

MINUTES
AMERICAN BAR ASSOCIATION
COMMISSION ON ETHICS 20/20
February 4, 2010
12:00 p.m. - 5:00 p.m.
Walt Disney World Dolphin Hotel
Orlando, Florida

Commission Members Present:

Jamie S. Gorelick, Co-Chair
Michael Traynor, Co-Chair
Stephen Gillers, Professor
Jeffery B. Golden
George W. Jones Jr.
Hon. Elizabeth B. Lacy
Judith A. Miller (by telephone)
Hon. Kathryn A. Oberly (by telephone)
Herman J. Russomanno
Theodore Schneyer, Professor
Carole Silver, Professor
Frederic S. Ury
Hon. Gerald VandeWalle
Hon. Diane P. Wood (by telephone)

Absent:

Roberta Cooper Ramo

Commission Liaisons Present:

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

Commission Reporter:

Keith R. Fisher

ABA Center for Professional Responsibility Counsel:

Jeanne P. Gray, Director
Ellyn S. Rosen, Commission Counsel
Marcia L. Kladder, Policy and Program Director
Mary M. Devlin, Deputy Director
Natalia M. Vera, Senior Research Paralegal

1. Chair's Report: Chair Gorelick called the meeting to order at 12:00 p.m. She welcomed audience members and thanked them for their attendance. After Commission members, liaisons and staff introduced themselves, audience members did the same and

identified their affiliation, if any. Chair Gorelick invited audience participation in the discussion of the Commission's Annotated Preliminary Issues Outline, noting that the Commission had not reached any conclusions regarding the subjects it is studying, nor has it prejudged issues. At the conclusion of the Commission's discussion of substantive agenda items, she and Chair Traynor will solicit audience comments and suggestions. Copies of the Annotated Preliminary Issues Outline had been placed on audience members' chairs.

Chair Gorelick directed the members' attention to the Commission's Informational Reports to the House of Delegates and Board of Governors. She will appear before the Board on February 5, 2010, and Chair Traynor will address the House of Delegates on February 9, 2010.

2. Appearance by ABA President Carolyn B. Lamm, ABA President Elect Steven Zack, and ABA President Elect Nominee William Robinson: ABA President Carolyn B. Lamm thanked the Commission for its work. She thanked President Elect Zack and President Elect Nominee Robinson for their commitment to support the Commission after her term as ABA President expires. She recently briefed the Conference of Chief Justices about the Commission's activities, and suggested to Conference President, Utah Supreme Court Chief Justice Christine Durham, that she attend the Commission's April 2010 meeting in Washington, D.C. President Lamm also mentioned the late filing with the House of Delegates by the New York State Bar Association seeking ABA review of the methodology to be used by U.S. News and World Report in its upcoming ranking of U.S. law firms. That Report and Recommendation also urges the ABA to consider the ethical implications of such ratings services. She believes that this issue already is on the Commission's agenda.

President Elect Zack observed that the legal profession will likely change more in the next ten years than it has in the past 100 years. He advised the Commission that, during his tenure as ABA President, it will have his support and necessary resources. President Elect Nominee Robinson agreed, and offered seamless organizational support, including financial resources, for the Commission's work at the Association's leadership level. Chairs Gorelick and Traynor thanked President Lamm, President Elect Zack, and President Elect Nominee Robinson for their generous offers of support and commitment to the project. Chair Gorelick advised that, as requested by President Lamm, the Commission will submit a report in August 2010 identifying the specific subjects it will address during its tenure as well as perceived problems with the ABA Model Rules of Professional Conduct and other regulatory policies for which the Commission will propose solutions.

Chair Traynor reported on legal process outsourcing (Section I.B. of the Annotated Preliminary Issues Outline). In 2008, at President Elect Steven Zack's direction, the Section of International Law formed a task force to consider issues relating to legal process outsourcing abroad by U.S. lawyers and law firms. President Elect Zack's request was in response to concerns raised by the Standing Committee on Ethics and Professional Responsibility's Formal Opinion 08-451. He had requested that the Section file a report and recommendation with the House of Delegates for full debate and consideration in August 2010. Because the issue of legal process outsourcing is also on the Commission's agenda, Chair Traynor and International Law Section Chair Glenn P. Hendrix held several teleconferences to determine how to best coordinate efforts. After

consultation between ABA President Lamm and ABA President Elect Zack, it was agreed that the Section would provide its draft report and recommendation to the Commission, which will consider the matter a priority. The Commission will form a Working Group with representatives from the Section and other relevant ABA and affiliated entities to consider the ethical and regulatory issues relating to outsourcing domestically and abroad. The Section will conduct a hearing relating to this topic at its April 2010 Spring Meeting in New York, and the Commission's August 2010 public hearing will address the topic. The Commission will file a report and recommendation for House consideration at the 2011 ABA Midyear Meeting. ABA President Elect Zack expressed appreciation for the Commission's collaboration on this issue and for expediting consideration of the matter.

3. Discussion of Annotated Preliminary Issues Outline: The Annotated Preliminary Issues Outline prepared by Commission Reporter Keith Fisher and Commission Counsel Ellyn Rosen incorporates comments received from within the ABA, outside entities, and individuals as of December 31, 2009. The Commission continues to welcome comments on the Outline and any other matters before it. Chair Gorelick urged Commission members to try to reach consensus at this meeting regarding the future direction of the Commission's work, while leaving open the possibility that new issues may arise that the Commission should consider. She asked members to strive to prioritize issues for which resolution is desired and for which they believe a solution exists. She recommended that they consider which, if any, topics are best referred to another ABA entity with demonstrated expertise to take the lead in conducting research, providing an assessment on the subject, and submitting to the Commission a developed proposal for consideration and collaboration.

Professor Fisher began discussion of the Annotated Preliminary Issues Outline with the Section of International Law's request that the Commission consider whether the U.S. state-based licensing scheme should be maintained. Professor Stephen Gillers noted that whether to recommend keeping the current U.S. state-based licensing mechanism is not an "either/or" proposition. Other options include, for example, supplementing the current regime with a form of federal licensure. Judge Wood agreed. After further discussion, Chair Gorelick recommended, and the Commission agreed, that more information was needed and that discussion of the issue should be deferred.

Professor Fisher advised that the Federal Bar Association recommended that the Commission consider the judicial ethics issues implicated by technology and globalization, and broaden the scope of its mission to include study of the ABA Model Code of Judicial Conduct. The Commission agreed with his suggestion to decline this invitation. To the extent that the Commission's ultimate recommendations implicate the Model Judicial Code, referral to the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Judicial Independence, and the ABA Standing Committee on Federal Judicial Improvements is appropriate.

Professor Fisher described the Standing Committee on Ethics and Professional Responsibility's suggestion that the Commission study how advances in technology and globalization of the practice of law have impacted the availability of lawyers in rural and remote areas. He suggested that this is beyond the scope of the Commission's mission and resources. The Commission agreed and recommends that the Ethics Committee consult with the Standing Committee on Delivery of Legal Services.

The Commission next discussed comments offered in response to Section I.A.I of the Preliminary Issues Outline, entitled “Admission of U.S. Lawyers to Practice in Other Countries.” The ABA Standing Committee on Client Protection asked the Commission to explore developing a policy recommending mutual recognition of privileges extended to foreign lawyers in the U.S. and those afforded to U.S. lawyers abroad. Professor Fisher advised that this is a “trade” issue that is currently being addressed by that ABA Task Force on International Trade in Legal Services and the Section of International Law. The Commission will monitor the work of these entities and coordinate with them to the extent that the Commission’s ultimate recommendations implicate their efforts. Ms. Rosen also serves as Co-Counsel to the Task Force on International Trade in Legal Services; she and liaison Professor Robert Lutz will keep the Commission apprised of the Task Force’s work.

The ABA Litigation Section queried whether the goal of the Commission’s study of foreign countries’ approaches to admitting U.S. lawyers is to assist those practitioners or to guide U.S. policy for admission of foreign lawyers. The Section believes that the latter is more consistent with the Commission’s goals. Carole Silver disagreed, and recommended that the Commission not exclude the former from its study. She stressed that issues relating to admission of U.S. lawyers abroad and foreign lawyers in the U.S. are bound together. Others agreed.

The Section of International Law recommended that the Commission consider defining what constitutes the practice of law in foreign countries, and studying how best to achieve harmonization of admission standards and substantial reciprocity. Citing the work of the ABA Task Force on the Model Definition of the Practice of Law and Federal Trade Commission responses to U.S. state efforts to define law practice, Professor Fisher recommended that the Commission not revisit that issue. The Commission agreed. The Commission agreed that the Section’s suggestion that it evaluate whether a law firm qualification scheme is appropriate. The Commission will do so as part of its study of proactive entity regulation and alternative business structures.

The Commission disagreed with Professor Fisher’s suggestion that issues regarding harmonization of admission standards and reciprocity should be referred to the ABA Section of Legal Education and Admissions to the Bar. Professor Gillers noted that these issues intersect with the Commission’s study of U.S. state-based lawyer licensure. Justice Elizabeth Lacy agreed, but stressed that it cannot be said that problems relating to the lack of harmonized admission and other lawyer regulatory rules would not exist “but for” state-based lawyer regulation. She also recommended that the Commission could assist U.S. lawyers practicing abroad by providing guidance to help them behave ethically in the face of conflicting rules and laws. Professor Ted Schneyer stated that the Commission should not necessarily focus on whether to retain state based judicial regulation of the legal profession, but rather it should look for ways to better achieve uniformity. Chair Gorelick observed that the Commission will examine facts, data, and other information to determine the existence of actual problems and their cause. The Commission will then strive to develop solutions tailored to those factually identified problems.

Section I.A.2. of the Annotated Preliminary Issues Outline identifies issues relating to the methods by which foreign lawyers are admitted to practice law in the U.S. Professor Gillers, chair of the Commission’s Inbound Foreign Lawyers Working Group,

advised that the group held a teleconference and will meet again on February 6, 2010. The Working Group agreed to recommend to the Commission the addition of foreign lawyers to the ABA Model Rules on Pro Hac Vice Admission and the Registration of In-House Counsel. The Working Group also agreed to propose to the Commission merging the provisions of the ABA Model Rule for Temporary Practice by Foreign Lawyers into Rule 5.5 of the ABA Model Rules of Professional Conduct. Professor Gillers and Ms. Rosen prepared draft proposed rule amendments for Working Group consideration at its February 6th meeting. The Working Group will take under consideration comments submitted in response to the Commission's Preliminary Issues Outline. Professor Gillers advised that the Working Group would submit completed drafts and explanatory reports to the Commission for consideration at its April 29 – 30, 2010 meeting.

Professor Fisher referenced the Standing Committee on Client Protection's recommendation that foreign lawyers practicing in the U.S. be subject to reciprocal discipline in their countries of original licensure. Chief Justice Gerald VandeWalle described negotiations between the Conference of Chief Justices and the Council of the Bars and Law Societies of Europe (CCBE), and between the Conference and the Law Council of Australia to develop reciprocal disciplinary protocols. He noted that, because of the nature of its member country rules and regulations, the CCBE can agree only to reciprocal notification.

In response to a comment that the Commission consider proposing a model rule for full U.S. admission of foreign lawyers already admitted in a non- U.S. jurisdiction, Justice Lacy advised that the Section of Legal Education and Admissions to the Bar was studying that and related issues. However, she cautioned against characterizing what, if any, policy proposals might emerge from the Section.

Professor Fisher addressed the Section of International Law's question about whether the Commission should "coordinate" with the Office of the U.S. Trade Representative regarding proposed modifications to U.S. admission and qualification requirements for foreign lawyers. After discussion, the Commission agreed that its development of proposed policies for ultimate consideration by the House of Delegates must be done independently. However, this does not preclude Commission consideration of information obtained from the Office of the United States Trade Representative and other domestic and international sources. Chair Gorelick directed Ms. Rosen and Professor Fisher to prepare a summary of international regulatory developments for consideration by the Commission at its April 29 -30, 2010 meeting.

Section I.C. of the Preliminary Issues Outline describes issues relating to conflicts of interest rules. The Commission discussed concerns raised by commentators' suggestions that the rules delineate between obligations owed to "sophisticated" versus "non-sophisticated" clients. Professor Schneyer noted that the concept is not entirely foreign to the Model Rules of Professional Conduct. The Commentary to Model Rule 1.7 refers to sophisticated clients in the context of disclosures for advanced conflict waivers. Professor Gillers added that, because case law has addressed the issue of waivers and sophisticated clients, this may be an area where the Commission seeks to provide further guidance to the profession instead of rule amendments. Chair Gorelick recommended that firm structures also be considered in the context of the Commission's study of the conflict of interest rules. For example, some firms organize as Swiss vereins for purposes of having a global presence. Jeffrey Golden suggested that this is an issue upon which

the Commission should solicit testimony. The Commission agreed to refer back to the Standing Committee on Ethics and Professional Responsibility for study the issue of how the conflict of interest rule impacts government lawyers differently.

Chair Gorelick asked the Commission to consider difficulties lawyers face applying the conflict of interest rules in the context of alternative dispute resolution proceedings. By way of example, she described the process by which a lawyer opposes another lawyer one day, and the next day the former opponent lawyer serves as the neutral on a panel before whom the first lawyer appears as an advocate. Professor Gillers questioned whether, assuming the U.S. rules prohibit this practice, there are transnational implications for U.S. lawyers. Philip Schaeffer advised that the International Bar Association has issued a set of elaborate rules that are followed almost universally. Professor Lutz agreed, indentifying the Code of Ethics for Arbitrators in Commercial Disputes approved by the ABA and the American Arbitration Association. George Jones stated that the issue identified by Chair Gorelick is one which is addressed during the disclosure process at the outset of the dispute resolution proceedings. Judge Wood agreed with Mr. Jones as it relates to large sophisticated clients who engage in international arbitration. However, from her perspective, there are issues worthy of consideration regarding the scenario posed by Chair Gorelick. Judith Miller also would like to see this issue remain on the Commission's agenda. Professor Fisher and Ms. Rosen will compile existing rules and regulations for examination and determine if there are gaps that the Commission should address. Ms. Rosen suggested outreach to the International Bar Association's Task Force on International Arbitration. Kenneth Reisenfeld, the immediate past ABA Representative to the International Bar Association, offered the Task Force's assistance. Ms. Rosen also suggested seeking assistance from the ABA Section of Dispute Resolution and the Section of International Law.

Section I.D. of the Preliminary Issues Outline raises questions regarding the sufficiency of Model Rule 1.6 (Confidentiality) in the context of increased globalization and advancing technology. Professor Fisher noted that the ABA Standing Committee on Ethics and Professional Responsibility suggested that the Commission consider how to better inform the public of exceptions to a lawyer's obligations under the Rule. As a compliment to this suggestion, another commentator recommended that the Commission propose a rule requiring all lawyers to reduce their fee agreements with clients to writing. Professor Fisher reminded the Commission that the House of Delegates defeated such a proposal by the ABA Commission to Evaluate the Model Rules of Professional Conduct (Ethics 2000 Commission). The Commission agreed to continue study of the issues raised in this section of the Outline, noting that issues relating to inadvertent disclosure and waiver also relate to the section addressing choice of law (Section I.E.). The Commission will undertake a study of Model Rule 8.5 in the context of increased global legal practice and evolving technologies. The members concurred with Professor Gillers' disagreement with the Legal Marketing Association's proposal to delete the phrase "offers to provide" from Model Rule 8.5.

The Commission agreed that, while the comments by Mr. Leslie Jacobs of Ohio had merit, the issues he raised are not within the scope of the Commission's mission. The ABA Standing Committee on Ethics and Professional Responsibility may wish to consider Mr. Jacobs' submission.

The Commission agreed that it is important for it and the U.S. legal profession to learn about and consider international ethical and regulatory developments. This includes developments relating to alternative business structures and law firm regulation. Inclusion of these issues on the Commission's Preliminary Issues Outline is not indicative of any position regarding those developments. The Commission recognizes the concern of some segments of the profession that doing so means that the Commission will recommend permitting multidisciplinary practices. The House of Delegates defeated such a recommendation in 2000. Professor Schneyer added that there are at least 6 -8 models of alternative business structures utilized by law firms abroad, not all of which involve multidisciplinary practice. Chair Gorelick stressed that, while the Commission needs to be mindful of the past, it must focus on how current developments impact the U.S. legal profession. The Commission deferred further discussion of these issues until after the February 5, 2010 public hearing.

The Commission did not remove from its consideration any issues set forth in Sections II. and III. of the Preliminary Issues Outline. This includes evaluation of lawyers' use of social networking sites and providers that rate or rank lawyers and law firms. In the context of the impact of evolving technologies on the profession, the Commission will consider whether legal ethics and regulatory rules should remain technology agnostic, or whether black letter rules should incorporate reference to specific technologies. Mr. Schaeffer commented that the nature and sheer volume of modes of internet communication may warrant new, more specific rules. Chair Gorelick commented that the Commission's ultimate work product regarding advancing technology should address increased access to justice. The Commission also will study whether current ethics rules pose unnecessary barriers to solo and small firm practitioners utilizing new technologies, or whether the rules as written allow for these lawyers to take advantage of technology driven opportunities.

Audience Comments on Commission's Discussion of Annotated Issues Outline:

ABA Dispute Resolution Section representative Kimberlee Kovach asked the Commission to consider ethics issues raised by international dispute resolution processes. In particular, she queried whether the Commission should consider the ethical implications of dispute resolution proceedings conducted via an on-line platform. Does it matter whether the representatives for the parties are lawyers in their home countries? Should they be U.S. lawyers? Do U.S. lawyers participating in this type of dispute resolution proceeding risk aiding in the unauthorized practice of law? She offered the Section's research assistance. Margaret Huff, Chair of the Dispute Resolution Section's Ethics Committee reiterated Ms. Kovach's offer of assistance and suggested that the Commission review the resources available on the Section's web site.

Rew Goodenow, a member of the Council of the National Conference of Bar Presidents (NCBP) invited the Commission to participate in NCBP programming and to solicit information from the bar presidents. Chair Gorelick thanked Mr. Goodenow for the invitation, and reiterated the Commission's commitment to transparency and information-sharing. She suggested that bar presidents consult with their respective disciplinary counsel about specific regulatory issues that disciplinary counsel are encountering due to globalization and advancing technology. Members of the Commission are already scheduled to present a program to the NCBP on February 5, 2010.

Ronald Minkoff advised that while he is a member of the ABA Standing Committee on Professionalism, he was not speaking on behalf of the Committee. He stressed the need to maintain public confidence and not isolate the Commission's work. He believes that consideration of licensing paralegals and other non-lawyers to perform certain legal services (as suggested to the Commission by the ABA Standing Committee on Ethics and Professional Responsibility) would engender hostility from the profession. He urged the Commission to study ideas raised in the Professionalism Committee's recent White Paper, *Reviving a Tradition of Service: Redefining Lawyer Professionalism in the 21st Century*. With regard to lawyer advertising, he urged the Commission to not make too many rules. He also suggested that the Commission consider whether the current state-based regulatory structure works. Chair Gorelick invited the Professionalism Committee to submit formal comments to the Commission about the issues raised by Mr. Minkoff.

Wallace Shipp, Chief Disciplinary Counsel in Washington, D.C., focused his comments on reciprocal disciplinary enforcement in a global legal practice environment. He stressed the need for disciplinary counsel to have the ability to follow bad lawyers in order to hold them accountable for current or prior discipline in other jurisdictions, whether U.S. or foreign. Recently, his office handled matters involving misconduct by three foreign lawyers. He anticipates that disciplinary agencies will see an increase in such matters in the future. Disciplinary Counsel would appreciate the Commission's consideration of how to enhance international reciprocal disciplinary enforcement. Mr. Shipp offered the resource of the National Organization of Bar Counsel.

Professor Gillers questioned Mr. Shipp about the District of Columbia's experience allowing non-lawyers to be partners in law firms and share in the firm's fees. Mr. Shipp advised that the District of Columbia has allowed such non-lawyer participation since the 1980's and there have been no problems. Chair Gorelick queried Mr. Shipp as to whether the National Organization of Bar Counsel had identified specific disciplinary enforcement related problems relating to the lack of uniformity of ethics rules in the U.S., and whether there should be a safe harbor for lawyers who make appropriate efforts to behave ethically in the face of conflicting rules. Mr. Shipp indicated that it had not.

Michael Downey practices law with Hinshaw & Culbertson, is a member of the Association of Professional Responsibility Lawyers and the ABA Law Practice Management Section. He urged the Commission to address data security issues facing lawyers and law firms, noting the threat of federal incursion into the state judiciary's regulatory authority over the profession. He stressed the importance of achieving better uniformity across states, citing the difficulties of having to advise multijurisdictional law firms about issues such as document management systems. Lawyers need better guidance regarding choice of law as set forth in Model Rule 8.5. If the Commission considers modifying the imputation rules, he suggests that it study the New Jersey advisory opinion on subsidiary law firms. He asked the Commission to consider whether the U.S. is on the right path with regard to multidisciplinary practice. The Commission should study and analyze the new regulatory models in Australia and the United Kingdom.

Chair Gorelick asked Mr. Downey whether he would promulgate standards for protection of data by law firms, especially in light of increased use of cloud computing. He cautioned that promulgation of best practices risks creation of new standards of care.

However, certain client protection measures for law firms are warranted; the federal government has required its agencies to implement basic data protection measures for years. If the legal profession does not set some standards, the government will argue it has cause to fill the void. Mr. Downey also urged the Commission to consider recommending that the profession and law schools do a better job educating law students about the financial burdens associated with attending law school, and provide more truthful assessments of opportunities for employment and income expectations. Reporter Fisher thanked Mr. Downey for his helpful insights and asked him to submit those ideas to the Commission in writing.

5. Organization of Commission Work: Chair Gorelick and Chair Traynor created seven working groups as follows:

A. Implications of New Technologies

Co-Chairs, Fred Ury and _____

Commission Members: Bob Lutz, Judith Miller, Herman Russomanno, and Carole Silver

B. Data Security and Confidentiality

Co-Chairs, Judith Miller and _____

Commission Members: Fred Ury and Justice Liz Lacy

C. Legal Process Outsourcing

Co-Chairs, Judge Kay Oberly and Steven Krane

Commission Members: Bob Lutz, George Jones, and Carole Silver (third choice).

D. Law Firm Regulation/Alternative Business Structures

Co-Chairs, Ted Schneyer and George Jones

Commission Members: Jeff Golden, Don Hilliker, Carole Silver, Chief Justice VandeWalle, Judge Diane Wood

E. Third-Party Financing of Litigation

Co-Chairs, Philip Schaeffer and Jeffrey Golden

Commission Members: Stephen Gillers, Herman Russomanno, and Judge Kay Oberly.

F. Uniformity and Choice of Law

Co-Chairs, Stephen Gillers and Judge Diane Wood

Commission Members: Ted Schneyer, Don Hilliker, Chief Justice Gerald VandeWalle (third choice), Justice Liz Lacy, and Bob Lutz (third choice).

G. Inbound Foreign Lawyer Issues

Chair, Stephen Gillers

Commission Members: Phil Schaeffer, Chief Justice Gerald VandeWalle

Chairs Gorelick and Traynor will finalize working group assignments soon after the meeting. Mr. Fisher is to promptly reassess the issues the Commission will consider in the context of available research, begin to refine priorities, and recommend a work plan and time-table for completion of research. Professor Fisher and Ms. Rosen will take the lead on assigning to each group relevant questions based on the issues set forth in the Preliminary Issues Outline and the Commission's discussion. Chair Gorelick and Chair Traynor will review that work product with an eye toward ensuring that no subject remains unassigned and creating any necessary additional working groups.

6. Strategic Communication Subcommittee: Judith Miller reported that the subcommittee met by teleconference to discuss initial questions and approaches for outreach and education. The Commission's discussion at this meeting will help focus the subcommittee's efforts and it will begin holding follow-up teleconferences.

7. Adjournment: Chairs Gorelick and Traynor deferred discussion of the remainder of the agenda items until February 5, 2010. They adjourned the meeting at 5:00 p.m.

Respectfully Submitted,

Ellyn S. Rosen
Commission Counsel