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MEMORANDUM

TO: Ms. Robin Roy, American Bar Association

FROM: Adam J. Sigman, Chairman, Ethics and Professionalism Committee, ABA-RPTE (RP-Side)

Pat Char, Chairwoman, Ethics and Professionalism Committee, ABA-RPTE (TE-Side)

RE: **ABA Commission on Ethics 20/20; Issues Paper: Choices of Law in Cross Border Practice**

CC: Ms. Susan G. Talley
Ms. Pat Char

DATE: March 30, 2011

As requested, the following list combines the comments and concerns raised by the ABA-RPTE Ethics and Professionalism Committees (both the RP and TE sides).

Our group recognizes that many instances of cross-border practice occur every day in our practice area. As mentioned in the paper (copy attached), Rule 8.5 addresses some of these, while missing others. We believe that Rule 8.5 might be the most offended (casually) rule in the books.

For example, if one of us were fortunate enough to have a client that wanted to purchase a swath of REO properties from a particular bank or servicer (at a discount) and the properties spanned several states, we cannot definitively answer where the predominant effect of our counsel "occurs" if the client is based in our home state and we engage (truly engage) local counsel in each of the other states/jurisdictions. In many respects, our counsel occurs where the client "is" or "goes" (which is sometimes out of our control). Most often, the client (and its office and operation) remains in our home state/jurisdiction.

The paper raises 2 chief issues based on our group's discussion. The first is the UPL issue that arises out of cross border practices.

In response to this paper's first issue, we believe the Commission should be asked whether the ABA wants to revise Rule 8.5 to reduce or even halt cross-border practices entirely or find a way re-draft Rule 8.5 to better describe a safe harbor for well meaning attorneys in 1 jurisdiction who have a client that wants to transact in several jurisdictions. We vote for the latter.

As an example, the ABA could craft an addendum to 8.5 to provide a safe-harbor for well meaning attorneys whose clients push the borders. In this regard, please note we've specifically excluded attorney advertising in another jurisdiction (a separate issue entirely that we did not discuss nor address here). Instead, we are referring to a solution for the hypothetical above - with the multi-state transaction client. We envisioned a modified Rule 8.5 that provides a safe-harbor for a lawyer licensed in 1 jurisdiction who (1) follows the adopted rules in his/her home state/jurisdiction, and (2) familiarizes him/herself and follows, reasonably, the adopted rules in each transaction state/jurisdiction, and (3) engages local counsel in each transaction state. As an alternative or a supplement, Rule 8.5 could add a quasi-pro-hac-vice process (similar to litigation practices).

The second issue is whether the actions of the attorney who crosses the border are subject to the disciplinary authority of the cross-border state, and, if so, which state's ethics rules will apply. We think the proposed/revised rule has taken the best possible approach, i.e. that the attorney's conduct can be subject to discipline in the cross-border state. With respect to which state's rules will apply, we believe that each state is going to apply its own rules and that the attorney may be subject to discipline in both his/her home state/jurisdiction as well as the cross-border state/jurisdiction. However, we think that the ABA should support a position that the cross-border state should take into account (as a factor) the attorney's reasonable belief as to whether a UPL violation occurred (provided such a reasonable belief existed).

The more difficult question involves attorneys (a) crossing the border and performing work with an impact in the non-home state, or (b) performing work that is intended to have legal consequences primarily in the jurisdiction that is not the home attorney’s state. Of the two approaches suggested that are relevant to 8.5(b)(2) – the New York proposal and the Restatement – the New York proposal is closest to the existing rule, with the primary difference being that it is more clearly written. Both the existing rule and the New York proposal focus on the lawyer’s “reasonable” belief about the predominant effect of the lawyer’s conduct. After reviewing the presumption and factors described in the Restatement approach, it does not seem that a significant change from the existing rule to something like the Restatement’s approach would materially improve the rule. Both approaches permit consideration of numerous different circumstances that may be material to what rule applies. Because the facts to which the rule may be applicable can vary significantly, an effort to be more specific may not improve the rule and could leave a hole where the rule should be applied. This rule, like every other statute, regulation, and rule, is difficult to apply in some circumstances and may be open to varied interpretation. But, that sort of flexibility is necessary and desirable.

Please do not hesitate to contact us with any question or concern. As a minor editorialization, I would like to add that preparing comments to this paper was very difficult. Both due to the breadth of the issues raised in applying and modifying Rule 8.5, and also in reaching a consensus among the participants in my working group respecting the comments.

If you have any questions or concerns regarding this memorandum, please do not hesitate to contact me.

Respectfully submitted,

Adam J. Sigman