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*Model Rules*

**Agenda for Ethics 20/20 Project Examines  
Impact of Technology, Disappearing Borders**

The ABA Commission on Ethics 20/20 Nov. 19 released an introductory list of issues it plans to address during the commission's three-year project to recommend updates to the Model Rules of Professional Conduct in light of evolving technology and globalization of legal practice.

In its "preliminary issues outline," the commission identified three developments that may warrant changes to the rules that govern lawyers' conduct:

- attorneys' regulation by states while engaging in multistate and international practice;
- advances in technology that enhance virtual cross-border access; and
- other challenges presented by changing technology, including "data security and confidentiality issues."

The detailed outline sets out numerous subtopics that elaborate on these three categories of inquiry. (See *box*.) An introduction to the issues outline emphasizes that the list is a work in progress subject to modification and additions as the commission's work goes on.

The commission has set a deadline of Dec. 31 for comment on this agenda, in time for its first public hearing on Feb. 5 in Orlando, Fla., during the ABA Midyear Meeting.

In an interview with BNA, commission co-chair Michael Traynor emphasized that the commission wants "continuing input of ideas" for the project. The Dec. 31 deadline was set as a practical matter, he explained, to give the commission enough time to assimilate comments in the short time before the initial public hearing. But "we'll take ideas at any time," he said.

Keith R. Fisher of Chicago, the commission's reporter, told BNA that the commission released the preliminary issues list "to solicit comment on what's in there and not in there." Changes to the agenda can be expected within the first year of the commission's work, he said.

Although experts who spoke with BNA about the preliminary agenda spotted no glaring omissions, they offered a range of views about which issues they believe deserve priority. The subject of impediments to lawyers' international practice seems to top the list.

**'Shrinking Globe.'**

In her remarks to BNA, commission co-chair Jamie S. Gorelick emphasized the globalization of legal practice.

"We really need to understand the implications of our place-based ethics systems for a world in

which borders are disappearing,” said Gorelick, a partner at WilmerHale in Washington, D.C.

“With a shrinking globe,” she added, “comes an obligation on our profession to consider how we wish to practice and advise clients outside the United States, and how others might contribute within the United States.”

Gorelick also said that rapid advances in technology will continue to affect the legal profession. “It’s hard to imagine technology developments having as much of an impact in the next 10 years as they have had in the last 10 years, but they will,” she said.

The commission’s plans and goals are not impossibly ambitious, in Gorelick’s view. “We’re not trying to boil the ocean,” she declared.

### **Take Advantage of Opportunities**

Traynor acknowledged that the commission has a “substantial agenda,” which means that “one challenge is merely to get focus.”

The ultimate goal, he told BNA, is “to help the legal profession respond to the opportunities and challenges” that advances in technology have created while preserving the core values of the profession.

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Jamie S. Gorelick  
Co-Chair, Ethics 20/20 Commission

The opportunities presented by the “borderless world” in which the practice of law now occurs are not limited to big firms, Traynor emphasized. “A six-person firm anywhere can have the world open to it,” he said.

Some observers are asking if the commission’s objective is “MDP by the back door,” Traynor commented, referring to multidisciplinary practice in which lawyers and nonlawyers join together to offer integrated services to clients.

“The answer is no,” he said. “But we need to be forthright that it’s happening,” and help lawyers take advantage of opportunities while maintaining a highly ethical approach, he said. “Rather than ducking the MDP puzzle, we need to deal with it openly,” he added.

Traynor was a member of the ABA Commission on Multidisciplinary Practice, which a decade ago issued a controversial proposal that called for substantial relaxation of the restrictions on lawyers’ MDP. In 2000 the ABA House of Delegates rejected that recommendation and disbanded the commission. See 16 Law. Man. Prof. Conduct 367.

### **Ostriches Not Invited**

Fisher said a key question for the commission is: “What are the barriers and impediments that face lawyers who practice on a transnational basis?” It’s almost a cliché how small the world has become, he noted.

“The whole landscape of the legal profession and lawyer-client relations is going to be transmogrified over the next couple of decades, and to a certain extent it already has been,”

Fisher said.

Accordingly, the commission is trying to figure out, he said, "whether the existing rules governing lawyers work in this environment, or whether other or additional rules are needed."

Fisher emphasized the difficulty of foreseeing certain trends, such as innovations in technology. Some lawyers remember when "mag cards" and, before that, carbon paper were key tools, whereas those in the "millennial generation" can only imagine what it was like to practice law without using the internet, he remarked.

Changes in technology may significantly affect legal services in regard to firms' marketing, business models, and investment in real estate, he suggested.

"Core functions like attorney competence have to be reconceived in this brave new world," Fisher said. He explained that changing technology raises such questions as whether legal materials pulled off the internet are reliable, and what constitutes an attorney's product when it's "out there in the ether."

Fisher acknowledged that some of the commission's ultimate recommendations may prove to be controversial. "But we shouldn't act like an ostrich," he said. "The future is already here."

### **Three-Year Plan**

Fisher also acknowledged that the commission's tentative agenda covers a lot of ground. "I hope that '2020' doesn't refer to the year we finish," he joked.

Actually, Fisher told BNA, the commission anticipates having an extensive report and recommendation ready for the ABA delegates' consideration at the annual meeting in 2012.

According to materials available on the commission's website, the first year will consist of research, outreach, and analysis of information about the issues identified in the outline. In addition to the Feb. 5 meeting in Orlando, public hearings are scheduled for Aug. 7 in San Francisco and Oct. 16 in Chicago, with a roundtable discussion on June 4 in Seattle.

The second year is expected to focus on development of proposed policies, principles, and perhaps model rules for circulation and comment. The final year is anticipated to involve continued vetting of proposals and presentation of the final results to the delegates.

Fisher said the commission wants to hear from a wide range of people and groups beyond the ABA itself, including state bar associations, local and regional bar groups, individuals outside the practice of law, and public interest groups. "We're going to invite participation from other legal systems too," he added.

The commission's task is made more complicated, he noted, by the fact that rules the ABA approves are simply models that have no binding effect until states adopt them.

### **State-Based Lawyer Regulation**

Fisher said that the commission has not yet decided whether to look at the issue of the state-based nature of lawyer regulation in the United States. "A lot can be addressed without dealing with that macro issue," he commented.

Some national regulation is slowly happening, he pointed out, mentioning as examples the Treasury Department's Circular 230, which affects lawyers who practice before the Internal Revenue Service, the U.S. Patent and Trademark Office's rules for lawyers who practice before that office, and efforts by the Securities and Exchange Commission to police lawyers who

practice before the agency.

Given that state supreme courts primarily control the regulation of legal practice in the United States, the Conference of Chief Justices is a key constituency for the commission to work with, Fisher said.

A lurking issue, he added, is the U.S. position on the extent to which lawyers should be allowed to practice across international borders under the General Agreement on Trade in Services (GATS) that countries have been haggling over—with no resolution—for years. Fisher noted the position expressed by some observers that the U.S. system of state regulation presents undue barriers to cross-border practice.

Another big issue, he said, is the notion of “alternative business structures,” such as publicly traded law firms as have been authorized in Australia.

These phenomena are “accidents waiting to happen” that need to be addressed on the front end, in Fisher's view. If the history of legal ethics is “trying to put the toothpaste back in the tube” after problems arise, “we’re trying to redesign the tube,” he said.

### **Commission's Work Is 'Essential.'**

Commission member Stephen Gillers, law professor at New York University, characterizes the Ethics 20/20 Commission's work as “not merely important” but “essential.”

“Technology and globalization will change the legal services market whatever we do or don't do,” he told BNA. These changes make it important, he said, “to revisit how we regulate that market” and “keep what makes the profession of law special, what makes it a profession.”

“Rather than ducking the MDP puzzle, we need to deal with it openly.”

Michael Traynor  
Co-Chair, Ethics 20/20 Commission

This is not a revolutionary prospect, Gillers said, pointing out that the profession's regulatory structure constantly reacts to court decisions and events in the outside world. “But new technology and the diminished importance of state and international borders do present a special challenge because they undermine the geocentric premise of traditional lawyer regulation,” he stated.

“Technology coupled with the fact that the needs of clients increasingly cross local and national borders (a trend which is itself facilitated by technology and market changes) often means that the relevant law of any place in the world can be discovered and practiced from any place in the world,” Gillers explained.

The point to emphasize, he said, is that “we are still at the early stages of a disruption in the premises underlying lawyer regulation.” Although that shift cannot be stopped by court rules and legislation, “we have the luxury, at least for a while, of anticipating and affecting its direction,” he said.

“One thing is incontrovertible,” Gillers stated. “Doing nothing is not an option.”

### **Structural Reforms in Regulation**

Law professor Theodore J. Schneyer of the University of Arizona, who is also a member of the

Ethics 20/20 Commission, told BNA that one aspect of the panel's work "will involve an examination of the major structural reforms in regulating law practice that are underway in other countries, most notably Australia and the U.K.," to consider whether some of those should be adapted for use in the United States.

This is of interest, he said, partly because it may be important to harmonize regulatory systems in countries in which many of the large U.S.-based law firms now maintain offices, and partly because the reforms have intrinsic merit.

Schneyer described two features that he finds particularly interesting about the reforms in Australia and the United Kingdom. The first, he said, is a regulatory scheme that governs law firms and not just individual lawyers, on the premise that "ethical and competent law practice is not only a function of the individual lawyer's values and skills, but increasingly a function as well of the internal governance or management systems of firms."

Schneyer explored the subject of firm-based regulation in his 1991 article, *Professional Discipline for Law Firms?*, 77 Cornell L. Rev. 1. In the United States, only New York and New Jersey have gone that route.

The main enforcement tool in the U.K. and Australian programs of firm-based regulation, Schneyer explained, is not the disciplining of firms per se, but a mandate that firms (1) designate one or more managers with enforceable responsibilities to ensure that the firm has appropriate management systems in place, and (2) regularly assess the adequacy of their management systems and make reports on that subject to the regulators.

Schneyer discusses these reforms, and the prospects for adopting similar measures in the United States, in *Thoughts on the Compatibility of Recent U.K. and Australian Reforms With U.S. Traditions in Regulating Law Practice*, 2009 J. Prof. Law. 13, 30-37, available at <http://www.abanet.org/cpr/pubs/uk.pdf>.

The second major regulatory development in the U.K. and Australia, Schneyer said, is the recognition that lawyers may practice in MDPs—that is, entities in which other professionals join with lawyers to provide their services and can be principals—and in other forms of Alternative Business Structures ("ABS") owned in whole or in part by nonlawyers, including passive shareholders.

Although the ABA has rejected these ideas in the past, Schneyer said the U.K. and Australian reforms raise the questions

whether the utility of the arrangements in the U.S. is now clearer than it was in the past, the dangers that the arrangements were thought to entail appear in the light of experience abroad to be less serious than was previously supposed, the methods by which MDPs and other ABS are being regulated offer assurances that were not thought possible at the time of the earlier ABA debates, and whether the failure to liberalize regulation in similar ways in the U.S. would place U.S.-based law firms at a comparative disadvantage in the burgeoning global legal services market.

Schneyer addressed some of these issues in *Multidisciplinary Practices, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 Minn. L. Rev. 1469 (2000).

## **Foreign-Licensed Corporate Counsel**

In an interview with BNA, professor Carol A. Needham of St. Louis University law school called the commission's work "tremendously important" in covering "many issues that are central to the practice of lawyers today and in the future." She said the panel's outline "captures the important topics" and tees up specific issues of key interest.

Needham singled out the issue of allowing non-U.S. licensed lawyers to practice as in-house corporate counsel. Although this topic hasn't been front and center, she said, it is hugely important to corporations that work with lawyers in their foreign offices and want to bring them to the United States as inside counsel, either temporarily or long term. The ABA currently lacks policies relating to foreign in-house counsel, according to a footnote in the commission's outline.

"Many companies have operations in other countries, and there's nothing untoward about having lawyers come here and advise them," she said. "There needs to be some hook for competent lawyers licensed outside the United States to advise corporate clients."

"Doing nothing is not an option."

Stephen Gillers  
Member, Ethics 20/20 Commission

Temporary practice by non-U.S. lawyers who aren't employed as in-house counsel is another key issue, in Needham's view. The commission's issues outline poses the question whether Model Rule 5.5 should be amended to allow temporary practice by lawyers from outside the United States.

Although the ABA has a separate Model Rule for Temporary Practice by Foreign Lawyers, most jurisdictions that have adopted Rule 5.5 have not adopted that corollary rule, according to the issues outline. Needham said that, in general, "the sense is that temporary practice by non-U.S. lawyers is occurring widely," although the evidence of that phenomenon is anecdotal.

Needham also suggested that the commission should study the sometime-conflicting obligations that other countries are imposing on lawyers, such as duties to report information that are at odds with rules governing lawyer-client confidentiality. "We are overdue for a much broader understanding of the ways other laws govern U.S. lawyers' practice," she said.

### **They're Already Here**

Regulation of practice in the United States by foreign-licensed lawyers was also identified as an important issue by Mark L. Tuft, who practices with Cooper, White & Cooper in San Francisco.

"We have untold numbers of foreign lawyers practicing under the radar in California," he said in an interview with BNA. Only six states have adopted the ABA's model rule for temporary practice by foreign lawyers, Tuft said. He also pointed out that many U.S. firms have foreign lawyers working in their offices abroad.

Tuft said that when he looked at the ethics opinions on outsourcing and offshoring legal services to foreign lawyers, he found "they basically say that to avoid assisting the unauthorized practice of law, you must treat them like nonlawyers under Rule 5.3," which governs a lawyer's supervisory responsibilities for nonlawyer employees. "This is antiquated," he remarked.

Tuft said that in California, the traditional model of law firms—"we're all partners"—is shifting to other approaches, such as corporations and arrangements with nonlawyers, and firms increasingly are working with foreign lawyers and have offices overseas. "We have to deal with these issues," he stated.

Although Rule 5.4, which addresses a lawyer's professional independence, is "part of the story, we have to look at Rules 5.1 and 5.3 too," Tuft said.

## Self-Regulation of Data Security

The commission will need to address several large groups of issues involving cross-border practice fueled by advances in technology, such as outsourcing and lawyers' use of networking websites, according to Michael P. Downey of Hinshaw & Culbertson in St. Louis. Downey co-authors "The Ethical Quandary," [http://blog.hinshawlaw.com/theethicalquandary/?page\\_id=2](http://blog.hinshawlaw.com/theethicalquandary/?page_id=2), a blog that addresses issues of professional responsibility.

"There is some unhappiness with the ABA's stance on outsourcing legal services," he stated, especially among some sole practitioners who Downey said feel that the ABA is selling them out to help lawyers in India.

ABA Formal Ethics Op. 08-451 (2008) advised that nothing in the Model Rules prevents lawyers from outsourcing legal services so long as they retain ultimate responsibility for rendering competent services and make reasonable efforts to ensure that the conduct of the service providers comports with the lawyers' own professional obligations.

Downey also noted that "certain jurisdictions are being aggressive about regulating lawyers in other jurisdictions." For example, he said, Connecticut disciplinary counsel has taken the position that out-of-state lawyers who market their services on the Internet and troll for clients in Connecticut are subject to Connecticut's advertising rules. See 24 Law. Man. Prof. Conduct 444..

Downey also suggested that the issue of data security is important for the commission to consider. He pointed out that the ABA has fought off some attempts to regulate data security, such as efforts to make law firms comply with the privacy requirements of the Gramm-Leach-Bliley Act. But "if you don't keep your house in order, someone else will do it for you—such as the federal government," he commented.

In addition, Downey said, issues of providing access to justice need to be examined. For example, nonlawyers may try to use software or forms found on the internet to handle their own legal matter. This booming trend, he said, raises questions such as what resources should be made available to people who have trouble getting access to justice, and how lawyers should support them.

by Joan C. Rogers

The website of the ABA Commission on Ethics 20/20 is <http://www.abanet.org/ethics2020/home.html>.

### **Ethics 20/20 Commission's Ambitious 'Issues Outline' Identifies Three General Areas of Inquiry**

In its "Preliminary Issues Outline" released Nov. 19, the ABA Commission on Ethics 20/20 listed three overlapping areas of inquiry:

(1) issues that arise because U.S. lawyers are regulated by states but work increasingly across state and international borders; (2) issues that arise in light of current and future advances in technology that enhance virtual cross-border access; and (3) particular ethical issues raised by changing technology.

The outline describes multiple subtopics for each area.

Within the first category, the commission identified eight subtopics:

- regulations governing admission of U.S. lawyers to practice in other countries, and of foreign

lawyers to practice in the United States;

- outsourcing legal services;
- whether the Model Rules on current-client conflicts and imputation of conflicts need to be changed;
- how the variation in confidentiality rules among U.S. states, and between U.S. states and other countries, can be addressed;
- choice of law under Model Rule 8.5;
- alternative business structures, such as law firms with nonlawyer managers or owners, multidisciplinary practices, and publicly traded law firms;
- regulation of law firms as opposed to individual lawyers; and
- regulation of lawyers' practice in international arbitration.

Within the second area of inquiry—the impact of technological advances on cross-border access—the commission described four issues to consider:

- constraints in the Model Rules on the use of new technologies in law practice;
- protection of clients;
- social networking, unbundling, and “opensourcing” of legal services; and
- lawyer accountability.

As for the third category—particular issues raised by changing technology—the commission spotted these four issues:

- access to justice;
- competence;
- data security and confidentiality; and
- jurisdictional issues in lawyer discipline.

The commission's “Preliminary Issues Outline,” with information on submitting comments, can be viewed at <http://www.abanet.org/ethics2020/outline.pdf>

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