff counsel.

Okay. Let's go then to the liaison reports. First for the Center For Professional Responsibility, Don Hilliker.

DONALD B. HILLIKER: I think in terms of the Center's liaison obviously the Center strongly supports all these efforts. We made an announcement yesterday at the coordinating council for the numbers --

MARCIA KLADDER: Don, you need the mike.

DONALD B. HILLIKER: Sorry. Anyway, the Center is obviously supporting all the efforts of the 20/20 Commission. And in our coordinating council meeting yesterday we again supported the activities of the Commission and then urged the various entities to provide comments many of which have already done so to Keith's issues outlined. And we've heard of other activities. They are trying to put together a couple panels for the International Legal Ethics Conference which we hope inform the Commission's deliberations going forward and generally being as supportive as we possibly can to support that.

MICHAEL TRAYNOR: Thank you. Next is Phil Schaeffer for the Standing Committee.

PHILIP H. SCHAEFFER: I'm scheduled this

afternoon or perhaps tomorrow morning to give a complete report to the Standing Committee on professional ethics as to what has transpired at the meeting yesterday and today and I expect to do that. I'm quite confident that the support of the Committee will be continuing. The Committee previously submitted its views after being circulated among the members to this Commission as on the preliminary agenda, and I will report back to the Committee those items which the Commission believes that should be handled directly by the Standing Committee. And there's one or two of those, and those issues which the Committee, while it raised it, it was thought it should be relevant to the work of other committees. I have no doubt that the Standing Committee on Professional Ethics is going to be totally supportive of what's going on, and indeed I'm quite sure that there will be individual members who will want to participate in the future.

MICHAEL TRAYNOR: Thank you. Our next report is on the Task Force on International Trade in Legal Services, Bob Lutz.

PROF. ROBERT E. LUTZ, II: Thank you, Michael. The Task Force has been working for a

number of years on issues of trade in legal services that relate to the issues that the 20/20 Commission is confronting. It is going to meet tomorrow, Saturday, at 8:00 to 10:30 in room 6111 and, of course, it's an open meeting and you're welcome to attend.

The issues that we're currently working on include considering a number of transnational legal practice principles that the Asia-Pacific Economic Cooperation Council has drafted and is proposing to consider as hortatory types of principles that might guide or be the best practices with respect to the countries that are thinking about regulating foreign lawyer access. And that's one topic that is currently presented and is an interesting one that is brand new but is one which could raise some very interesting issues.

We have also been working very closely with the government in trying to develop special ties with the Bars of China and India to deal with issues of access to the Bar to the practice of law for U.S. lawyers in those countries, and currently there's a prospective exchange with the Chinese lawyers that may take place in San Francisco at

the annual meeting and would take place also in Beijing presenting the issues of transnational legal practice and how we might cooperate with respect to those.

With India a recent high court decision in Mumbai has raised questions about how foreign lawyers may be treated in the future in that jurisdiction and we are cosponsoring a program at the Section of International Laws spring meeting in New York in April that will focus on the U.S./Indian legal practice issues and hope also to meet separately with Indian lawyers about these issues at that time.

There's also the prospect of holding a global law firm summit, a second global law firm summit in New York with major law firms trying to engage in discussions about issues that they are confronting in the international practice. Phil participated in our first program the last time we were in New York.

Finally -- well, there are a couple of other things. We are also engaged in trying to assist the Department of Commerce and the USTR in developing better statistics with respect to the legal profession. And there's a special

committee, subcommittee that's working with those agencies because they collect information, produce economic analysis of that information on a regular basis in terms of the value of imports, the value of exports of legal services, et cetera. And so we're working with them to try to improve that, the collection, and also the identification of information.

We continue our efforts, too, to outreach to the various State Bars in particular to adopt foreign legal consultant statuses in their jurisdictions and also to endorse the FIFO or temporary practice rule, the Model Rules that the ABA has developed either in the 5.5 version or in the Recommendation 9, I think it was, of the MJP Commission.

Finally, we are considering a type of summit meeting -- well, we're talking about it. We have not focused. But previously we've held an Asian summit in San Francisco and had a couple of other meetings and there was some talk about trying to do something along that line for the annual meeting. And as we talked about yesterday, there might be some coordination with the 20/20 Commission on that particular project. I think

that concludes most of the things that we're doing right now.

MICHAEL TRAYNOR: Bob, thank you, very much. Our next report was going to be from the Board of Governors, but they are meeting, so I don't think we're going to have that report.

Now, I want to thank the members of the audience for your interest and for your attention. Yesterday we had a little bit of time where members of the audience came up and said a few words if they wanted to, so I'd like to provide that opportunity. If anybody is moved to say anything to us, just come up and step up to the table and get a mike and give us your name and make a comment.

Let me ask if anybody wants to report on the National Conference of Bar Presidents.

HON. ELIZABETH B. LACY: Fred should really be doing this. He put it all together. I think we had a very good panel presentation. The room was quite full. We gave our presentation. Fred did a very good job and at the end highlighted the seven, eight working groups that we have, that they might want to organize around it. They had some good inquiries and questions. And I know in

talking with Fred and myself, and the other panel members might want to add to this, there were members of those Bars that came up and were interested in the possibility of members of the Commission appearing at their Bars and things like that. So they highlighted some of the problems and they talked about some of the issues of getting people interested in it. It's not the easiest thing. You know, it's like this doesn't affect me syndrome/yes, it does type of thing. So, Herman, can you add to that?

PROF. THEODORE SCHNEYER: Somebody who was there from Delaware said that the topic of multidisciplinary, the recognition of the Commission to the thinking again on the multidisciplinary practices came as a great surprise since that had been more or less killed ten years ago and zombie-like appeared to be making a return. And I've heard that from one or two reporters as well. I think there are good reasons why we are going to be looking into that. But that is definitely one of the reactions that I think is expectable. But there were other people I think who were intrigued by what we said and I was glad we were there.

HERMAN JOSEPH RUSSOMANNO: Michael, I would add, and I agree with Justice Lacy, and Professor Ted said that, I thought it was a very good session. It was well received by the members. You know, being a former Bar president it was sort of like home to me and I think they realize that their input is needed and it was really for them to go back to their local Bar Associations, their State Bars, look at all these issues. I think the fact that there were several subcommittees that were formed interested them. It seemed that everybody in the room can relate to those committees or some of those committees as to the work being done. And I would think it would be important for the Commission to really include the Bar Associations which we had. This has been such an inclusive Commission trying to get everyone's input. And the more and more that we can keep in contact with the Bar presidents and the other leaders, president elect, because this is a long process, you know, in the present I think it would be productive for us at the end of the day. So I thought it was a very good session.

MICHAEL TRAYNOR: I think we have an educational and communication challenge for us on

the MDP issue and perhaps others. But that one has surfaced. And I sort of feel we need to be open and forthright about what it is, that we would be remiss in not understanding it, but in also not exaggerating the problem. It's a piece of the whole puzzle that we're considering. I think there's some feeling afoot that, you know, that the dragon was slayed, the evil dragon was slain ten years ago and now it's coming out of it's lair secretly, and that's not the case at all. It's a matter of enabling our legal profession to compete in the modern world and to deal with the issues. But if anybody here around the table or in the audience has a suggestion today about how we can really get the dialogue going in an intelligent way that doesn't minimize the problem or exaggerate it. Steve?

PROF. STEPHEN GILLERS: I think it's very important to distinguish between three different structures, and we sometimes use the same phrase to refer to all of them. But the British, for example, have identified distinct structures and they are these and they raise different issues. There's the legal disciplinary practice using the UK term which is what we have in Washington D.C.

where persons who are not members of the Bar can have equity interests in law firms that practice law, they practice law, and that might be the least aggressive structure. And then there's the multidisciplinary practice which involves a law firm that contains nonlawyer equity owners and which provides services in multiple disciplines, not just law. And then there's the alternate business structure which the British call Tesco law, we might call Wal-Mart law, where a nonlaw business like Wal-Mart or Tesco creates an entity to render legal services albeit through lawyers, employed lawyers to third parties. The owner is a nonlaw corporation and the lawyers are the employees of the corporation and the client is not the corporation as in a traditional in-house counsel office, but third parties. And that perhaps raises the most aggressive model. We should keep those three models in mind.

Last point. Mr. Shipp said yesterday that in nearly 20 years he hasn't had a problem with the Washington D.C. legal discipline model. And in the UK now that model has been allowed with up to 25 percent nonlawyer ownership since March of 2009, and a document we received yesterday says

that it hasn't presented a problem. There are all kinds of bells and whistles and safety nets that you can employ to ensure that the people who are nonlawyers but co-owners of the firm are of appropriate character. We can talk about that at sometime. So that model is the most tame and we actually have some empirical experience with it that can help inform our judgment and we can use to respond to predictions of doom if we proceed down that path.

HERMAN JOSEPH RUSSOMANNO: Just as a follow-up to what Professor Giller just said. One other issue that came up today at the presentation before the National Council of Bar Presidents, the workshop that we were in, was are there significant changes in the last ten years to say warrant the Commission's work. Meaning if you went back a decade ago, and clearly certain issues were discussed, not everything that's on the table here, what has changed. And they say the Commission were able to show like in the last ten years the significant changes that we have had and how these issues have become more complex and more pressing.

And, you know, when we were here yesterday

when President Elect Steve Zack talked about that probably the next ten years in the profession we'll see more changes than in the last century and many people believe that. So I think even from the standpoint of our public relations, too, to be able to show the need, the necessity, and even though it's just a decade, that there's many issues today that are on the table in 2010 that were not that clear in the year 2000. But that's important I believe for a number of members as they look into this and see the Commission's work for the next few years.

MICHAEL TRAYNOR: Other comments? Carole?

PROFESSOR CAROLE SILVER: Well, I think just following up on what you said, Herman, I think that it's, to me at least, it's very helpful to look at other disciplines. And in my neighborhood we have a CVS Pharmacy which my family has visited regularly as a doc in the box. And ten years ago, if that existed it certainly didn't exist in the city of Chicago. And it does make you think how convenient this is and how easy it is for, you know, on the weekends, off hours, until eight o'clock at night to go and have a particular need met; if we decide that our need is pedestrian

enough to go to a doc in the box, in other words, we think we know what's wrong with us, we just need someone to give us something and fix it. And it sort of has broadened my thinking in thinking about legal services.

So while I absolutely think what you said, Steve, was so helpful in delineating the issues with regard to MDP and how it infiltrates what we're thinking about, I would hate to see us say, well, the first layer we might tackle, the middle layer we'll think about, but the last layer, Tesco law, CVS law, God forbid, right, we won't touch. Because I'm not sure that that is going to do the service that we really are after. I'm not sure it would help deliver legal services as much as we might. I'm not sure it will help in terms of full employments of law graduates, which I think is a huge issue, and provide good training to people. And so I really encourage us to use that rubric which I think is so helpful but to not get stuck on just tackling the simplest or perhaps least troubling layer.

MICHAEL TRAYNOR: Keith?

KEITH R. FISHER: Two thoughts occurred to me. One, following up on what Herman was saying,

if in our communications with Bar presidents and other groups that may have some misgivings about some of these issues, we can illustrate the accelerated pace at which technology has evolved just within the last decade as some kind of an indicator of what the next ten years portends, it might help with the pitch. And to follow up on what Carole was saying, we have a lot of accumulated years of law practice and law teaching and other wisdom here on this Commission and we may want to conclude that while we should not rule out anything a priori that most of the development in various areas of the law, not just legal ethics, has come with taking small steps at a time. So perhaps we should, you know, endorse the smaller steps and leave open the possibility of, after having had some experience with those here in the United States, of exploring some of the bigger steps down the road. I think people will be turned away if we hit them with the Wal-Mart idea. We can say we're not ruling it out, but maybe at the beginning we should experiment with the smaller steps that people might be more comfortable with.

PROFESSOR CAROLE SILVER: It depends who the

people are. Those people in Colorado that go to Wal-Mart might be really happy about this.

KEITH R. FISHER: We have people in California who have the marijuana super store we heard last night. They might be happy too. I don't know.

PROF. THEODORE SCHNEYER: They would be happy too, but I don't know.

MICHAEL TRAYNOR: Ted and Jeff and then Liz.

PROF. THEODORE SCHNEYER: Somebody from the Philadelphia Bar Association said that he had been discussing at a recent meeting with members of the association the preliminary set of issues that we have circulated, and with respect to many of them including alternative business structures and including MDPs, that a lot of people said, well, that has nothing to do with me. And I think a lot of people are probably right, it would have nothing to do with them. But it seems to me that it's one of the burdens of what we proudly call self regulation which becomes more burdensome in a time of great professional specialization because lawyers hear a lot about stuff that has nothing to do with them, if they want to pay attention to the broad range of issues that affect the profession

and the delivery of legal services. And I think that attitude is very unfortunate, but that there would be a lot of lawyers that feel that, that selectively would be passionately interested in one or two things that we are doing but a lot may be feeling different about others. I just think it's unfortunate from the standpoint of the quality of the internal debate within the profession about these issues.

MICHAEL TRAYNOR: Thank you. Jeff?

JEFFREY B. GOLDEN: I just want to harken back to Carole's comment, her example of looking across the street at another profession and developments in that profession and ask the question, are there lessons -- should we be consulting in a more interdisciplinary fashion? I think that's a job we're committed to being very inclusive in reaching out orally within in the profession. But would it be useful at the Commission at any point to take evidence or consult with the medical profession or any other profession where similarly technology has been impacting their business just to see if they have thought that through in terms of their own ethical rules?

MICHAEL TRAYNOR: Liz.

HON. ELIZABETH B. LACY: A couple of things. The man that was the head of the Philadelphia State Bar approached me, and in some ways this goes to Carole's comments. He's quite young for being president of such a large Bar. But his point to me was this is the way his generation of lawyers is going to be practicing law, and many of the people that he deals with in terms of people and even senior people within his firm don't see it as part of them or have trouble getting interested in it because that's not the world they know. The people that he deals with in the younger lawyers, this is the world they know. They knew it in law school. They knew it in college. And so I got an even a bigger sense of we need to really be approaching the young lawyers division, which was suggested yesterday, and because these may well be the people that can be motivated and mobilized in ways that perhaps some others couldn't.

The other thing I think that we need to remember, many of these Bar Associations or State Bars have issued various LEOs on some of these issues: outsourcing, type of off-site management.

And, you know, like any group when you've done it you kind of cross it off your list of things to do. And I think we need to be sure and say, you may have -- some of these were issued eight, nine years ago, you know. Do you need to revisit that? Have you had some problems with it? It should be shared with other people who may not have done it because we're also looking for uniformity. But trying to approach the regulatory group, whether it's the State Bar or Bar Council and saying just because you've done this doesn't mean you can cross it off your horizon. So those are two of the things that I came away with. And, again, not getting hijacked by the alternative business structures that they are part of what we're doing, but don't get, don't think that's hijacked this Commission.

GEORGE W. JONES, JR.: I want to follow up on Liz's comment. Did you understand the young Philadelphia Pennsylvania president to be saying --

MICHAEL TRAYNOR: George, can you speak right into the mike just for our court reporter? Thanks.

GEORGE W. JONES, JR.: Did you understand him

to be saying that he expected to be practicing in alternative business structures or multidisciplinary practices in the future? I mean, that is a world that he knows and he expects?

HON. ELIZABETH B. LACY: I would not say that I could say that he was looking at that specific thing, but his general comments were that so many of the ways we're talking about the practice of law is being affected or may be different is the world that he would be in. Now, I don't think he he would rule it out, but he wasn't speaking directly to that point. And he also wants us to come to the Philadelphia Bar Association meeting.

MICHAEL TRAYNOR: Thank you. Ellyn.

ELLYN S. ROSEN: I just wanted to add to what Liz and to what Mike had said. This is really just a piece of a much larger puzzle. But that it is important in the context of looking at technology and globalization and our increasingly borderless world for the Commission to learn and to help educate and to help the profession learn about what's happening outside of our country's borders, because that helps to give us context as we look at and consider the issues on our agenda

including the issues of uniformity, the issues of outsourcing, the issues of differing conflicts of interest and confidentiality rules, data security protection rules and other ethical considerations that are affecting lawyers, not just in the United States, but are affecting U.S. lawyers who are practicing outside of the United States.

MICHAEL TRAYNOR: Why don't we get the rest of our agenda done before we break for lunch. And when we break we'll have lunch. All of the people in the audience are welcome to stay. I'm sorry we can't include you in our -- the lunch for the members of the Commission, but you're welcome -- we don't know exactly what's going to come up because we're going to probably be completing our agenda pretty quickly before we have the next witness at 1:00. But we might have a continuation of this discussion or might discuss other issues and you're welcome to attend and we really appreciate your interest.

So let's turn to the remaining item on the agenda which is future meetings and teleconferences. Ellyn?

ELLYN S. ROSEN: Thank you. We've already discussed the future dates for the Commission's

meeting at the annual meeting and some of the other events that will be happening prior to that time. We will be updating the Web site, for those of you in the audience, we will be updating the Commission's Web site with those changes and with those additional events, so we encourage you to please keep checking the Web site for more information about where the Commission will be appearing for public forums, for roundtables.

In addition, just for the Commission members, I'd like to direct your attention, we have provided you with a prepopulated reimbursement form that you can use after the meeting to submit. And I think that's about it for future meetings.

The next Commission meeting itself is scheduled April 29th and 30th in Washington, D.C. and we will be providing some more details and logistics for that meeting to you in the near future.

HON. GERALD W. VANDEWALLE: What's the March teleconference?

ELLYN S. ROSEN: There may be a March teleconference. We're going to discuss further based on Keith's revision of the issues outlined on that. So you'll be hearing from us on the

Commission Listserv.

MICHAEL TRAYNOR: Anything else before we take a quick break? Let's take a break and until noon and then we'll all come back for our lunch break and discussion and then we'll have a hearing.

(Recess for lunch).

MICHAEL TRAYNOR: One brief announcement and we can have some discussion. Laurel Terry has very nicely expressed a wish and volunteered to talk immediately following Larry Fox. We have that time slot open so she will be talking then. I thought with the few minutes we have before we start hearing testimony again, we might think about, in a preliminary way, not in any decisive way, about our work product and what it's going to look like. And right now we've got an annotated preliminary issues outline. We've got Steve's task force working on material. We have a number of substantive groups as well as the strategic communications group. And if you look at this as a book or something, you know, it would be a substantial book with eight chapters, some of which might be controversial in it, so I have, just thinking ahead, how we get this in shape for

us to consider and make a presentation on when the day comes for it to be presented.

Bob Lutz had some ideas on it. I'd like to have him share with you. And then I'd like to have Keith comment on what he foresees. Bob?

PROF. ROBERT E. LUTZ, II: My thoughts really go to the outsourcing project and how we might present that. In the current form it is in the draft that's been circulated, but not out for comment other than through a limited group of people, the draft proposes, first of all focuses on foreign legal outsourcing. And I understand that we want to speak to the broader issue of outsourcing domestic as well as foreign. And it attempts to propose a set of best practices for lawyers to consider when outsourcing rather than prepare a large number of specific dos and don'ts. It sets up, in its current form, a set of principles that the drafters felt were composed of the best practices with respect to the topics of confidentiality, conflict of interest, supervision, et cetera, et cetera, that are involved in outsourcing.

So I think one of the questions that is posed is whether or not that approach of endorsing and

essentially the recommendation that it's proposed at this point to go to the House merely says we endorse or support the best practices as articulated in the report, and so the House would vote merely on that. And the content, the substantive content is actually in the best practices and that is what's in the report.

So that's one way to go and at least with that aspect of the Commission's work, and it seemed to me that that was the most helpful to the lawyers, while also -- I mean, the U.S. lawyer who is dealing with these issues, while also being an articulation of the ABA policy.

MICHAEL TRAYNOR: Thank you, Bob. Keith.

KEITH R. FISHER: Well, I'm a little hesitant to try and forecast at this point what our approach should be since we just formed these working groups. I need the mike. I'm sorry.

I was saying I'm a little reluctant to try to forecast what our work product will look like at this stage since we've just formed these working groups and we don't have yet a clear idea of what their recommendations and product will look like. Off the top of my head I could think of a number of approaches. The one that Bob just mentioned is

certainly one that commands our attention. But we're also going to have to keep our eye, an educated eye based on our outreach efforts based on now and 2012. On the audiences that we're reaching out to, one of those audiences clearly constitutes the state regulators of the legal profession and they might prefer a menu approach from which they could choose the various ideas. They could pick and choose as opposed to just endorsing one set of practices. So I think, I think there are a lot of things that will commend themselves to us as we get a little bit further down into this and do some more research and more thinking and have more input from various groups that form our core audience and our potential list of cosponsors to take this to the House, that, you know, we may be able to gradually narrow in on the approach that makes the most sense. I don't want to rule anything out at the beginning. I think the best practices idea has a lot recommended and maybe we use it in all or in part of what we end up with. But at this point I'm just a little bit hesitant to try to commit us to a particular format.

MICHAEL TRAYNOR: Other thoughts? Liz?

HON. ELIZABETH B. LACY: Keith, I have a question. When you said menu approach, were you talking about alternative proposed Model Rules or best practices in Model Rules? Maybe it's too early to ask.

KEITH R. FISHER: Yes. It will depend on what we come up with. We may decide on certain subjects that it's impractical to try to draft a rule or that the existing rule is fine and maybe just needs a little bit of gloss which we could provide by suggesting additional commentary to the rule. Some states might prefer to amend their rule as opposed to putting something in the comments. So that's what I'm thinking.

HON. ELIZABETH B. LACY: And I certainly agree with that. I think that's a very wise thing to do, especially since we don't know what we're going to recommend yet. I do have some concern with alternative Model Rules, however, in light of our committed thrust to try and get some uniformity. And I don't see that to be inconsistent with the idea of commentary versus rules versus best practices because it's the same idea in different locations perhaps. But I am a little, would be a little concerned about

alternative Model Rules.

MICHAEL TRAYNOR: I wish I anticipated before lunch what light eaters we all turned out to be. There seems to be a lot left. If any of our guests at this late stage would like some food to eat, you're welcome to go up there.

Next is Ted.

PROF. THEODORE SCHNEYER: I think with a project that we already know has been going on for three years, it's a good idea to get something early to the House of Delegates to show a little product. On the other hand, with respect to submitting something and calling it best practices, you wonder what expectations you're creating about future, what forms future recommendations might take. And besides a rule that would be in the Model Rules. The ABA has a number of Model Rules that are not in the Model Rules, but that go to subjects that we may have some interest in, and they are always in discussion of amending the Model Rules, and the principle in vogue what's called the Christmas tree principle, you can't get all the ornaments that people can conceive of into the Model Rules sort of document, and some things are probably

better treated as independent freestanding rules. So I think it would be good to submit some product early on in the process, but you have to also consider how that particular product could bear on expectations about what would be coming from us subsequent.

PROF. ROBERT E. LUTZ, II: Just a point. The thought that went into the draft of the section so far has been that this subject area really demands guidance or invites guidance to the American lawyer in how they deal with these issues. Of course, the focus was on foreign outsourcing, and so given that context the thought was that really the contribution that the section could make was really to assist to guide lawyers in their considerations, because there wasn't a clear negative attitude with respect to --

PROF. THEODORE SCHNEYER: I think there are a lot of subjects that are better addressed by guidelines or so-called desk practices although some people think when we say that that automatically establishes a standard of care, but -- and that's fine. I didn't mean to criticize that.

PROF. ROBERT E. LUTZ, II: No. No.

PROF. THEODORE SCHNEYER: That's probably not the appropriate approach for someone to take.

PROF. ROBERT E. LUTZ, II: I just wanted to explain the background to that approach.

PROF. THEODORE SCHNEYER: You think about all the specialty Bar sets of rules that exist, how trusts and estates and others --

MARCIA L. KLADDER: The mike?

PROF. THEODORE SCHNEYER: Sorry -- and how they relate to the Model Rules is sometimes a mystery. Sometimes there's a little tension. But people in those organizations think that those things are worthwhile even though they don't have that focus.

MICHAEL TRAYNOR: There's a very interesting article in the current issue of the New York Review of Books, not about legal guidelines, but by Dr. Groopman on medical guidelines and best practices in the medical area about how counterproductive that's been to health of people. People get locked into those guidelines and follow them and it can be counterproductive. That's not to say that best practices is -- we shouldn't be using that term, but simply that we be careful about what the implications are.

I also remember working on the McCray Task Force on Legal Education a couple decades ago. The core part of that project, what was the skills and values of lawyers, that we not -- while articulating skills and values, not create a recipe for malpractice which, you know, guidelines and best practices can be maybe used for negligence cases or malpractice cases. So we want to think about the terminology. There may be additional terms to consider, but that we just not use it lightly is all I'm suggesting.

Other comments about the work scope and the way it's taken shape given Keith's understandable concerns so we do not act prematurely.

KEITH R. FISHER: Can I follow up on something that was suggested? I think Ted's suggestion that we should have some manageable product that we can get to the House earlier rather than later is something we talked about before and I think is an excellent suggestion. And to continue his Christmas tree metaphor, I'm wondering, or maybe to mix it, I'm wondering if we as a group can identify some low hanging ornaments that we could, that we could suggest some revisions to, that are not particularly in

controversial areas or areas that we perceive will likely be controversial and spruce that up a little bit and get that to the House earlier rather than later. I'd welcome suggestions and thoughts on that from the Commission.

ELLYN S. ROSEN: I think that's a good idea. Ted, your thought about going soon with some things rather than later is something we have thought about and considered and certainly the outsourcing issue is one of those issues. The possibility of some of the inbound policy you've been working on have also some of those issues and I agree that there are some others that we might consider.

I know we're running right up against one o'clock and so my suggestion would be, to tag on to Keith's suggestion, is to think about some other issues. But I think it will be important that we -- and we're working to get those working groups established and off and running quickly to have perhaps a more detailed conversation about some of that within the working groups and then to funnel those ideas to Keith, myself and Jamie and Mike.

MICHAEL TRAYNOR: Other comments?

PROF. ROBERT E. LUTZ, II: I think we should think about packaging. And maybe there's a big package at the end or maybe we have a bunch of little packages under the tree.

MICHAEL TRAYNOR: I think we're going to regret using this metaphor.

KEITH R. FISHER: Don't take it any further.

PROF. THEODORE SCHNEYER: On the nomenclature of the best practices, the one concern is that people will say, oh, that that was under the standard of care, or that best is not the same as the ordinary, but best practice is to become the ordinary. But also the best practices is not some people sat around and decided the view that would be best, but rather it would be everyone's fate. And this is being been abused all the time, nowadays identifying, just in common parlance, best practices, and they are not evidence based and some in medicine turned out not to be medicine based points. That's one of Dr. Groopman's points. But that's another reason to be a little bit wary of that term.

MICHAEL TRAYNOR: Anybody else? Larry Fox is here early. We don't want to rush you, Larry, but whenever you'd like to begin, we welcome you.

Nice to see you. I think you know almost everybody here.

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LAWRENCE J. FOX: Nice to see you. I know almost everybody. I never met Mr. Schaeffer. Good morning. Carole Silver, I've not met you. Jeffrey Golden, I've not met you. Judge, Your Honor, good to see you. I think maybe the rest I know. Not Natalia, nice to see you. Hi, Marcia.

MARCIA L. KLADDER: Hi.

LAWRENCE J. FOX: May I begin?

MICHAEL TRAYNOR: Yes, you may, please.

LAWRENCE J. FOX: I guess you gave me my opening lines because I'm here on a faith-based initiative and I'm also here to make sure that certain gifts don't show up under my tree or under the ABA tree when you finally deliver the Christmas presents that I know you have in mind for all of us.

I thank you for this opportunity. You've all received my paper. My great friend Ted Schneyer thinks I lost it rhetorically, perhaps I did, but I apologize for that. But I will say that I care so deeply about these issues and I am so much a veteran of the wars that took place before at the

ABA over some of the issues that you may be addressing that my enthusiasm for expressing my views may have gone overboard. On the other hand, Ted suggested that maybe my view was that this Commission should not be convened at all, and to a certain extent I'm afraid that's right. And only to the extent that I think that there are some that are gleefully rubbing their hands and thinking about how this is yet another opportunity to pursue an agenda that I think is dear to the hearts of too many and relentless in its approach and intending to, in my view, and I hope the views of lots of others, seriously undermine professional values and professional faith.

Today I think -- I don't know how much time I have. Five minutes? Is that right?

MICHAEL TRAYNOR: We have a little leeway since we started early.

LAWRENCE J. FOX: I'll try and be brief. I feel a little difficulty only because I'm really carrying two different buckets of water here and I don't know how to go first. But let me just address if I can the issue relating to loyalty. It is my view that loyalty is constantly under attack and it's only under attack for economic

reasons, and it's relentless and it's broad based and it is premised on the proposition that lawyers have to turn down business. And the lawyers who turn down business think it's terrible that they have to do so and they don't recognize how lucky they are because when they turn down business there are other law firms turning down business who reciprocally will give them business. But since lawyers, all of us including me think we're better than any other lawyer, we think that if we didn't have to turn down business we'd have more business.

But I think when we talk about loyalty, there was a recent event that struck me as particularly instructive. It turns out that Goldman Sachs has been accused and apparently in fact sold collateralized mortgage obligations and it also bet against the same collateralized mortgage obligations that it was selling to its customers. Pretty shocking stuff. And it was much more shocking when one looked at what their defenses were. Defenses that I hope will resonate with this group. Their first defense was our clients are sophisticated, they should have known that we would be doing this, and, therefore, it was okay.

Those very sophisticated clients are suing Goldman Sachs right now, as well they should, and I don't think the fact that they were sophisticated in any way eliminates the obligation of Goldman Sachs to have not pursued such a strategy.

The second one was equally well resonated for our profession because that one said, well, it was different departments within Goldman Sachs who were pursuing these different strategies. The sales department was selling these CMOs and our trading department was trading, selling them short. And you'll recall many who have argued that what we ought to do in our profession is water down if not eliminate the basic rule of imputation. And to me this just struck me as exactly what we want to avoid.

The proposals for getting after imputation, eliminating or watering it down, are quite numerous. Some have suggested that we should just make all conflicts personal to the lawyers working on the matter. Others even say we don't have an obligation and shouldn't have an obligation to inform our clients that we're talking on matters adverse to the clients. Others suggest we should only impute conflicts within a country or within a

state or within a city or within an office or within a floor or within a department. It's perfectly okay if the 11th floor takes the position directly adverse to the 17th floor's clients, and it's really quite stunning. I went so far as to hear somebody argue, a prominent lawyer argue that one of his colleagues would relish taking a position directly adverse to other clients in the firm. I thought that was quite shocking. This also takes the form of seeking to have prospective waivers, not in writing, but to be assumed.

Then the other attack on conflicts of interest and loyalty of lawyers is that lawyers ought to only have to deal with conflicts when they are substantially related to the matters the firm is handling for the client. Or, and this is a proposal that I think has come from the Standing Committee on Ethics and Professional Responsibility, they have suggested that we eliminate Rule 1.7(a)(1), the directly adverse rule and we simply have 1.7(a)(2) which is the material limitation rule. And the problem with that, of course, is if we go to a material limitation, I know many lawyers who will say I'm

not materially limited in any way. In fact, I don't feel any compunction at all about taking a position directly adverse to a client in our California office because I'm in New York and I've never even met that lawyer.

So I hope and pray and plead that when it comes to issues relating to loyalty you stay the course. The Rule 1.7 has it exactly right. Rule 1.10 doesn't have it quite right. My friend Bob Mundheim ruined a part of it. But the basic principle in 1.10 remains a very important one, and for our profession to abandon that I think would be a shame.

The second bucket of water I'm carrying here is Rule 5.4. I see so many shades of MDP in what you guys are talking about in your agenda, in your publicity, that I can only remind you that we had these wars ten years ago. They were wars fought I think faith-based in part but a lot value-based and in some ways client-based. I don't want to resist those wars. They were very bad for us even though the forces of good prevailed. I think we got 5.4 exactly right, and there may be many things that you can address, but changing Rule 5.4's provision governing the independence of the

profession would be a terrible result.

Why am I so concerned? I'm so concerned on the merits, but I'm also concerned in two other ways. One, I don't think that the ABA necessarily will keep its monopoly on establishing standards for professional responsibility. We don't include clients in our deliberations. We are all lawyers deciding these questions. We've got a special responsibility and we also have a special responsibility to adopt rules that get adopted by the states, and I think the ABA's role in this can be jeopardized if we go the wrong way. So I think we've got a special responsibility if we're going to keep the role that we cherish that I am so proud of us having, and you have to think about that as you go forward.

Second, I really do worry about how often we change the rules. I think we have an institutional problem. I've been thinking about it for a while and it doesn't necessarily focus on the fact that I have disagreed with so many of the proposed changes. I think that we as an institution have an obligation to step back and say to ourselves, aren't we hurting ourselves when year after year after year we have new changes

coming to the floor of the ABA House of Delegates changing our rules of professional conduct. The profession doesn't change that much. It's simply a political battle that we're having over and over again. I think we need some stability and, frankly, I would like to retire. I'm not going to retire from teaching and I'm not going to retire from practicing law, but I would like to go say three years in the House of Delegates. That's six meetings without having another change in the rules of professional conduct, because I don't think we're doing ourselves any good.

Anyway, I thank you very much for the time. I thank you for your dedication to the enterprise. I'm sorry if I've offended any of you in my memo. But as I said at the beginning, it was heartfelt views that I had to strongly express because that's the way I feel about them, and it's the way I will remain feeling about them and fighting for.

Thank you.

MICHAEL TRAYNOR: Thank you, very much. Can you remain for a few questions?

LAWRENCE J. FOX: Well, I got an advance from Professor Gillers for the young student who might be able to answer the questions that he sent me

last week, but on the other hand they are pretty imponderable.

MICHAEL TRAYNOR: So why don't we start with Steve then?

PROF. STEPHEN GILLERS: I did give Professor Fox advance notice.

LAWRENCE J. FOX: Thank you.

PROF. STEPHEN GILLERS: An argument over the conflict rules of imputation pro and con can be based on many things including values and imponderables about how people will behave and not behave. But an argument over Rule 5.4 and nonlawyer participation in the ownership or management of law firms is often made in terms of predictions of empirical results. You've done that yourself in the debate over Rule 5.7, ancillary business practices. With regard to one kind of lay participation in the law in industry, one very narrow kind, we do have some empirical information and that is the Washington D.C. experience of allowing nonlawyers to have equity ownership in law firms, law firms that practice law for clients, not alternative business structures, not MDPs, and now we have nearly a year's worth of experience in Britain in which the

Washington D.C. model is also allowed so long as the equity participation of the nonlawyers in the law firms is under 25 percent.

Now, my question is, as we proceed over the next two and-a-half years, to what extent should we expect or be able to rely on actually existing empirical information in support of a conclusion rather than a prediction as you just made about what will happen if we adopt a change for which there is no empirical support?

LAWRENCE J. FOX: Well, I always thought that the best argument against any change to 5.4 was Arthur Anderson and Enron. We didn't have to go very far or wait very long to get the proof of what happens when you end up mixing up various functions within an enterprise and ending up eroding the core function. And in that situation the core function was auditing. In our situation the core function is the delivery of legal services. If you're simply saying is there some basis for suggesting out of the Washington experience that we could have people own an interest in the law firm who were not lawyers -- I don't know how to respond in terms of Washington because I'm not familiar with what has happened

there. I thought that the people that were allowed that ownership were people who in fact worked for the law firm in support of the law practice. They were not people who could do any other activity. They were simply -- and my only concern there is that, to what extent do those people, and I see this happening more and more, become far more powerful than the lawyers in the enterprise itself? And in that situation what we're stuck with is lawyers reporting, in effect reporting to nonlawyers who have no obligation to our rules of professional conduct and no dedication to those propositions. So that, you know, if it's perfectly okay to think about a nice model where the individual involved is the office manager or something and that person gets two percent, maybe that's totally benign. But I don't know how you draft a rule that doesn't capture things that I would suggest were evil in and of themselves on a value basis even if they weren't evil in and of themselves on an experiential basis.

And I also, of course, always, because I've seen how badly we've done with imputation, believe that as soon as we start eroding these rules a

little bit here and a little bit there, before you know it we're down to the point we are now with imputation with further pressure, now we've got, because we've amended 1.10 we have people saying why don't we amend Rule 1.10 further now that we've done this.

PROF. STEPHEN GILLERS: You know, you're changing the subject.

LAWRENCE J. FOX: Oh, I hope so. I was counting on that.

PROF. STEPHEN GILLERS: Arthur Anderson and Enron are rhetorical devices. We're not talking about that.

LAWRENCE J. FOX: They are not rhetorical devices. They are absolutely real situations and real people who lost their way.

PROF. STEPHEN GILLERS: Let me just finish.

LAWRENCE J. FOX: I'm sorry.

PROF. STEPHEN GILLERS: The Washington D.C. model and the UK model are not Arthur Anderson and Enron --

LAWRENCE J. FOX: Yes.

PROF. STEPHEN GILLERS: Let me just finish, Larry. My question, let me ask another more blunt way. Okay. Just taking the UK model and the D.C.

model, is there any empirical experience with those models, i.e. the absence of a problem no matter how compelling that would change your mind about those models?

LAWRENCE J. FOX: I don't think so.

PROF. STEPHEN GILLERS: Okay. Thank you. No further questions.

LAWRENCE J. FOX: Phil?

PHILIP H. SCHAEFFER: We have a similar empirical experience in the state of Texas where, of course, Rule 1.7 is considerably different than the 1.7 of the Model Rules. There has to be a substantial relationship between the matters before there is a concurrent conflict. The subdivision of 1.7 continues in both places where there's material limitation. That's the same rule pretty much that appears throughout the western world, indeed in the eastern world, too. What empirical evidence is there that the Texas lawyers are acting at an ethically subservient level compared to the rest of the lawyers in the United States?

LAWRENCE J. FOX: I don't know about empirical. I know this is clearly value based. The whole idea that any lawyer would take a

position directly adverse to its client without client consent, client informed consent, to me is a nonstarter on the value structure. So -- and federal courts, very interesting, you know, rejected the Texas rule because of just that proposition.

PHILIP H. SCHAEFFER: That was quite a few years ago.

LAWRENCE J. FOX: Well, the federal courts continue to enforce the ABA Model Rule, not the Texas rule.

PHILIP H. SCHAEFFER: Are you saying the English, the French, the Germans, the Belgians are acting at an ethically subservient level?

LAWRENCE J. FOX: Yes, I believe so. I believe that when you take positions directly adverse to your clients, you are taking a position that is ethically subservient, ethically untenable, that you cannot do that, that that is -- what are we selling if we're not selling loyalty? What kind of agents are we for our clients if we think on a disclosed or undisclosed basis without the consent of the client we're going to take a position directly adverse and defend it? It's like Goldman Sachs.

PHILIP H. SCHAEFFER: I take it it's an act of faith on your part.

LAWRENCE J. FOX: It's not an act of faith. The question is whether we as a profession are going to besmirch ourselves and ruin our professional birthright by saying it is perfectly okay without consent for a lawyer to take a position directly adverse to a client. End. Stop.

PROF. THEODORE SCHNEYER: I've heard you many times refer to Enron and Arthur Anderson, and I remember you published an article in our Law Journal breathing a sigh of relief that MDP went down in flames, because if Arthur Anderson had become an MDP what an embarrassment that would be for the legal profession, et cetera. And have you ever commented on the relationship between Enron and Vinson, Elkins?

LAWRENCE J. FOX: Actually I wrote another article, and I don't remember exactly what I said about Vinson and Elkins. But you misstated my proposition. My proposition was not what would have been an embarrassment if Arthur Anderson had taken over a law firm. I thought the analogy turned simply on the current Arthur Anderson as it

was, and I saw the core function of Arthur Anderson as being the certified public accountants independent in their own professional way and they are losing that value, compromising that value because they have gotten into so many other businesses. And it was that, I was just analogizing that to what a law firm might do if a law firm were providing legal services and also changing batteries.

MICHAEL TRAYNOR: Carole?

PROFESSOR CAROLE SILVER: I would love to learn a little more about how to think about the source of the ethical line between right and wrong that you're talking about or you talked about professional faith, and this is a question asked in all seriousness and candor. And as a group we're trying to inform ourselves and figure out at a very basic level what kind of information we should be looking at and rethinking how the rules affect lawyers, practice of law, legal services in light of changes that have occurred including technology and the influence of the ease of travel and communication that many people talk about as globalization. So in thinking about sources of information, professional faith and professional

sort of moral codes are possible sources, right? And I would love to know a little more, especially in light of the questions about empirical basis for some of the thoughts that you put forward. I would love to just know a little bit more about what we ought to be reading. What should we look at?

LAWRENCE J. FOX: Well, I would start by saying that at a time of intense technological change as we are experiencing, that is the time when we have to embrace our values, our professional values ever more. It's not an excuse for giving them up. It's a reason for being more vigilant about asserting them, being proud of them, enforcing them, and making the profession proud, and our client body most importantly understand that we're not going to let the fact that there's email and Internet and so on compromise our loyalty, our confidentiality, our dedication to their cause, our independence. To me, that's the answer to that. That in light of that that's no excuse. That's ever more a reason to stick with it.

In terms of where you're going to search for what it is you're looking for, I'm not sure,

because I'm not an expert on various forms of business organization. I'm here to tell you that I think it would be a sad day if the American Bar Association endorsed different forms of business organization that compromised the professional independence.

PROFESSOR CAROLE SILVER: But you're assuming that compromises.

LAWRENCE J. FOX: No, I'm not assuming that it compromises, because I'm in fact saying that we have an obligation to report to lawyers, not to nonlawyers who are not steeped in our values, not educated in our law schools, not subject to our discipline. And the whole idea that -- we see compromises in lawyer ethics when lawyers, for example, in in-house insurance company firms compromise lots of the professional independence we think they should have. There's a classic example of lawyers actually reporting to nonlawyers in a business environment where they are providing legal services to third parties. So there's a good place to start. See what's happened in that milieu because we've had enormous problems with having those lawyers treat the insured as the client while they are full-time

employees of the insurance company. Good place to start. I gave you one.

MICHAEL TRAYNOR: Other questions from the Commission?

I had one, Larry. First, I can assure you that we've not taken any positions on anything. We've just started last August and this is our second meeting and our first public hearing. And we appreciate the alert and we are guided by the core values that Carolyn announced in her formation to this Commission. We are going to be getting data and trying to address forthrightly what's going on in the world about alternative business structures, and I just want to check what the implications of your views are, whether you think that's really entirely irrelevant and we shouldn't even be doing that. Is it like a jurisdictional objection?

LAWRENCE J. FOX: I think what we should be doing is figuring out a way of exporting our values, not importing somebody else's values. One of the stunning cases I was involved in involved a situation where an American company overseas had hired a foreign law firm in Belgium or someplace where they were not entitled to the loyalty that

we're entitled to here. They then get sued by that same law firm in New York -- I think it was New York -- and they say, they brought a motion to disqualify. And the answer is, no, because you're a client of our Belgium firm, you're not entitled to the American level of loyalty that otherwise you would be entitled to. You only came to Belgium and in Belgium that's all you get, therefore, the motion to disqualify should be denied. And I was shocked at that kind of an argument that was being made in a court in the United States. There they were saying we ought to import the much lower standard than Belgium.

Now, fortunately the court rejected that argument saying when you're in our courthouse we're going to enforce our laws. And to me that's the very essence of the problem, that we should be looking at opportunities to enforce our rules and explain to the rest of the world why they are so important. Not say because of competitive interests that we ought to be weakening our rules to match the lowest common denominator whatever it may be, because there will be the rush to the bottom then. And if what we're judging it on is how competitive our firms should be, then the

answer would be, of course, in order to be the most competitive we ought to eliminate rules of loyalty altogether. That's not a standard, that's not a value that should inform this Commission's work in my view.

MICHAEL TRAYNOR: In trying to persuade others to accept our values, if we were to pursue that, do you think it would be helpful to understand what the other fellow's values are?

LAWRENCE J. FOX: Sure. I wouldn't suggest for a moment you should not research lots of things. I just want you to, hope you'll do it with the background of where we've been and how important these matters are.

I will say this. And maybe it's another apology I owe you. But I've read every word that was written about this Commission carefully and I didn't -- it read like, I said to Ted earlier, it read like somebody had already decided some things or certainly it had been set on a course, some of the language that was used. Now maybe I shouldn't have looked at it so carefully. It was only in publicity, it was only an announcement, but I read it and that's why I submitted this paper I submitted because I saw the use of words laded,

loaded with values that I was upset about. That's what got me started.

MICHAEL TRAYNOR: Well, we really appreciate it profoundly and appreciate your being here with us today.

LAWRENCE J. FOX: I thank you for giving me that chance.

MICHAEL TRAYNOR: I know you'll stay alert on this set of issues. Let's give Larry a hand.

(Clapping).

MICHAEL TRAYNOR: I think Laurel Terry is here. We'd like to hear from her. Give us a brief description where you're coming from.

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LAUREL TERRY: My name is Laurel Terry. I'm a professor at Penn State Dickinson. I teach and write and do service in the area of global lawyer regulatory matters. I was not on the list to speak today. I wasn't planning on speaking today, other than I shared some informal comments with members of the Commission about issues that I hope they would consider. There was a cancellation because of the snowstorm and I didn't stop to think what having Larry Fox right in front would be like, the room being packed, or I might have

made a different decision.

I normally don't like to talk unless I have a fully-formed opinion and so I'm a little bit uncomfortable because what I'm giving you are reactions to yesterday's meeting. It's not really a fully-formed presentation. But after sitting through yesterday's meeting there were three issues that I came away thinking I hope that the Commission in its six subcommittees, seven subcommittee structure finds a way to think about these issues. And the first is I would like the Commission to ask the question, is there a better way than the status quo for the ABA and the U.S. legal profession to be responding and commenting on and participating in lawyer regulatory developments elsewhere in the world. Because part of what I see is, as a combination of technology and globalization, we live in a very small world, an interconnected world, and things that happen elsewhere have influence here. So we can't just put blinders up on what's happening elsewhere. We have to pay attention to it and I think maybe we need to be commenting on it and at least have a dialogue. I mean, that may be presumptuous to think we can shape it, but we can at least share

our values and our views elsewhere. And I think right now there's not a very good mechanism to do it.

There's a blanket authority provision, but the problem is what entity has the responsibility. There's so many different interests at stake that I don't think there's any group that really has blanket authority, and I think a lot of these things happen so quickly that the ABA Board of Governors' structure isn't nimble enough. So I don't know what the answer is, but from where I sit something needs to be done.

For example, this morning in his liaison report, Bob Lutz talked about the APEC draft best practices. I see that document as incredibly significant. It is not going to be binding as he announced. But one of the things that I think has happened as a result of globalization is you have soft law initiatives. And so best practices end up acquiring a life of their own and really having a force. So if the U.S. government as a sponsor of this APEC legal services initiative signs on to this best practices document, I guarantee you every state and jurisdiction is going to be seeing it as this is the policy.

So, you know, documents like that, there needs to be a mechanism -- we have a draft, I personally have a lot of comments on the draft, I know a lot of people have a lot of comments, but how do you get them officially to this intergovernmental organization? So that's one issue is to think systemically about a globalized world.

And alternative business structures is another example. It seems to me this Commission has to think about this issue because it's a fact of life whether you like it or not. And a lot of law firms have offices in New York and London and so that means that they are either going to be doing it or competing with people that are doing it and so we're going to be hearing a lot about it. And so, you know, we didn't have any voice at the outset, but they are in the process of making regulations right now. And it seems to me it would be nice if through some mechanism, and I don't know exactly what it is, the U.S. legal profession pays attention and at least shares our perspective, you know, Larry's perspective on core values, what would be good regulations and what not because they may just travel all around the

world.

So that's the first issue that I hope the Commission keeps in mind.

The second issue is, you know, I tried to think, well, what should the Commission specifically and lawyer regulation generally be trying to accomplish. And as I thought about the Commission's mission and mandate and I read the preliminary issues mission, I find them mind boggling. There's just so much there, how do you tackle it, where do you start. And so Gene Shipp yesterday I thought was particularly memorable when he said, okay, one thing you ought to do is you got to catch the bad guys. And it seems to me that we clearly want to do that, but we also want to encourage the good guys to act up to their best selves and we also want to help figure out what it means to be a good guy because we operate in a system with competing tensions and so sometimes it's not always easy to tell how to balance these.

And then the third thing I think we want to do is we want to get out of the way of these sorts of innovations that for many of us are completely new: cloud computing, virtual law office. I don't think you want to be acting as an impediment to

development of the future if there's no good reason to do so. And I think there's a role for this Commission to think about each of those three parts.

So in terms of catching the bad guys, I agree, Gene yesterday mentioned that D.C. has among the most reciprocal discipline cases of any jurisdiction in the U.S. and that they have seen some involving foreign lawyers. I think that's only going to increase with globalization. And I think part of what the Commission ought to maybe be doing is try to get in front of that issue and think about what are the practical nitty-gritty details that might impede catching the bad guys when they are in a different country.

And I was on the ABA discipline committee at the tail end of trying to get the software correct for the lawyer regulatory databank and I know that it was a very long, very arduous task with -- not because of the legal issues, but just the IP, making it work.

The European Union is in the process right now of creating something called an eJustice Portal where I think all their lawyers are going to be on a databank, and clients are going to be

able to go in and find lawyers, they are going to share information, I don't know the details, but I know they are about to do it. I think the CCB has a contract to help them do it.

I also know that as part of the UK reforms I think they are assigning a lawyer identifier number to the lawyers there. Well, it seems to me that for Gene Shipp to catch the bad guys, our lawyer regulatory database system has to be able to talk to their database system, and you don't know what's going to be incompatible unless you start talking at the outset. And so that's just one example. But I think the Commission should be asking how can we catch the bad guys in the global world, what are the nitty-gritty details that we need to be thinking about.

The CCJ has done wonderful work now in discipline cooperation with the CCBE and with the Law Council of Australia, but I think you really got the initiative from the ABA. I mean, they really jump-started those discussions. So this could be happening in APEC, it could be happening other places around the world. So that's catching the bad guys.

Okay. So what about encouraging the good

guys? It seemed to me you could think about this in two parts. One is technical review. One of the things that we've heard about the last day and-a-half is that because of technology, because of just changes in practice there may be times in which you have to look at the old rules and see whether or not they still fit, whether or not you need a new rule, whether this is just an application issue. Is it like eDiscovery and, you know, Sonoma? Do you need to completely rethink it? Or do you say, okay, this is how we apply confidentiality rule in this new context of cloud computing? So I think it makes sense, and some of the issues that I think are on the Commission's issues, preliminary issues list are of that nature. For example, third party financing, outsourcing, maybe they require more, but at a minimum they require technical review. I think you'll see how our rules fit what's going on.

I think the Commission should think more broadly, though. Those happen to be two hot issues this year. But there's going to be different hot issues next year and the year after. So how do you get people like Stephanie and Richard to communicate with you to say we need a

technical review, we are being chilled from doing this cloud commuting which is great for access to justice and great for lawyers. So I would think systemically about what mechanisms. Maybe it's just a button, I mean, on the ABA page that says, you know, you're in my way, please read this. I don't know. It seems like that would be a useful conversation for the Commission to have.

But I also think that it's useful to think more globally. We want to encourage the good guys. Historically I think we've been very reactive in this country. I think part of what we're starting to see globally is much more proactive, trying to -- you know, the sorts of things that you heard about yesterday, that Ted in particular was mentioning, some of the things that are being done in Australia, some of the things that are being done in the UK. Could the ABA take, do more than it currently is doing -- and it does a lot -- but could it be doing more than it currently is doing to encourage the good guys.

And, you know, one tool that I've spoken about that would be very easy to do is Rule 5.1 requiring law firms to have systems is an incredibly powerful tool and the rule is already

in place. So all you would need to do is maybe think about helping implement it in ways, for example, that they have done in Australia by having a self-assessment questionnaire, by giving people access to law practice management, by making sure that anybody that's, you know, in cloud space has checked a box that they have read the E task force. So I would be trying to think more proactively about helping clients. And I also think one of the issues that's related to this -- well, I won't talk about that.

The third point is you want to get out of the way. I read Richard Granat's materials before I came here and I have to say I was really blown away. I didn't know any of this world existed. I didn't know anything about cloud computing. I didn't know any of the software. And after I read it I ended up saying I agree with what I think he was saying, that the legal profession is at risk of a large chunk of it being made obsolete because other providers stepping in.

And I can see why in a technological age the rules of the game have changed and maybe you need capital investment. And I believe in the profession. I believe in core values. I believe,

you know -- I don't want to throw away lawyers. But I do think we have to think, you know, are we at a change of an era where to stay with the old ways means that lawyers just become obsolete, and I think those are hard questions but questions we have to think about.

So, you know, how can you do that? Well, one way is you do the technical review that I just talked about. You have to think about where you want best practices, where you don't. Second, I really hope that the Commission has a serious discussion about whether technology and globalization in the pace of change means that we need to go to principles-based regulation rather than rules-based. This is a trend that you're seeing around the world with lawyer regulation. Much less detail oriented. Now, maybe that makes no sense. But I think you need to really grapple with the issue because I think you're going to have a lot of people from the outside saying that's how the legal profession should be regulated. And if you don't think that's the right answer, I think you need to be prepared to say exactly why and to defend it. So if I were on the Commission and could assign homework, I would

make each of you read the Hunt and the Smedley report from the UK. You might not like the conclusions, but I think they are very, very thoughtful reports about lawyer regulation.

The third thing that I think you need to have a discussion about is whether or not we've evolved to the point where we need two levels of regulation, or at least application of regulation, one for sophisticated clients and one not. Now, that's not part of your culture. That's not part of your history. There's a lot of opposition. And maybe that's a terrible idea. But I think it's an idea that you're starting to see in a lot of places. Sometimes it's very explicit as in the U.K. Sometimes it's sort of in between the lines like arguably in this draft APEC best practices, but it's an idea that may be imposed on us, and I think we need to be prepared to have a very thoughtful answer to it. And again, the Hunt and Smedley reports are very good for framing a lot of the issues and they have discussion about it.

My final comment in terms of issues to think about is, I've been sort of -- this is what happens when I don't prepare. I don't think of my words real quickly. But I would like you to think

about whether or not the ABA should develop a list of regulatory objectives. This is something that if you know the UK legislation, it's now Section 1 of their statute, is what is it that lawyer regulation is trying to accomplish, and there was a big fight about it actually. And the final list is a result of the legal profession really going in and lobbying hard to get things added. But it seems to me that regulatory objectives are now -- number one, it might make your analysis on a lot of these discrete issues easier if you had a way to benchmark it. But, second of all, I think this is something that the legal profession is going to be asked to respond to more and more because of the influence of globalization and talking-ology where everybody talks to each other and all these ideas get mingled again.

So, for example, in this draft APEC report, one of the changes that I would like to see is a change -- it has a regulatory objective section which does not list protecting the public, which I think is probably a clear oversight. You know, I'm sure that if we suggest it, it will go in there, but you're going to start seeing this sort of stuff a lot. And I think it would be better as

they did in England to have a discussion about this, have a debate about it, figure out what's in and what's out, have a list, and then when you're taking any particular issue, you have something to measure it against. You're not always going to agree on what the outcome could be, but you could at least agree what your goals are trying to be. So again, I know you set up the subcommittee structure yesterday, but those are three issues that I hope find a home at someplace in one of the committees.

MICHAEL TRAYNOR: Thank you. You willing to take some questions?

LAUREL TERRY: Yes.

HERMAN JOSEPH RUSSOMANNO: First, thank you for your presentation. In the materials you suggested, do they define what a sophisticated client is? Is there a measuring stick or certain factors that how you fit into that category of sophistication versus other client?

LAUREL TERRY: One of the reasons why I hate speaking contemporaneously is I have a terrible memory. And I have my piles of notes. I think Ted probably has a much better answer.

PROF. THEODORE SCHNEYER: I think it's more a

question of the clientele of a particular firms rather than in any one client. Smedley report is very interesting as far as to what extent there should be a regulatory track for the law firms that are serving corporate clients. However, he even means large corporate clients. It's not completely clear, but I think he probably does.

LAUREL TERRY: And part of it is we don't have definitions yet because we don't have regulations yet, and that is my first point. If there's going to be a whole new system in which sophisticated clients, whatever the heck that means, are regulated different than nonsophisticated clients, and if you're going to have a definition that's developed, I think we should be looking at that definition and I think we should be commenting on the definition.

And it's not just the U.K. The European Union launched a number of years ago, like 2004-ish, 2003, an antitrust initiative directed at five professions including the legal profession and issued a series of reports, and now they have sent out the E.U. member states to go think about it and they are making significant changes in their lawyer regulations. But one of the things

that the E.U. report did was distinguish between sophisticated clients and nonsophisticated clients, and say we need to put regulations. And it was even pretty light on whether they mean much regulation at all in sophisticated clients. This idea, I mean it's traveling around the world and it's traveling around the world among communities that we don't always talk to regularly, governmental entities, these trade unions. But this is what the conversation is like. And I think we're just going to be, you know, left out and have something imposed on us that we haven't had time to think about and digest and debate and have alternative suggestions if we don't embrace it now. So I'll leave it at that.

MICHAEL TRAYNOR: Bob, I think you had a question.

PROF. ROBERT E. LUTZ, II: Laurel, thank you for your very thoughtful presentation and your many contributions to the field of legal ethics. You raise in your first point a question that's stymied me many times as well, how to better respond as a spokesperson for the profession to the fast-changing developments that occur worldwide. It is a difficult one, particularly

with a large voluntary institution like the ABA. I'm wondering whether sort of hidden in your suggestion there might be a suggestion that there be sort of an omnibus policy that is conferred upon a particular group in the ABA which could in fact play that role of being expert in the area of legal regulation and having a finger on the pulse of what's happening internationally.

LAUREL TERRY: I don't know what the answer is, Bob. I'm not sure I'd be completely comfortable, for example, with having a task force on International Trade in Legal Services responding officially on behalf of the entire ABA. For example, to this APEC document, because part of it, part of the problem with these globalization issues is they are complicated and it takes a learning curve to know enough to be able to offer intelligent comments. And quite frankly I think on ITLS, the number of members who actively participate is smaller than I would want to represent the voice of the whole ABA. On the other hand, I mean, maybe it means that you have messages coming in from individual sections or individual perspectives. I mean, maybe you have a lawyer answering individually, but that the ABA

facilitates that happening with it. You know, right now I think it's hard for an individual lawyer to write to the SRA and say, you know, please consider my views. I've been reading the consultations. I haven't sent any comments because I'm one lawyer in America. What do they care?

PROF. ROBERT E. LUTZ, II: One model has been blanket authority as you suggest in the area of international antitrust, but --

LAUREL TERRY: The problem is you have so many different interests at stake, much more so than in antitrust.

PROF. ROBERT E. LUTZ, II: That's correct.

LAUREL TERRY: If you look at the membership of the ITLS Task Force, it now has, what, 20 different sections, all of which I think really do have a stake in it. So I don't know what the answer is. That's why I called it an issue, not a solution. But I think right now there are developments globally that are going to impact the U.S. legal profession. We can't just pretend we can pull up the screen. And they are significant, on a lot of them they are dealing with the issue before we are, and we're not at the table and

we're not even talking. I mean, maybe it means we set up emails -- which how I happen to be up here this morning. I sent an email to a couple of my friends on the Commission and the next thing I know I'm up here. You know, maybe it's just email saying have you thought about this, have you thought about that, resources. But there needs to be more communication.

For example, the morning session, Jeff mentioned inviting foreign Bar leaders to comment on the Commission's work. There's a great mechanism for doing that. The International Bar Association has assumed a much broader policy role because of the World Trade Organization in GATS. The WTO wants to hear from organizations which all of its members can belong to. That's not the ABA at the Bar level, but it is the IBA. So the IBA all of a sudden has this gigantic policy rule. And they are going to have in Copenhagen in May the Fourth Annual Bar Leaders Conference. If you're serious about wanting foreign Bar perspective, I think, number one, you see if you can get on the program somewhere and talk about it. But, number two, you make an announcement and you say let us tell you all the things that we're

thinking about, some of the things that we're trying to do, and please come in August, we're really serious, we want to hear from you.

And the other thing that's sort of related to that that I'll say, is just because -- one of the issues that I think maybe was taken off of the preliminary issues list but from what I've heard is a real practical problem for lawyers in a technology globalized world, is the very different data protection standards in the E.U. and the U.S. I mean, it's just a real headache. And I don't know how you solve it, but you certainly don't solve it by not talking to each other.

PHILIP H. SCHAEFFER: It's sort of in defense of the agenda that we've evolved. Isn't it significant that there were reforms in England and in New South Wales that in a major part were inspired by governmental action, groups that were not just lawyers. We all know what the losses are in the UK and at first was very upset and continues to be upset about the changes. And one of my concerns as a liaison, I'm not a member of the Commission, would be that the Commission take on too much and that which it is not capable of accomplishing.

You mentioned data protection, something I live with every day of my life together with the other work. There's no practical way that this Commission can really deal with that subject given the structure of government in the United States. Essentially many of the things virtuous I really think they should be addressed, but they cannot be addressed by a century old trade organization like the ABA.

LAUREL TERRY: Again, I'm not saying the Commission should solve these problems. My first comment was is there a better way than the status quo to be involved in regulatory developments outside the U.S.

PHILIP H. SCHAEFFER: Maybe we should make a recommendation, and don't put it on the agenda, that for some things that you have been talking about, which I think are critical, values, the system of what's going on in Australia and the UK about how to regulate and in the regulation maybe we should recommend that there be a group, a Commission or something formed not just of lawyers.

LAUREL TERRY: Yeah. I mean, I think there needs to be an ongoing communication mechanism. I

don't know how you structure it, but I think not a single task, not a group of groups, but I think a permanent acknowledgment that we live in a global world with technology that means -- you know, The Legal World is Fine. That was the name of one of the articles that I wrote stealing from Thomas Friedman. And, you know, I think it's true. And I think -- the other thing that I was going to comment is, you know, there were a lot of forces that led to the changes in the UK and the changes in Australia, and obviously each country is unique. On the other hand, the Organization of Economic Cooperation and Development, OECD, published a report in February of 2008 called Competitive Restrictions in the Legal Profession which followed their earlier report on competitive restrictions and professions. The U.S. is a member of the OECD. And if you read that report, it's a very different description than this group would write on restrictions. It is really eye opening.

And so some of the people from the UK who were involved in their changes, you know, they are at these meetings jointly writing these reports with the U.S. representatives. So I'm not sure I

think it's realistic that we can just say that's, you know, that's over there and we're here and it's not going to happen here. I think we have not had as much oversight as they have in Australia or the UK, but we've certainly had Department of Justice and the Federal Trade Commission looking at unauthorized practice definition and advertising definitions, et cetera.

PROF. THEODORE SCHNEYER: I have not seen much indication of the ABA trying to export the profession's values to other parts of the world such as by actually trying to participate in providing ideas to the people who were working on the Legal Services Act in the UK or in Australia. I've seen the CCBE doing it, you know, a couple of responses to consultations and that sort of thing. Is that just because they are right in Europe or is it because there's something structural about them that allows them to aggregate views and mobilize more readily than the ABA?

LAUREL TERRY: I think it's both. I think the CCBE which represents the law societies in the European Union, it's their members who are affected, so obviously they have more of a stake, more of a reason and they are more likely to be

listened to. It's also a much smaller organization staff wise. It's very small which I think makes it very nimble. It's also not an individual representing an organization which I think is a tremendous advantage. If the ABA wants to set policy it needs help the Delegates. I mean, there's great democratic values in that but it does not make for very quick action. So one of the things, going back to the conversation with Bob about ITLS and trying to intervene is, you know, the ABA only tries to say something consistent with adopted House of Delegates policy, which is totally appropriate. But when you're trying to figure out do you have this paragraph and that paragraph and how do you edit it, it doesn't give you much guidance that you can rely on to comment on a best practices document that may become soft law and incredibly influential. And so I think they do have a lot of advantages that we don't have. But on the other hand I agree with you, I don't think we've really tried. And from what I've seen in the IBA, the ABA has not really been using that as much of a forum for dialogue as it could be doing.

MICHAEL TRAYNOR: Other questions?

Laurel, thank you, very much.

(Clapping).

MICHAEL TRAYNOR: We have a scheduling note. We're running just a little bit ahead of schedule. We've got three speakers scheduled at 2:15. We have a little bit of time between 3:00 and, approximately 3:00 and 3:30 if we go that far, and another ten or so minutes before we take a very short break. Are there members of the audience who would like to say a brief word at some point? Show your hand. We encourage you if you would like to. We don't see any. Of the speakers who are scheduled for this afternoon, I know one of them is here. Let's take a recess.

(Recess).

MICHAEL TRAYNOR: We have three witnesses this afternoon beginning with Chris McGeehan. And under the procedures we worked out with each witness they will have about a five or so minute opening statement, and then ten minutes will be left for questioning, and then after that fifteen-minute segment, it's done, we'll move on to the next witness. That will enable us to be finished with the testimony and speaking by approximately three o'clock, and then we'll see if

there's further business that the Commission wants to consider at that time before we formally adjourn.

But let me introduce Chris McGeehan, a lawyer from Chicago, Illinois, who will give us a presentation and we'll have questions at the end if you wish.

Chris, go ahead.

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CHRISTOPHER McGEEHAN: Good afternoon. My name is Christopher McGeehan. Thank you for allowing me to offer comments regarding the Commission's preliminary outline. I'm a sole practitioner in Chicago and I was first admitted to practice in 2003. I am presently admitted to practice in Illinois and I'm registered as a patent attorney with the U.S. Patent and Trademark Office.

In my view the Commission should completely re-evaluate lawyer regulation in the United States. In my view this is necessary because the primary effect of the current legal ethics rules has created an uneven playing field for licensed attorneys who are at a substantial competitive disadvantage. This disadvantage results in both

the regulatory rules of the Bar licensure as well as the fact that lawyers' cost structures typically mean they must recapture the cost of obtaining licensure such as repayment of law school loans. Unauthorized practitioners do not have these costs.

The primary purpose of the ethical rules is client protection. However, the reality seems to be the only people that the ethics rules protect consumers from are other attorneys. In particular the current market for legal services raises an important question. What should be done if a client doesn't think they need to be protected? It is clear from the marketplace and many consumers both large and small think that it's unnecessary to use licensed attorneys.

As previously discussed this morning, there are many online outlets such as LegalZoom and other Internet providers whereby consumers can contract online for quote-unquote legal services. And at the same time more sophisticated clients are engaging foreign outsourcing companies to handle their legal work. If these activities are permitted, it should be asked why can't an attorney practice in other states other than the

one they are admitted in? Isn't it fair that an attorney can also, a person who actually has a legal background should be able to offer legal services in other jurisdictions as well?

For example, this comes up often in my practice when I'm representing an Internet client that wants terms of services or privacy policies and the like drafted for their Web sites. If this policy is subject to a different choice of law, say, Nevada, Delaware, California, am I engaging in unauthorized practice as soon as I add a foreign choice of law provision? In sum, the issue that confronts an attorney practicing online is often whether or not you are better off asking for permission in advance or forgiveness in the unlikely event you wind up before a disciplinary commissioner's board at some point in the future. These issues underscore some of the issues with state, practicing across state lines.

I'd also like briefly to address foreign practice issues. As many members of the Commission in this room know, foreign markets are often closed to American attorneys, and in some of these foreign markets price fixing exists as well. It's extremely important that if there's to be

reciprocity in across-border practice, there must be, Americans must also be able to enter these other markets.

For example, I'm presently in the process of becoming licensed to practice patent and trademark law in Canada. All that I have to do to do this is submit a certificate of good standing and pay a fee. Now, this is a great situation. Compare this situation to practicing in different states. Basically there's essentially two alternatives. One, associate an attorney who is licensed to practice in that state or, two, take the Bar in that state, both of which are extremely rather expensive and defeat the cost savings that the client would otherwise enjoy by retaining a single attorney. Basically what I would like to see, rather than a state-by-state licensing regime, is something comparable to corporate practice where you can be admitted essentially as a foreign lawyer by simply registering with the Bar of the relevant state.

In particular another issue that multijurisdictional practice always raises is what advertising rules is an attorney subject to. If a client in state X contracts me to draft a patent

application, am I now practicing in state X? Am I subject to their licensing rules? If I have an online profile on a legal site such as LinkedIn, can I find testimonials? What happens if I have certain dirty words inserted into my profile like, say, specialty?

And I'd like to spend the remainder of my time talking about the most important issue for many attorneys: How do I get clients? There are a couple ways you can do this on the Internet. One, is to go where the clients are. For example, there are a number of online Web sites primarily directed towards technology matters where attorneys can go to sign up and bid on legal work. I wanted to show some of the these sites online, however we had some projector issues. And in these sites it's very clear who you are bidding against. You're bidding against attorneys in the U.S. and other people in India.

Another solution is to put your Web site where clients will find it. And a leading attorney, who runs a blogging company, named Kevin O'Keefe recently posted that he was shocked by the number one concern of attorneys regarding recent conflicts. What was this concern? How do you

improve your Google search results.

Basically in order to make sure that clients search for you online you need prime real estate. There are a number of ways you can do this. One, you pay for linked ads. For instance, if you search on Toyota Recall Lawyers right now, you're going to see a lot of attorney ads. Another way you can do this is what's called organic search results which are basically, rather than sponsored ads, you appear on the front page. And there are a number of techniques to accomplish this, primarily something called search engine optimization, which basically you pay to link to other sites, and by virtue of the page rank system, the provider links back to your sites and drives up your position to the front page.

One firm sent me a proposal relating to this and explained, quote, We have 15,000 Web sites. Many of our Web sites are ranked organically on the first pages of the search engine. This is how we generate our leads. Our leads have a 96 percent retention rate. We also do optimization from our clients and one of our clients was ranked number one organically within four to six weeks.

And the third way that you can do this is

engage in, get clients is engage in either Legal Match or some sort of referral mechanism. And this is a particularly problematic area that was touched on this morning in that there's a very fine line between essentially being a permissible cooperative advertising network and an impermissible legal referral network, and a number of these firms clearly fall on the wrong side of this line. They are simply nothing more than virtual runners. That is, people who advertise, use their capital advantages to get prime search position, bring in potential clients, and then sell the leads to attorneys. This process simply should not be permitted.

And I'd like to touch last on the issue of nonlawyer ownership. And that some firms go one step further than this virtual runner model. Instead, they become legal services companies. Again, they bring in the clients through the online advertising, sign them up, and then delegate the work out to attorneys typically at a fraction of the cost and pocket the balance. And one example of that was a company that was simultaneously soliciting registered patent practitioners to file applications at 200 a pop.

They advertise that your sole responsibility is to determine the proper fee and forms and no proofreading required. And at the same time the other thing that they are advertising is for Indian intellectual property professionals to draft patent applications in mechanical, chemical, pharma areas for 200 a pop. So, in other words, they could charge 2,000 or $3,000, and give a U.S. attorney, 200, $225, the Indian attorney $200, and pocket the 2,500 themselves. And this is quite simply a very real possibility if nonlawyer ownership of legal services companies is permitted in the United States.

MICHAEL TRAYNOR: Thank you. Are there any questions? We want to express our appreciation to you.

(Clapping).

MICHAEL TRAYNOR: Next is Seth Rosner from Saratoga Springs, New York.

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SETH ROSNER: Thank you, ladies and gentlemen, for the opportunity to be here. I would have been much more comfortable sitting at the table with you as you were set up yesterday than standing here as a speaking head and thinking

back to a lot of you teaching at NYU Law School as an adjunct.

There's really two or three major issues that I'd like to share thoughts with you today. The first, actually I learned a knew acronym when I read Keith's memorandum to you all. ABS does not mean antilock break system. It means alternative business structures. And despite that disguise, I would share with you that in the New York delegation, there was a great deal of rumbling, oh, no, multidisciplinary practice is back.

As I think many if not all of you know, I chaired, I was liaison for the ABA Board of Governors to that Commission for three years and it's hard to believe that it's now just about a decade since that report went to the House of Delegates. I agree with Laurel, that it is impossible and probably would be not entirely responsible for the Commission not to address alternative business structures, MDP, as it is developing outside the United States currently in the UK and in New South Wales. I would urge the Commission not to reach a point where that whole system comes back for a substantive review at least at this point in the House of Delegates, but

rather to restrict or to focus the efforts of the Commission on how the profession here responds to it. How do lawyers who are in law firms that have international, multinational reach, how do they deal with and respond to the problems created by living and working in the United Kingdom and in New South Wales rather than revisiting and bringing in to our House of Delegates the multidisciplinary practice structure itself. I think it's very unlikely that it would meet with other than very strong opposition in the House of Delegates, I think with good reason.

The members of the Commission have in the papers that are among your work product an opinion that I wrote for the Dutch Bar, the Nederlandse Orde van Advocaten, which it's now fifteen years ago. It's hard to believe. Many of you know that the Dutch Bar was sued in the mid 1990s by Arthur Anderson and Pricewaterhouse on the basis that their rules which are similar to ours on sharing fees and forming partnerships with nonlawyers were a violation of the antitrust provisions of their own European Community Treaty. And they hired me to write an opinion setting forth the development background and rationale of the American rules

prohibiting sharing fees and forming partnerships with nonlawyers. That case went to the European Court of Justice and the Dutch Bar prevailed at the time. I don't know how the European community is viewing it -- Laurel would know -- is dealing with that currently.

You made some comments earlier on current efforts in the community and I'm certain that it's within the needed work focus of the Commission to investigate and determine how the American profession should deal with that, how our lawyers respond in their practices to the challenges that New South Wales and the United Kingdom rules provide.

I have a few reactions and comments on specific rules. Laurel suggested, and I agree with her, that there is some real benefit I think to be gained by the Commission's addressing the difference in the rules application to sophisticated clients and clients who only see lawyers a few times in their lives and aren't used to working with lawyers and don't understand the relationships with the completeness that the sophisticated client either corporate or institutional or individual do.

One of the issues that sings on the Internet of the Listserv of the APRL, the Association of Professionally Responsibility Lawyers, has been advanced waivers.

Has Ury already spoken here? I saw him. I'm sorry I was not here for his presentation. I missed it.

Advanced waivers of conflicts of interest for a truly sophisticated client I think poses significant, a significantly lower threat to the system and to the relationship, relationships, than an individual client. And you might also consider thinking about whether there are rules that might differentiate between, not just sophisticated clients and unsophisticated clients, if you will, but law firms of great size and reach and a small firm or sole practitioner. Imputation and screening of conflicts is one area that occurs to me.

Model Rule 1.6 I see is one of the rules that you are looking at, and justifiably. I would urge that you leave that rule in its present language unless your work indicates that there is some very important reason to make changes. There is no single rule in the Model Rules from the very

beginning -- the first discussion draft published by the Kutak Commission in January 1980 -- there is no rule that has received the attention, that has been as contentious and filled with discord and trying to get to the right rule than 1.6. You saw that when Ethics 2000 presented its amendment. It was rejected by the House. At the urging of Larry it came back. One of the provisions that that Ethics 2000 recommended came back to the House and was adopted.

On the other hand, I think there is, there will be great value if the Commission talks to the lawyers in firms, for example, that have multistate reach and in states where 1.6 differs, where, for example, disclosure of a particular confidence or secret is required in one state, in another state is prohibited, and in the third state may be discretionary. And I'm certain that there will be lawyers in firms with that kind of reach finding out how those firms deal with that conflict I think, and implementing it in the Commission's report I think will be very, very useful to the association and to the profession.

MICHAEL TRAYNOR: Thanks, Seth. Any Questions? Steve.

PROF. STEPHEN GILLERS: Seth, your caution against bringing the MDP back.

SETH ROSNER: I'm sorry?

PROF. STEPHEN GILLERS: Your caution against bringing MDP back.

SETH ROSNER: It's back. When I said bringing it back, I think it would -- it would be very, very difficult to get through the House a recommendation to amend the rules in a permissive way, to permit fee sharing and forming partnerships with nonlawyers specifically.

PROF. STEPHEN GILLERS: My question is, does that advice apply even to a recommendation that would support the Washington D.C. rule which allows nonlawyers to have equity interests in entities that are law firms that only practice law that practice no other discipline?

SETH ROSNER: No, I don't think so. I have not thought about it, but I think -- I don't think that would raise the kind of furor in the House or in the profession, if you will, that a wholesale revisiting of the fee sharing and partnership rules would.

PROF. STEPHEN GILLERS: But you understand in Washington D.C. --

SETH ROSNER: I understand.

PROF. STEPHEN GILLERS: -- an economist can be a partner in Jones & Smith in D.C. and participate in the fees, but Jones & Smith only practices law.

SETH ROSNER: Understood.

PROF. STEPHEN GILLERS: You feel that that animosity toward MDPs is not --

SETH ROSNER: I'm only speaking for myself. And, Steve, it is a pure guess. I don't know. It certainly would not -- it would not engender, I think, the kind of antagonism that a revisiting of the broad scope of multidisciplinary practice would.

MICHAEL TRAYNOR: Seth, thank you, very much.

(Clapping).

MICHAEL TRAYNOR: Our last witness is Samuel Crews of Columbia, South Carolina. Mr. Crews?

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SAMUEL CREWS: I have good news for all of you. I am the last one, I am the least qualified and I have the least amount of credibility in the room. We can have fun now. I want to be sure Ms. Rosen, you don't have a Taser. I promise I'm here on good behavior.

This has just been a very enlightening situation and I've really enjoyed hearing so much all day today. It's just important to understand with some of us on the lower level, those of us who slipped in from under the bridge, that there are a few nuts and bolts things that we haven't heard today.

The first line of the preliminary issue outline says the United States, the highest court of each state and the District of Columbia has the authority to regulate lawyers within its borders. That's great. That's right. See, we don't have self regulation which so many of you said today. We have judicial regulation. My chances of being a judge are zero, nil and none. And for a lot of you that may be the case. So we have judicial regulation. And what I don't see is, so far we've got 51 Supreme Courts that are absolutely marinated in the greatest pot of that stuff called judicial independence.

Now, I absolutely agree on getting a system that is consistent from state to state. I absolutely agree that needs to be a big priority here. Because what's happening is, as we move on and we keep doing things -- back in the day I did

adoptions and on a simpler level, believe it or not. The National Association of Social Workers did ten years ago what y'all are trying to do now. They developed an interstate compact of adoptions. It is an absolute wonderful situation. Every state knew and their department of social services or whatever how to do an interstate adoption. It worked out great.

Now, what I hear now is we're getting the nuances of all these ethical rules, but see, there's that back end of disciplinary rules. And I have caught the back end of disciplinary rules, but we'll get into that later. What happens is what we have is while the Model Rules on ethical behavior is consistent pretty much from state to state, and we're talking about Clause 3 on item 4 and all that kind of stuff, the disciplinary rules are all over the board. And what nobody has mentioned is we're going to get into discipline shopping. Now, should I break this rule in New York or should I do it in Texas or should I do it in Virginia? Because, see, I've got home offices everywhere. Where can I get through, what's my best chance of getting off? And we need to work on that. I'm here as a team player. You might

not think that, but I promise you I am. And my wife said I couldn't come home if I didn't say that.

I believe that the ABA has provided great leadership in the last ten years especially. The leadership has been -- and a lot of it is because of technology. We can actually get to the rules. We don't have to pay $240 and get a book to come in 30 days from Chicago, we can just read it online now, and that's good, and that's very good. But what is the leadership? What's the next step? See, we got to work for those 51 groups that control us.

I was talking to a president, a former president of our South Carolina Bar Association earlier and he says, if you say anything, just don't say this. And I said, okay. And so I couldn't wait. What happens is you send the rules to the court and then you get back denied. What are you going to do, Mr. Traynor, if they just say denied, thanks for including us? I know we got a couple Chief Justices here and that's good. But I think we need to extend the knowledge branch and get them on the team. I think a lot of that is education.

Believe it or not back in the day when I had more hair, 1996, I worked for the Supreme Court in helping family court judges use laptops. And my first job was to take the 46 laptops to the 46 judges. Then I went back three months later to see what they had done with them. Two of them are holding up plants, two of them couldn't find them, two of them were under a desk, and one of them said, when were you coming to train me.

So then we get into implementation of what we do, and I think that's an absolutely critical step here, the follow-up. There's a group of industrial engineers out of San Jose, California that would do these massive programs for people like Boeing, Sony, the Air Force and the Navy, I mean, just international big people, and they suddenly realized they would do all this work, they would charge them a kazillion dollars, and then there was nobody after they left to implement it, to make it work, to do the follow-up and follow through. Thank the Lord they started the division for that because my son finished at Clemson in industrial engineering and got a big job with them, and he implements. When the smart guys go in, somebody has got to follow up and will

be a consensus builder, make it work, and follow through.

Is Larry still here? He left? I just loved Larry's definition of loyalty and that sort of thing. In South Carolina political loyalty means I'm your friend, you're my friend, we've known each other forever, but someday I'm going to need you or you're going to need me and I won't even have to ask because I'll know how to do it. But that's the paradigm we need to change. That's the attitude, I agree, we need to follow up. We need to change that situation so that the ABA does not stand for American Backroom Association. We're out there now. Well, not we, I can't be in it. But, anyway, it can happen. Just the fact that you let somebody from the public come and speak to you is a tremendous thing. And not only do I thank you, I congratulate you. I got a tip to apply to come speak and said, you know, they just need somebody who is different. So I said, okay, so I applied. I had no idea y'all would let me come. And that is a tremendously good thing.

Thank you. Any questions?

MICHAEL TRAYNOR: Thank you, very much, Mr. Crews. Any member of the Commission have a

question? Well, we appreciate your patience with us and you're the last person to speak. Thank you.

(Clapping).

MICHAEL TRAYNOR: Let me ask, Ellyn, if there's anything you think that ought to be brought to our attention before we adjourn?

ELLYN S. ROSEN: No.

MICHAEL TRAYNOR: Any member of the Commission have any suggestion for the good of the order? Any member in the audience want to reconsider their reticence and step forward? Phil, is that you?

PHILIP H. SCHAEFFER: I just want to know, did we assign people on a committee yet?

MICHAEL TRAYNOR: No, not yet.

Mike Downey, you want to say something? Just give a brief line of your affiliation.

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MICHAEL P. DOWNEY: Sure. Actually I speak only for myself, although as I mentioned yesterday, I'm a section member of the law practice management section, a legal ethics professor and a lawyer in Hinshaw's professional ethics practice.

I just wanted to raise, there has been some discussion today about the accounting profession both good and bad. But also, to follow up on Professor Silver's comment, about looking to other professions, there's been a lot of emphasis of looking to the international community. There are a number of issues that have been raised today that the AICPA has dealt with very recently. They have dealt with multijurisdictional practice twice in the last ten years and have reached what I think they think is a good result. They have dealt with multidisciplinary practice that do allow non-CPAs now to own accounting firms in most states. They have dealt with outsourcing, and I'm not sure where they are on it, but I know they have addressed it. They also have dealt with unauthorized practice. They have also dealt with online services document preparation and related services.

I really do encourage you to look to what they had to say. And the one thing I think, the reason I decided to say something, was I think there's a momentum building for treating sophisticated clients differently. That may or may not be the appropriate result, but I wanted to

mention the AICPA addresses the concern differently. They addressed it, instead they treat certain services differently. If you provide what they call attest services, an audit, a review of compilation, you're held to a higher standard of independence than if you provide other accounting services where you're only required to provide objectivity. And there's a very, particularly after Arthur Anderson and Enron, they have really ratcheted up what it requires to be independent and really tried to provide guidance so accounting firms know when it is appropriate to do things and when it is not.

The last comment I want to make is, I think if you talked to the typical accountant, they would say that what happened to Arthur Anderson would be a lot like judging the legal profession about what happened with the tax shelter opinion letters. And I think that we need to realize that they are a very proud profession that has embraced these concerns very dearly. And I think they would say, most accountants would say that the new independence regulations and the limits on providing non-attest services to attest clients are something that is working very well, and

there's sophisticated firms that have really taken this as part of their marrow.

So I think as we look for sources I think we really should look to them as well for guidance. In addition, obviously the nurses and the doctors have really had to deal with multijurisdictional practice issues and are doing so I think relatively successfully.

MICHAEL TRAYNOR: Any questions? Thank you, very much.

Many thanks to all the members of the Commission and staff for your help for making this meeting and hearing today and meeting yesterday very interesting, and I think it's a testament to the group. And thank you all the members of the audience for your interest and attention today and yesterday when you were here.

With that, if there's no further business, the meeting adjourned.

(2:38 p.m.)

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C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF ORANGE)

I, **PAMELA S. HARDY**, **FPR**, **RMR**, **CRR**, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record.

Dated this 8 day of February 2010.

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PAMELA S. HARDY, **RMR**, **CRR**, **FPR**