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**To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Disciplinary Agencies, Individuals, and Entities**

**From: ABA Commission on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest<sup>1</sup>**

**Date: January 18, 2011**

**Re: Issues Paper: Choice of Law in Cross-Border Practice**

## I. Introduction

The American Bar Association Commission on Ethics 20/20 is examining a number of legal ethics issues arising from the increasing globalization of law practice. The goal of this paper is to identify ethics-related choice of law problems that have arisen because of this increase in cross-border practice and to elicit comments on possible approaches that the Commission is currently considering. Comments received may be posted to the Commission's website and should be submitted by **March 15, 2011**.

The Commission has taken no positions about the matters addressed in this paper. Rather, the Commission expects to use any comments that it receives to supplement the research that the Commission has completed and to facilitate the development of various reports and proposals that the Commission plans to draft during the next year and a half.

## II. Model Rule 8.5: Disciplinary Authority; Choice of Law

Rules of professional conduct vary within the United States and around the world. These variations create problems for lawyers who engage in cross-border practice, especially when they encounter legal ethics issues that could be resolved differently depending on which jurisdiction's rules apply.

Model Rule 8.5 of the Model Rules of Professional Conduct is designed to address this problem. It provides as follows:

<sup>1</sup> Members of the Working Group are: Stephen Gillers (Chair and Commission Member), Hon. Elizabeth B. Lacy (Commission Member), Theodore Schneyer (Commission Member), Doug Ende (National Organization of Bar Counsel), Donald B. Hilliker (ABA Center for Professional Responsibility), Janet Green Marbley (ABA Client Protection Committee), Jim McCauley (ABA Ethics Committee), and John P. Sahl (ABA Standing Committee on Professional Discipline). Andrew M. Perlman serves as Reporter, and Dennis A. Rendleman and John A. Holtaway provide counsel.

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Rule 8.5(a) describes the circumstances under which a lawyer is subject to the disciplinary authority of a jurisdiction, even if the lawyer is licensed in another jurisdiction. Rule 8.5(b) identifies which jurisdiction's rules of professional conduct should be applied to the lawyer's conduct. For example, a lawyer might be subject to the disciplinary authority of New Jersey under Rule 8.5(a) by engaging in law practice there, but Rule 8.5(b) might specify that the New Jersey disciplinary authority should apply the ethics rules of Illinois to determine whether the lawyer should, in fact, be disciplined.

### III. Potential Problems and Ambiguities with Model Rule 8.5

Model Rule 8.5 supplies clear answers in some circumstances, but it produces unclear and arguably problematic results in other contexts. These ambiguities and possible problems are reflected in the following fact patterns:

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**Fact Pattern #1: Virtual Law Practices.** Susan has a solo practice in State X and advertises her will-writing services on her website, which is accessible anywhere in the world. Most of her clients come from State X, but she occasionally writes wills for individuals who live in nearby State Y. (Susan is not licensed to practice in State Y.) When Susan works for a State Y resident, she communicates via telephone and the Internet, but she does not physically enter State Y. The State Y resident comes to State X to execute the will. With regard to Susan's website and her work for State Y residents, does State Y have disciplinary authority over Susan under Model Rule 8.5(a)? If so, which jurisdiction's rules would State Y apply under Rule 8.5(b)? In addition to different

advertising rules, the two jurisdictions may, for example, have different conflict of interest rules and rules for fee agreements.

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**Fact Pattern #2: Screening of Laterals in Multistate Law Firms.** Firm GHI has offices in States Y and Z. Mike, a lawyer at GHI who practices in State Z, is handling a matter against LITCO in a court in State Z. The firm now wants to hire a lateral, Lucy, to work in GHI's offices in State Y, where Lucy is licensed. Lucy has been representing LITCO at her current firm in a matter substantially related to the matter that Mike is now handling adverse to LITCO. If GHI hires Lucy, LITCO would remain a client of Lucy's former firm, but Lucy's hiring would create a conflict of interest for Mike in his lawsuit against LITCO if Lucy's work for LITCO is imputed to Mike if and when she moves to GHI. State Y allows law firms to screen lateral lawyers to avoid the imputation of this type of conflict (nonconsensual screening), but State Z does not. Can GHI hire Lucy and employ a screen to prevent Lucy's conflict from being imputed to Mike without obtaining LITCO's consent?

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**Fact Pattern #3: Conflicts in International Multi-Office Law Firms.** Firm JKL has offices in the United States and Country Q. Max in JKL's New York office represents NCO on contract matters. Lia, in JKL's office in Country Q, is asked to undertake an arbitration, litigation, or negotiation against NCO on a matter unrelated to Max's work. Lia's work will be done entirely in Q. Q's rules allow her to do the work. New York's imputation rules treat Max and Lia as one lawyer for conflict purposes, so Lia's clients are imputed to Max. Thus, if Lia were in New York she could not accept the work without informed consent. Can Lia undertake the engagement?

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**Fact Pattern #4: Choice of Law Provisions in Engagement Letters.** Anticipating the inconsistent conflict rules in the prior two fact patterns, the two firms had specified in their original engagement letters with their clients that the conflict rules in a designated jurisdiction (or in the Model Rules) would govern their relationship. The firms wish only, to the extent allowed, to contract for governing conflict rules, not other rules where there might be inconsistency among jurisdictions, because lack of uniformity in conflict rules is where they run into the most difficult problems. The firms reason that conflict rules are nearly always default rules that can be supplanted by private contract (i.e., informed consent as defined in the rules). Can the firms and the clients bind themselves to such a substitution with the result that the firms can safely conform their conduct to the conflict rules identified in the agreement? Would reliance on such a contractual provision give lawyers a reasonable belief that their conduct complied with applicable rules of professional conduct under Model Rule 8.5(b)(2)?

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**Fact Pattern #5: Client Fraud.** Ann and Len are representing INCO in a series of negotiations regarding a joint business venture with other parties and that will take place in several jurisdictions, including the two jurisdictions in which Ann and Len are admitted, State A and State L, respectively. Ann and Len learn that INCO is engaged in a substantial fraud in connection with the matter. The potentially defrauded parties to the joint venture are in States Q, R, and S. State A's rule forbids Ann to reveal what she knows. State L's rule requires Len to disclose. The rules of Q, R, and S, where Ann and

Len did much of their work (as authorized under the applicable multijurisdictional practice rules) forbid, permit, and require revelation, respectively. What can (or must) Ann and Len now do with regard to the revelation? Under what circumstances would their reliance on a particular jurisdiction's rules protect them from discipline under Model Rule 8.5(b)(2), which provides that "[a] lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur"?

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**Fact Pattern #6: Partnering and Sharing Fees with Non-Lawyers.** Law firm ABC has offices in five states, Washington, D.C., and London. Washington, D.C. allows nonlawyer equity partners, and ABC (which has 1,100 lawyers) has two nonlawyer partners, both economists who work with the firm's antitrust lawyers in each of the firm's offices. ABC also has three nonlawyer partners in London who are financial planners and who work with trusts and estates lawyers in London and in the United States on the needs of families with interests around the world. The London financial planners also provide financial advice through the firm to clients who are not law clients of the firm. What is and what should be the rule regarding the ability of the economists and financial planners to share in the income of the firm and the ability of lawyers outside Washington, D.C., to share in the fees generated by the economists and financial planners?

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With regard to these facts patterns, the Commission seeks feedback regarding the following questions:

- Does Rule 8.5(a) make clear (or as clear as possible) which jurisdictions would have disciplinary authority over the lawyers identified in these fact patterns? If not, how should Rule 8.5(a) be changed?
- Does Rule 8.5(b) enable a lawyer *confidently* to resolve the issues in the above fact patterns? If not, how should Rule 8.5(b) be revised to offer clearer guidance? What should be the answers to the above fact patterns?
- The first and fifth fact patterns implicate the second sentence of Model Rule 8.5(b)(2), which states that "[a] lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Should this portion of Model Rule 8.5(b)(2) be retained or modified?
- Should the choice of rule provision vary depending on whether the underlying legal service primarily arises under state or federal law, with a greater emphasis on uniformity when the service arises under federal law?

- In those cases where the current rule offers a clear answer, is that answer correct? If not, how should Rule 8.5(b) be changed?
- How should the Commission address inconsistencies among jurisdictions with regard to their choice of law rules (i.e., some jurisdictions still adhere to the pre-2002 text)?<sup>2</sup> Should all jurisdictions be urged to adopt the same choice of rule provision, or is this rule, like other rules, a matter best left for each jurisdiction to decide on its own based on its own policies?

#### IV. Possible Solutions to the Rule 8.5 Issues

The Commission could consider various possible revisions to Model Rule 8.5, including the following:

##### A. Proposal by the Association of the Bar of the City of New York

The Committee on Professional Responsibility of the Association of the Bar of the City of New York recently issued a report, proposing the following approach in New York. (The redline reflects the Committee's approach relative to Model Rule 8.5.)

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:

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- Deleted:** A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.
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- Deleted:** Choice of Law.
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<sup>2</sup> Prior to 2002, when the current version of Model Rule 8.5 was adopted, Rule 8.5(b) had offered a more straightforward, bright line approach. That bright line approach is still used in some jurisdictions, including New York. New York Rule 8.5 provides as follows:

- (b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:
- (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
  - (2) For any other conduct:
    - (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
    - (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Thus, choice of law problems are complicated not only because of the increase in cross-border practice and the variations among ethics rules, but because there is a lingering disagreement among states as to the appropriate choice of law rule to apply.

(1) ~~For~~ conduct in connection with a matter pending before a tribunal, the rules ~~to be applied shall be the rules~~ of the jurisdiction in which the ~~court~~ tribunal sits, unless the rules of the tribunal provide otherwise; and

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(2) ~~For~~ any other conduct, the rules ~~to be applied shall be~~ the rules of ~~this~~ state: ~~provided, however, that if a lawyer reasonably believes that the services for which the lawyer or the lawyer's firm has been retained have their predominant effect in another jurisdiction, such lawyer may rely on the rules of professional conduct of such other jurisdiction.~~

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Deleted: jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the

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Association of the Bar of the City of New York Committee on Professional Responsibility, *Report on Conflicts of Interest in Multi-Jurisdictional Practice: Proposed Amendments to New York Rules of Professional Conduct 8.5 (Disciplinary Authority and Choice of Law) and 1.10 (Imputation of Conflicts of Interest)*, pages 1-2 (March 2010), available at <http://www.nycbar.org/pdf/report/uploads/20071895-ReportonConflictsofInterestinMulti-JurisdictionalPractice.pdf>.

Moreover, to address some of the conflicts-related issues identified in the above fact patterns, New York has proposed the adoption of the following Rule 1.10(d):

(d) Notwithstanding the foregoing, no conflict will be imputed hereunder where (i) a conflict arises under these rules from the conduct of lawyers practicing in another jurisdiction in accordance with such jurisdiction's rules of professional conduct, and (ii) such conduct is permitted by the rules of professional conduct of that other jurisdiction.

*Id.* at 4.

#### B. Proposal by Professors Laurel Terry and Catherine Rogers

Professors Laurel Terry and Catherine Rogers have submitted a report (attached to this memorandum), which offers an alternative proposal. (The redline is relative to the Model Rule.)

#### RULE 8.5: Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as

follows:

(1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules specified by or for the tribunal, if any;<sup>3</sup>

(2) If no ethical rules are specified by or for a tribunal for matters pending before it, the rules to be applied shall be:

i) for conduct in connection with a matter pending before a tribunal, other than an international tribunal, the rules of the jurisdiction in which the tribunal sits, ~~unless the rules of the tribunal provide otherwise~~; or

ii) for conduct in connection with a matter pending before an international tribunal, the rules of this jurisdiction, including Rule 8.5.

As described in the attached memo, this proposal does not suggest any specific amendments to the provisions currently found in Rule 8.5(b)(2).

#### C. Adoption of the Restatement Approach

The *Restatement (Third) of the Law Governing Lawyers* contains an extended discussion of choice of law considerations and proposes the following approach, which could be reflected in Model Rule 8.5 and its comments:

It is . . . necessary to have a choice-of-law rule to determine which specific provision of two or more arguably applicable and inconsistent lawyer-code provisions should apply. Such a rule should take appropriate account of such elements as the following: the nature of the charged offense; the nature of the lawyer's work; the impact of the questioned conduct on the interests of third persons and on public institutions such as tribunals, administrative agencies, or legislative bodies; the residence and place of business of any client or third person whose interests are materially affected by the lawyer's actions; the place where the affected conduct occurred; and the nature of the regulatory interest reflected in the different provisions in question. That rule should be selected for application which, among rules having a plausible basis for application, is the rule of the jurisdiction with the most significant relationship to the charged offense

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<sup>3</sup> This proposed language for 8.5(b)(1) differs textually from the current ABA Model Rule 8.5(b)(1) and the City Bar's proposal, but its purpose and effect are the same. All three rules specify that the advocate's first step is to consult the tribunal's own rules. The proposed changes to paragraph (b)(1) are necessary to accommodate the substantive changes proposed for paragraph (b)(2).

conduct. See [Restatement Second, Conflict of Laws § 6](#). Somewhat contrary to that approach, the 1983 ABA Model Rules of Professional Conduct were amended in 1993 (Rule 8.5), adding a rule that attempted to provide more rigid, per se rules—an approach that has not recommended itself to most jurisdictions (see Reporter's Note).

No more specific formula than that stated here can adequately deal with all relevant conflict considerations, and each issue of conflict must be addressed on its specific facts. However, as a presumptive preference, a lawyer in nonlitigation work is subject to the lawyer code of the single state in which the lawyer is admitted or, if admitted in more than one state, in the state in which the lawyer maintains his or her principal place of law practice. If the lawyer's act occurs in the course of representing a client in a litigated matter, the presumptive preference is for the lawyer-code rules enforced by the tribunal in which the proceeding is pending. Either presumptive preference can be displaced by a sufficient demonstration that the interests of another jurisdiction are, on the particular facts, more involved than those of the presumptive jurisdiction.

*Restatement (Third) of the Law Governing Lawyers*, §5, cmt. h.

### III. Conclusion

Lawyers need clearer guidance when they engage in cross-border practice and encounter rules of professional conduct that impose conflicting obligation. For this reason, the Commission seeks input into whether amendments to Model Rule 8.5 or other action would be advisable and specifically requests feedback on whether any of the above approaches (or any other alternatives not described here) would be more effective than the current version of Model Rule 8.5. The Commission also seeks feedback on whether it should consider any amendments to Model Rule 1.10 in order to clarify how conflicts of interest should be resolved when the conflict implicates more than one jurisdiction.

Any responses or comments on related issues should be directed by **March 15, 2011**, to:

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Comments received may be posted to the Commission's website.

## Sample Bibliography

The Commission has had the benefit of reviewing numerous materials, a select number of which are included in this sample bibliography. The Working Group and Commission welcome recommendations for additional resources that address the issues in this paper.

### Representative Ethics Opinions

#### **Arizona:**

State Bar of Ariz., Formal Op. No. 90-19 (1990) (applying choice of law principles to conclude that lawyer who was a member of both the Arizona and Navajo Nation bars was not subject to discipline by the former for compliance with the latter's rules during representative appointment by the latter), *available at* <http://www.myazbar.org/ethics/pdf/90-19.pdf>.

#### **District of Columbia:**

D.C. Bar Op. 311 (2002) (applying D.C. Rule 8.5(b)(2)), *available at* [http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion311.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion311.cfm).

#### **Florida:**

Florida Bar, Formal Op. No. 88-10 (1988) (applying choice of law principles to ascertain which jurisdiction's ethics rules govern contingent fee schedules and client statements of rights), *available at* <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+88-10?opendocument>.

#### **Pennsylvania – Philadelphia:**

Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. No. 2008-3 (2008) (discussing choice of law principles where Pennsylvania-licensed lawyer represents Pennsylvania residents who were injured in Florida *pro hac vice* in Florida court), *available at* <http://www.philadelphiabar.org/page/EthicsOpinion2008-3?appNum=1>.

### Selected Publications & Other Sources

1. Ronald A. Brand, *Professional Responsibility in a Transactional Transactions Practice*, 17 J. L. & Com. 317 (1998)
2. Stephen B. Burbank, [\*State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform\*](#), 19 Fordham Urb. L.J. 969 (1992)

3. Stephen A. Calhoun, Note, *Globalization's Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 Tex. L. Rev. 235 (2008)
4. Edward A. Carr and Allan Van Fleet, [Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street](#), 36 S. Tex. L. Rev. 859, 894-905 (1995)
5. Wayne J. Carroll, *Liberalization of National Legal Admissions Requirements in the European Union: Lessons and Implications*, 22 Penn State Int'l L. Rev. 563 (2004)
6. [Theresa Stanton Collett, Foreword, Symposium: Ethics and the Multijurisdictional Practice of Law](#), 36 S. Tex. L. Rev. 657 (1995)
7. Mary C. Daly, [Resolving Ethical Conflicts in Multijurisdictional Practice-- Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?](#), 36 S. Tex. L. Rev. 715, 719 (1995)
8. Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct Between U.S. and Foreign Lawyers*, 32 Vand. J. Transnat'l L. 1117 (1999)
9. Mary C. Daly & Carole Silver, "Flattening the World of Legal Services": *The Ethical and Liability Minefields of Offshoring Legal and Law Related Services*, 38 Geo. J. Int'l L. 401 (2007)
10. Stephen Gillers, [Lessons From the Multijurisdictional Practice Commission: The Art of Making Change](#), 44 Ariz. L. Rev. 685, 715 (2002)
11. Stephen Gillers, *It's an MJP World: Model Rules Revisions Open the Door for Lawyers to Work Outside Their Home Jurisdictions*, [88 A.B.A. J. 51 \(Dec. 2002\)](#)
12. Mark I. Harrison & Mary Gray Davidson, *The Ethical Implications of Partnerships and Other Associations Involving American and Foreign Lawyers*, 22 Penn State Int'l L. Rev. 639 (2004)
13. Hans Jurgen Hellwig, *The Legal Profession in Europe: Achievements, Challenges and Chances*, 4 Ger. L. Rev. 263 (2003), available at [http://www.germanlawjournal.com/pdf/Vol04No03/PDF\\_Vol04\\_No03\\_263-276\\_Legal\\_Culture\\_Hellwig.pdf](http://www.germanlawjournal.com/pdf/Vol04No03/PDF_Vol04_No03_263-276_Legal_Culture_Hellwig.pdf)
14. Emile Loza, *Attorney Competence, Ethical Compliance, and Transnational Practice*, Idaho State Bar Ass'n, The Advocate 28 (2009).
15. Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. Int'l & Comp. L. Rev. 139 (2007)

16. Nancy J. Moore, [Lawyer Ethics Code Drafting in the Twenty-first Century](#), 30 Hofstra L.Rev. 923, 943 (2002)
17. Nancy J. Moore, *Choice of Law for Professional Responsibility Issues in Aggregate Litigation*, 14 Roger Williams Univ. L. Rev. 73 (2009)
18. H. Geoffrey Moulton, *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 Minn. L. Rev. 73 (1997)
19. Gary A. Munneke, [Multijurisdictional Practice of Law: Recent Developments in the National Debate](#), 27 J. Legal Prof. 91 (2003)
20. Matthew T. Nagel, Note, *Double Deontology and the CCBE: Harmonizing the Double Trouble in Europe*, 6 Wash. U. Global Stud. L. Rev. 455 (2007)
21. Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. Tex. L. Rev. 1075, 1095-1100 (1995)
22. Natalie E. Norfus, Note, *Assessing the Recent Revisions to Model Rule 8.5: How Do the Changes Affect U.S. Attorneys Practicing Abroad, Specifically Those Practicing in Japan?*, 36 Geo. Wash. Int'l L. Rev. 623 (2004)
23. James Podgers, *The New World: Lawyer Ethics Are Getting More Attention as a Matter of International Law*, 92-MAY A.B.A. J. 26
24. Catherine Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 Stan. J. Int'l L. 1 (2003)
25. Catherine Rogers, *Lawyers Without Borders*, 30 U. Pa. J. Int'l L. 1035 (2009)
26. Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 Geo. J. Legal Ethics 1 (1993)
27. Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct*, 7 Geo. J. Legal Ethics 345 (1993)
28. Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 Wash. U. Glob. Stud. L. Rev. 463 (2005)
29. John Toulmin, Q.C., *A Worldwide Common Code of Professional Ethics?*, 15 Fordham Int'l L.J. 673 (1991-92)
30. Carole Silver, [Regulatory Mismatch in the Market for Legal Services](#), 23 Nw. J. Int'l L. & Bus. 487, 495 (2003)

31. Detlev F. Vagts, International Legal Ethics and Professional Responsibility, 92 Am. Soc. Int'l L. Proc. 378 (1998)
32. Detlev F. Vagts, [\*Professional Responsibility in Transborder Practice: Conflict and Resolution\*](#), 13 Geo. J. Legal Ethics 677, 690 (2000)
33. Carla C. Ward, Comment, *The Law of Choice: Implementation of ABA Model Rule 8.5*, 30 J. Legal Prof. 173 (2006)
34. Kirsten Weisenberger, *Peace is not the Absence of Conflict: A Response to Professor Rogers's Article "Fit and Function in Legal Ethics,"* 25 Wisc. Int'l L.J. 89 (2007)
35. Christopher Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 Vand. J. Transnat'l L. 931 (2001)
36. Jamie Y. Whitaker, Current Development 2005-2006, *Remedying Ethical Conflicts in a Global Legal Market*, 19 Geo. J. Legal Ethics 1079 (2006)
37. Charles W. Wolfram, [\*Expanding State Jurisdiction to Regulate Out-of-State Lawyers\*](#), 30 Hofstra L. Rev. 1015 (2002)
38. Association of the Bar of the City of New York Committee on Professional Responsibility, *Report on Conflicts of Interest in Multi-Jurisdictional Practice: Proposed Amendments to New York Rules of Professional Conduct 8.5 (Disciplinary Authority and Choice of Law) and 1.10 (Imputation of Conflicts of Interest)* (March 2010), available at <http://www.nycbar.org/pdf/report/uploads/20071895-ReportonConflictsOfInterestInMulti-JurisdictionalPractice.pdf>.

**MEMORANDUM**

**FROM:** Laurel S. Terry  
Catherine A. Rogers

**DATE:** October 1, 2010 (updated Dec. 1, 2010 by adding footnote 2)

**RE:** Proposed Revisions to Model Rule 8.5

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On June 24, 2010, we circulated a proposal to add to the ABA Model Rules of Professional Conduct a new Model Rule 8.6. The purpose of the new rule, if adopted, would be to govern choice-of-law issues for legal activities that occur outside the United States or before an international tribunal that sits or is seated in the United States. We have now received comments and feedback on our June 24<sup>th</sup> draft and have had the opportunity to review the *Report on Conflicts of Interest in Multi-Jurisdictional Practice: Proposed Amendments to New York Rules of Professional Conduct 8.5 (Disciplinary Authority and Choice of Law) and 1.10 (Imputation of Conflicts of Interest)* prepared by the Professional Responsibility Committee of the New York City Bar Association which was released on June 29, 2010. In light of this feedback, we have revised our proposed rule, a copy of which is attached.

The current draft seeks to simplify proposed changes by incorporating them into Rule 8.5 instead of being proposed as a stand-alone Rule 8.6. Thus, the blackletter in the attached draft now provides a unitary rule for both domestic and transnational practice. Should the Commission prefer, the same concepts could be included in a separate Rule 8.6 that would apply to U.S. lawyers engaged in transnational practice.

This proposal is limited to the most problematic applications of the current version of Model Rule 8.5(b)(1), which mandates application of the ethical rules of the foreign jurisdiction in which an international tribunal sits when such tribunal does not have its own ethical rules. The problems arise with international tribunals because, unlike U.S. state and federal courts, many international tribunals have not adopted rules of conduct for lawyers appearing before them. As a result, the first clause in paragraph (b)(1) usually applies and subjects U.S.-licensed lawyers to the rules of the jurisdiction where the tribunal “sits.” While this formulation makes sense in the domestic situation, where state and federal lawsuits are subject to venue rules, the approach of paragraph (b)(1) is inapposite to the context of international disputes.

In disputes before international tribunals, clients, their counsel, and the underlying dispute are often wholly and intentionally unrelated to the place where the tribunal physically sits. As a result, in obliging counsel to follow the rules of professional conduct of the jurisdiction where an international tribunal sits, Rule 8.5(b)(1) effectively requires that U.S. attorneys abide by rules that are completely unrelated to the proceedings in which they are appearing. To illustrate, because the Iran-U.S. Claims Tribunal sits in the Hague and does not have its own ethical rules, under paragraph (b)(1) a U.S. attorney

would be bound by Dutch ethical rules, even though Dutch law and Dutch procedure have no relationship with, or even relevance to, proceedings before the Tribunal and regardless of whether the Dutch rules (or sources interpreting them) are available in an official English translation. Moreover, because few, if any, foreign jurisdictions have a choice of law rule equivalent to Rule 8.5(b)(1), U.S.-licensed lawyers are likely to be the only lawyers appearing before the Iran-U.S. Claims Tribunal who would be subject to Dutch rules. For more detailed discussion of the problems with the current version of Rule 8.5, see Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PENN. INT'L L. REV. 1035 (2009); see also CHALLENGES OF TRANSNATIONAL LEGAL PRACTICE: ADVOCACY AND ETHICS, Panel 30 in the *Proceedings of the 103<sup>rd</sup> Annual Meeting of the American Society of International Law* (2010) (forthcoming).

The solution found in the attached proposal is straightforward. If an international tribunal has adopted rules of conduct for counsel appearing before it, Rule 8.5(b)(1) would require a U.S.-licensed lawyer to comply with those rules. But if the tribunal has not adopted rules of conduct for counsel, the fallback provision would be Rule 8.5, not the rules of the jurisdiction in which the international tribunal “sits.”

In streamlining the blackletter, the current proposal shifts into the Comments much of detailed guidance that had been included in the blackletter of our June 24<sup>th</sup> draft. The draft makes clear that very different considerations apply in transnational settings, but proposes that those considerations be treated as background guidance rather than blackletter mandates.

Because this proposal is limited in scope to those provisions that pertain to advocates, namely the provisions of paragraph (b)(1) of the current Model Rule 8.5 and paragraphs (b)(1)&(b)(2) of the proposed revisions below, the proposed revisions do not address the provisions in paragraph (b)((2) of the Model Rule, now paragraph (b)(3) of the proposal. We are aware that the New York City Bar has proposed changes to the provisions in paragraph (b)(2) of the current version of the Model Rule and we are generally supportive of those proposed changes.

We welcome any and all comments and suggestions. Please send them to Laurel Terry at LTerry@psu.edu and Catherine Rogers at CAR36@psu.edu.

**APPENDIX A – Redline Version**

**RULE 8.5: Disciplinary Authority; Choice of Law**

**(a) Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

**(b) Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

**(1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules specified by or for the tribunal, if any;<sup>1</sup>**

**(2) If no ethical rules are specified by or for a tribunal for matters pending before it, the rules to be applied shall be:**

**i) for conduct in connection with a matter pending before a tribunal, other than an international tribunal, the rules of the jurisdiction in which the tribunal sits, ~~unless the rules of the tribunal provide otherwise;~~ or**

**ii) for conduct in connection with a matter pending before an international tribunal, the rules of this jurisdiction, including Rule 8.5.**

**(3) [As described in the attached memo, this proposal does not suggest any specific amendments to the provisions currently found in Rule 8.5(b)(2).]**

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<sup>1</sup> This proposed language for 8.5(b)(1) differs textually from the current ABA Model Rule 8.5(b)(1) and the City Bar’s proposal, but its purpose and effect are the same. All three rules specify that the advocate’s first step is to consult the tribunal’s own rules. The proposed changes to paragraph (b)(1) are necessary to accommodate the substantive changes proposed for paragraph (b)(2).

## Comment

### *Disciplinary Authority*

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement,. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

### *Choice of Law*

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject ~~only~~ to the rules adopted by or prescribed for that tribunal. The applicable rules might consist of pre-established ethical rules that apply to all matters pending before that tribunal or rules or rulings regarding conduct that are imposed for a specific matter. ~~of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise.~~ [The remainder of comment 4 focuses on Rule 8.5(b)(2), which this proposal does not address].

[5] Many international tribunals do not have pre-established ethical rules. The absence of such rules creates problems because participants from different systems may have different perceptions about what constitutes ethical conduct and their abiding by different ethical rules can undermine the fairness and perceived legitimacy of the proceedings. Accordingly, international tribunals sometimes address lawyer conduct issues through procedural orders or rulings, either at the beginning of the proceedings or in response to specific issues that arise during the proceedings. Particularly in international arbitral tribunals, parties often enter into agreements and tribunals issue rulings regarding the procedures to be followed. Those agreements and rulings sometimes have implications regarding the conduct of counsel, and related issues of legal ethics. Consistent with their obligations under Rule 3.4(c), a lawyer should make every effort to comply with such agreements and rulings to the extent possible consistent with these rules. To the extent that compliance is not possible, a lawyer should provide the tribunal and opposing counsel timely notice of the lawyer's intent not to comply and cite to the conflicting rule that is determined to apply under paragraph (b)(2)(ii).

[6] Paragraph (b)(2) provides two distinct choice-of-law rules that apply to those situations in which a tribunal does not have any rules governing the conduct of lawyers appearing before it. For domestic tribunals, paragraph (b)(2)(i) provides that the governing rules are the ethical rules, including the choice of law provisions, of the jurisdiction in which the domestic tribunal sits. Paragraph b(2)(ii) provides that, if an international tribunal does not have any preestablished rules and has not adopted rules for a specific matter, then a lawyer who is licensed in this jurisdiction and who is appearing before an international tribunal shall use the rules of this jurisdiction.

[7] The choice-of-law rule for domestic tribunals in paragraph b(2)(i) selects the rules of the jurisdiction where the tribunal sits. In such contexts, there is necessarily some relationship between the dispute and the jurisdiction in which the tribunal is located, even when the tribunal is an arbitral tribunal instead of a court. The same is not true with respect to international tribunals. The place where an international tribunal sits or has its seat often bears little or no relationship either to the dispute, the proceedings or the parties. Indeed, in the international context, the jurisdiction in which the international tribunal sits or has its seat is often selected for travel convenience or precisely because it bears no relationship to the dispute. Accordingly, if an international tribunal does not have any general rules governing counsel conduct and has not adopted any rules specific to the matter at hand, then the rules of this jurisdiction apply rather than the rules of the jurisdiction in which the international tribunal has its seat.

[8] The term "international tribunal" includes foreign and international tribunals seated abroad, as well as tribunals, other than U.S. state and federal

courts, that are seated in the United States but are constituted to resolve a dispute that involves property located abroad, performance or enforcement of obligations abroad, or has some other reasonable relation with one or more foreign states. Rule 8.5(b)(2)(ii) thus applies to international arbitral proceedings that physically occur in the United States, such as an ICSID arbitral tribunal, because these proceedings have more in common with international tribunals seated abroad than with other domestic tribunals in which all lawyers are licensed in a U.S. jurisdiction.<sup>2</sup>

[9] It may be the case that a lawyer appearing before an international tribunal is licensed in more than one U.S. jurisdiction. In that situation, the provisions of paragraph (b)(2)(ii) do not fully resolve the choice-of-law issue since that lawyer may be directed under that paragraph to abide by ethical of rules that are different from those that another jurisdiction directs the lawyer to follow. In that instance, the lawyer should, consistent with the approach found in paragraph (b)(3), apply the rules of the other jurisdiction if the lawyer if the lawyer reasonably believes that the lawyer’s representation in that case has a predominant effect in the other U.S. jurisdiction. This approach may be appropriate, for example, if the clients are located in another U.S. jurisdiction or if the lawyer’s primary office or principal locus for preparing the case is the other U.S. jurisdiction.

### **Choice-of-Law in Parallel Proceedings**

[10] Large complex international cases often involve multiple proceedings that occur in different venues. In many instances, these parallel proceedings involve a combination of national courts, arbitral tribunals and other international tribunals. Generally, lawyers will be able to abide by all the ethical rules of the multiple tribunals, even if the rules of one tribunal are more restrictive than those of another. For example, in a case pending in a U.S. court, a lawyer may wish to depose abroad a witness who resides in a country that does not permit private depositions, and instead requires that any deposition be administered by a local judge. A lawyer can comply with both U.S. ethical obligations and the foreign prohibition by pursuing the judicial procedure in the local foreign court, or by arranging to depose the witness in a jurisdiction where the foreign prohibition does not apply. If a lawyer cannot comply with the rules of both tribunals, the rules of the tribunal that are most directly related to the relevant conduct apply. One forum is likely to have a more direct link to the conduct in question, for example if the activities physically occur in that forum. In the event that a lawyer

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<sup>2</sup> In the Oct. 1, 2010 draft, this sentence stated “Rule 8.5(b)(2)(ii) thus applies to international arbitral proceedings that physically occur in the United States, such as an ICSID arbitral tribunal, because these proceedings have more in common with international tribunals seated abroad than with other domestic tribunals in which all lawyers are licensed in a U.S. jurisdiction.” The updated draft, dated Dec. 1, 2010, deletes the words “in which all lawyers are licensed” because some U.S. jurisdictions authorize pro hac vice appearances by lawyers who are licensed in a foreign jurisdiction but not a U.S. jurisdiction. See [http://www.abanet.org/cpr/mjp/prohac\\_admin\\_comp.pdf](http://www.abanet.org/cpr/mjp/prohac_admin_comp.pdf).

cannot comply with the rules that would otherwise apply to proceedings before a particular tribunal, the lawyer shall provide timely notice, both to the tribunal and to opposing counsel, of the lawyer's intention not to comply with the otherwise applicable rule, and cite to the conflicting rule that is determined to apply under paragraph (b)(2)(ii).

[insert as [11] and [12] comments related to proposed Rule 8.5(b)(3)]

[713] The choice of law provision in Rule 8.5(b)(3) applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

### **Issues Related to Enforcement**

[614] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules. In the domestic context, U.S. disciplinary authorities have procedures for communicating regarding lawyer conduct issues. For example, many jurisdictions have adopted rules that address reciprocal discipline and cooperation issues such as those found in ABA Model Rule of Disciplinary Enforcement 22. U.S. jurisdictions also share information through the National Lawyer Regulatory Data Bank.

In the international context, there are no formal rules or procedures to facilitate reciprocal discipline and cooperation. However, decisions regarding discipline for conduct that occurs in another country or involves violation of foreign or international ethical rules may be aided by information from the foreign jurisdiction or international or foreign tribunal. In determining whether to impose discipline, this jurisdiction may seek appropriate guidance from the foreign jurisdiction or foreign or international tribunal regarding the interpretation of and the policies underlying its rule, and whether discipline would be imposed by that jurisdiction for the conduct at issue. Moreover, this jurisdiction may take under consideration any factual findings or assessments of a lawyer's conduct rendered by a foreign or international tribunal, whether or not such tribunal imposed sanctions directly on the lawyer.

[15] The ethical rules of some foreign jurisdictions or international tribunals may require conduct that would be considered offensive to the public policy of this jurisdiction. For example, an order by a foreign tribunal that would require a lawyer to violate directly a non-derogable order of a court in this jurisdiction would almost invariably be a violation of the public policy of this jurisdiction. In determining whether discipline is appropriate for conduct that

occurred outside the United States and is subject to the rules of a foreign jurisdiction or international tribunal, this jurisdiction may consider whether the imposition of discipline would result in grave injustice, be contrary to the reasonable and good faith expectations of the lawyer regarding the applicable rules, or be offensive to the public policy of this jurisdiction. This allowance for exceptions based on grave injustice, unfair surprise or violation of public policy is consistent with the approach found in ABA Model Rule of Disciplinary Enforcement 22(D)(3), which contains a similar public policy exception in the context of reciprocal discipline between individual U.S. jurisdictions.

**APPENDIX B – Clean Version**

**RULE 8.5: Disciplinary Authority; Choice of Law**

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**(3) [As described in the attached memo, this proposal does not suggest any specific amendments to the provisions currently found in Rule 8.5(b)(2).]**

## **Comment**

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[insert as paragraphs [11] and [12] comments related to proposed Rule 8.5(b)(3)]

[13] The choice of law provision in Rule 8.5(b)(3) applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

### ***Issues Related to Enforcement***

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[15] The ethical rules of some foreign jurisdictions or international tribunals may require conduct that would be considered offensive to the public policy of this jurisdiction. For example, an order by a foreign tribunal that would require a lawyer to violate directly a non-derogable order of a court in this jurisdiction would almost invariably be a violation of the public policy of this jurisdiction. In determining whether discipline is appropriate for conduct that occurred outside the United States and is subject to the rules of a foreign jurisdiction or international tribunal, this jurisdiction may consider whether the imposition of discipline would result in grave injustice, be contrary to the reasonable and good faith expectations of the lawyer regarding the applicable rules, or be offensive to the public policy of this jurisdiction. This allowance for exceptions based on grave injustice, unfair surprise or violation of public policy is consistent with the approach found in ABA Model Rule of Disciplinary Enforcement 22(D)(3), which contains a similar public policy exception in the context of reciprocal discipline between individual U.S. jurisdictions.

2010-2011

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**To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Disciplinary Agencies, Individuals, and Entities**

**From: ABA Commission on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest<sup>1</sup>**

**Re: For Comment: Issues Paper Concerning the ABA Model Rule on Admission by Motion**

**Date: December 2, 2010**

**Introduction**

The American Bar Association Commission on Ethics 20/20 is examining the impact of globalization and technology on the legal profession. It is clear that these developments are driving continued growth of cross-border practice both within the United States and between the United States and other nations.<sup>2</sup> One of the Commission's objectives is to examine existing domestic and international regulations governing cross-border practice to determine whether to propose amendments to existing ABA policies and rules in this area. One such rule is the ABA Model Rule on Admission by Motion, which addresses one of the methods by which a lawyer licensed in one American state or jurisdiction can gain admission to practice law in another state or jurisdiction. The goal of this paper is to invite comments on whether the Model Rule should be amended to better accommodate the increase in cross-border practice.

In seeking these comments, the Commission is not suggesting that the current Model Rule should be less or more restrictive or that the Commission has any agenda for such changes. Rather, the Commission expects to use any comments that it receives to supplement the research that the Commission has completed and to facilitate discussion and the development of any reports and proposals. The Commission is particularly interested in comments from state bar associations, disciplinary agencies, and others about the potential impact that changes to admission by motion procedures would have in their jurisdictions.

<sup>1</sup> Members of the Working Group are: Stephen Gillers (Chair and Commission Member), Hon. Elizabeth B. Lacy (Commission Member), Theodore Schneyer (Commission Member), Doug Ende (National Organization of Bar Counsel), Donald B. Hilliker (ABA Center for Professional Responsibility), Janet Green Marbley (ABA Client Protection Committee), Jim McCauley (ABA Ethics Committee), and John P. Sahl (ABA Standing Committee on Professional Discipline). Andrew M. Perlman serves as Reporter, and Dennis A. Rendleman and John A. Holtaway provide counsel.

<sup>2</sup> The Commission is separately considering issues concerning inbound foreign lawyers. See <http://www.abanet.org/ethics2020/templates.pdf>

## **I. ABA Model Rule on Admission by Motion**

The ABA Commission on Multijurisdictional Practice (“MJP Commission”) submitted numerous proposals to the ABA House of Delegates in August 2002, including a Model Rule on Admission by Motion (“Model Rule”). The House of Delegates adopted the Model Rule at that meeting, and it has remained unchanged since that time.<sup>3</sup> The Model Rule provides as follows:

**1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction.**

**The applicant shall:**

**(a) have been admitted to practice law in another state, territory, or the District of Columbia;**

**(b) hold a first professional degree in law (J.D. or LL.B.) from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the graduate matriculated;**

**(c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed;**

**(d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;**

**(e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;**

**(f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and**

**(g) designate the Clerk of the jurisdiction’s highest court for service of process.**

**2. For the purposes of this rule, the “active practice of law” shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted to practice; however, in no event shall activities listed under (2) (e) and (f) that were performed in advance of bar admission in the jurisdiction to which application is being made be accepted toward the durational requirement:**

**(a) Representation of one or more clients in the practice of law;**

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<sup>3</sup> The ABA Section on Legal Education and Admissions to the Bar has proposed several modest amendments to the Model Rule, described in more detail in the attached report from that Section, and which will be presented to the ABA House of Delegates in February 2011.

- (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;**
  - (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;**
  - (d) Service as a judge in a federal, state, territorial or local court of record;**
  - (e) Service as a judicial law clerk; or**
  - (f) Service as corporate counsel.**
- 3. For the purposes of this Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.**
- 4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rule shall not be eligible for admission on motion.**

The MJP Commission drafted the Model Rule because many states had erected excessive barriers to admission for out-of-state lawyers, often requiring those lawyers to take the state's bar examination. The MJP Commission concluded that such requirements had become problematic in light of lawyers' increasing mobility and the increasingly interstate character of law practice. The MJP Commission's report to the House of Delegates highlighted these trends:

At one time, lawyers tended to maintain their law offices in a single jurisdiction over the course of their entire legal careers because of the local nature of law practice. Today, in contrast, geographic mobility is unexceptional. Lawyers move from one state to another in order to continue to serve clients who are relocating or to better serve clients that function outside the state, for personal reasons, for career advancement, or for a host of other reasons. Lawyers change law firms or employers, or simply reestablish their individual practices in different jurisdictions. Lawyers in large law firms move from one office of their firm to another. Lawyers employed by corporations move from one corporate office to another.

Jurisdictional restrictions impede national mobility, because in many cases the process for admitting lawyers to practice law in a new jurisdiction is lengthy, expensive, and burdensome. Some states subject a lawyer who is already licensed and experienced in legal practice to the process designed for admitting new law school graduates. The practicing lawyer is required to take the state bar examination and, upon receiving a passing grade, to undergo character and fitness review.

Report 201G, American Bar Association, Commission on Multijurisdictional Practice, Report to the House of Delegates, at 1.

## **II. Adoptions of the Model Rule**

Current approaches to admission by motion fall into three categories. First, approximately ten jurisdictions have an admission by motion procedure that is nearly identical to the Model Rule.<sup>4</sup>

A second group of approximately thirty jurisdictions have an admission by motion procedure that imposes restrictions beyond those contained in the Model Rule. For example, more than half of these states have some type of reciprocity requirement, which makes admission by motion possible only for lawyers from states that also offer admission by motion on a reciprocal basis. Moreover, some states have a definition of the types of practice experiences that qualify a lawyer for admission by motion that is narrower than the Model Rule definition. Some states also require that lawyers certify that they intend to practice actively in the state where admission by motion is being sought.

Finally, approximately eleven states still have not adopted any admission by motion procedure and instead require lawyers to take at least some part of the state's bar exam (or a special lawyers' examination) in order to gain admission.

## **III. Issues and Questions Relating to the Model Rule on Admission by Motion**

Lawyers are engaged in more cross-border practice now than when the Model Rule was first adopted nearly ten years ago. This continued growth in cross-border practice suggests that the Commission might reexamine the Model Rule, determine whether it has had its intended effect, and determine if any new efforts might be advisable in this area. Indeed, in its final report, the MJP Commission concluded that precisely such work would have to be undertaken. It advised that the ABA would have to "evaluate the implementation and impact of its policies relating to multijurisdictional practice, coordinate the continued study of multijurisdictional practice and monitor developments in the United States and in international practice, and make such additional recommendations as appropriate to govern the multijurisdictional practice of law that serve the public interest." Introduction and Overview, American Bar Association, Commission on Multijurisdictional Practice, Report to the House of Delegates, at 15. To gather information for possible Commission actions regarding the ABA Model Rule and to implement the MJP Commission's recommendation to engage in further information gathering in this area, the Commission seeks information regarding the following:

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<sup>4</sup> A comparison chart is available here: [https://www.abanet.org/cpr/mjp/admission\\_motion\\_comp.pdf](https://www.abanet.org/cpr/mjp/admission_motion_comp.pdf)

A. Options for Possible Commission Action:

1. Should the Commission recommend that the ABA actively encourage states that make no provision for admission by motion, or have stricter eligibility requirements for admission by motion, to adopt the Model Rule?
2. Should restrictions contained in the Model Rule be eased further to facilitate admission by motion? If so, which current requirements should be amended?
  - a. Section 1(c) of the Model Rule requires a lawyer to have been “engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed.”
    - i. Does this requirement make relocation more difficult for women, who are more likely to have taken time away from practice to raise children, or for members of military families, who may find their practice interrupted because of an assignment or relocation?
    - ii. What adverse effects (if any) would result from liberalizing this requirement to permit admission by motion at an earlier point in time or by eliminating the time requirement entirely? In other words, what is the basis for the “five of past seven years” requirement? Could it safely be liberalized or eliminated?
  - b. To the extent that states move towards a Uniform Bar Exam<sup>5</sup> or continue to rely primarily on testing materials created by the National Conference of Bar Examiners (such as the Multistate Bar Exam, Multistate Essay Exam, and the Multistate Performance Test), should a state rely on a recently licensed lawyer’s test results as an alternative to section 1(c)’s practice requirements?
  - c. Should there be a category of admission by motion short of full membership? For example, some states currently have a special registration procedure for in-house counsel. Would it be advisable to adopt other special registration categories that would permit a lawyer to perform certain types of work in a state, such as legal services related to international law or federal law?

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<sup>5</sup> See <http://www.ncbex.org/multistate-tests/ube/>.

- d. Should Model Rule 5.5(d) be amended to permit a lawyer to practice within a state when that lawyer is pursuing admission by motion expeditiously but has not yet gained formal admission? *See, e.g., D.C. App. R. 49(c)(8)*. Should such a safe harbor provision also be available when the lawyer seeks admission by examination if the lawyer does not qualify for motion admission or if the jurisdiction does not recognize motion admission? If such a safe harbor includes both motion admission and admission by examination, should the period of the safe harbor differ depending on the form of admission the lawyer is seeking?

#### B. The Experience of States that Permit Admission by Motion

1. Are lawyers who are admitted by motion more likely to be the subject of discipline, disciplinary complaints, or legal malpractice actions than lawyers who have been admitted through traditional means (i.e., by taking the state's bar examination)?
2. How does the Model Rule advance (or hinder) the state-based system of lawyer regulation?
  - a. For example, does the adoption of the Model Rule enhance a state's control over law practice by ensuring that lawyers who practice in the state are formally licensed to practice law there?
  - b. Similarly, might the increase in the number of lawyers who are licensed in multiple jurisdictions enhance the resources available to bar associations and disciplinary counsel, such as through increased bar dues and greater participation in lawyer protection funds? Or do the additional lawyers admitted on motion pose a greater burden to the disciplinary system?
  - c. Does a state have a legitimate concern that motion admission could attract a substantial number of out-of-state lawyers to seek admission to the state's bar although they have no intention of relocating to the state, thereby making it harder for the state's courts to regulate these lawyers? A state may conclude that by requiring passage of its bar examination as a condition of admission, it weeds out those whose interest in the state is casual or peripheral and who have no commitment to the state's administration of justice. Does this concern have empirical support? If so, is there a way short of denying motion admission to address such a concern?

3. How does the Model Rule advance (or adversely affect) the profession's core values, including confidentiality, loyalty, avoidance of forbidden conflicts, diligence, and protection of the public?
4. What are the constitutional implications of existing variations on the Model Rule?
  - a. For example, do reciprocity requirements raise dormant commerce clause or other constitutional problems?
  - b. What issues have arisen in cases that challenge these procedures?

C. The Concerns of States that Do Not Permit Admission by Motion

1. In states that do not permit admission by motion, why have they decided not to do so? Do these states have concerns that are related to the profession's core values? If so, what is the nature of these concerns?
2. To the extent a state is concerned about out-of-state lawyers' knowledge of local law, does the bar examination in that state test local law?
  - a. If so, how much local law is on the state's bar examination?
  - b. To what extent does the state rely on multistate tests created by the National Conference of Bar Examiners?
  - c. How would the widespread adoption of the Uniform Bar Examination affect these concerns?
3. Are there any relevant demographic considerations that should affect a state's approach to admission by motion?
  - a. For example, in states that attract retirees, are those states more likely to receive applications for admission by motion from retiring or semi-retired lawyers?
  - b. If retiring or semi-retired lawyers become admitted by motion, are they any more likely than other attorneys to be subject to legal malpractice actions, disciplinary complaints, or discipline? Are there other concerns that relate to the profession's core values that would justify treating these lawyers differently?

**IV. Conclusion**

The practice of law has become increasingly national and transnational in the years since the American Bar Association adopted the Model Rule for Admission by

Motion. In light of these trends, the Commission seeks input into whether amendments to the Model Rule or other action would be advisable and specifically requests responses to the questions posed in this paper. Any responses or any comments on related issues should be directed by **February 15, 2011**, to:

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ABA Center for Professional Responsibility  
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Comments received may be posted to the Commission's website.

## Selected Bibliography

The Commission has had the benefit of reviewing numerous materials, a select number of which are included in this bibliography. The Working Group and Commission welcome recommendations for additional resources that address the issues in this paper.

The MJP Commission's report on the Model Rule on Admission by Motion can be found here: <https://www.abanet.org/cpr/mjp/report-201g.pdf>

A fifty state survey of the existing admission procedures for out-of-state lawyers is here: [https://www.abanet.org/cpr/mjp/admission\\_motion\\_rules.pdf](https://www.abanet.org/cpr/mjp/admission_motion_rules.pdf)

A comparison of state procedures for the admission of lawyers relative to the Model Rule is here: [https://www.abanet.org/cpr/mjp/admission\\_motion\\_comp.pdf](https://www.abanet.org/cpr/mjp/admission_motion_comp.pdf)

Statistics regarding admission by motion nationwide can be found here: [http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar\\_Admissions/2009\\_Stats.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2009_Stats.pdf) (see pages 26-28)

A description of Canada's approach to this issue is here: <http://www.flsc.ca/en/committees/mobility.asp>

Essays related to the Uniform Bar Examination can be found here: [http://www.ncbex.org/uploads/user\\_docrepos/780109\\_UBEEEssays\\_01.pdf](http://www.ncbex.org/uploads/user_docrepos/780109_UBEEEssays_01.pdf)

**AMERICAN BAR ASSOCIATION  
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR  
STANDING COMMITTEE ON CLIENT PROTECTION  
REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, that the American Bar Association House of Delegates adopts the proposed  
2 amendments to the Model Rule for Admission by Motion, dated February 2011.

**ABA Model Rule on Admission by Motion**

- 3  
4  
5
- 6 1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion,  
7 be admitted to the practice of law in this jurisdiction. The applicant shall:  
8
- 9 (a) have been admitted to practice law in another state, territory, or the District of  
10 Columbia;
  - 11 (b) hold a ~~first professional degree in law (J.D. or LL.B.)~~ degree from a law school  
12 approved by the Council of the Section of Legal Education and Admissions to the Bar  
13 of the American Bar Association at the time the ~~graduate applicant~~ applicant matriculated or  
14 graduated;
  - 15 (c) have been primarily engaged in the active practice of law in one or more states,  
16 territories or the District of Columbia for five of the seven years immediately  
17 preceding the date upon which the application is filed;
  - 18 (d) establish that the applicant is currently a member in good standing in all jurisdictions  
19 where admitted;
  - 20 (e) establish that the applicant is not currently subject to lawyer discipline or the subject  
21 of a pending disciplinary matter in any ~~other~~ jurisdiction;
  - 22 (f) establish that the applicant possesses the character and fitness to practice law in this  
23 jurisdiction; and
  - 24 (g) designate the Clerk of the jurisdiction's highest court for service of process.
- 25
- 26 2. For purposes of this rule, the "active practice of law" shall include the following activities, if  
27 performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if  
28 performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted  
29 in that jurisdiction; however, in no event shall any activities ~~listed under (2)(e) and (f)~~ that  
30 were performed in advance of bar admission in some the state, territory, or the District of

31 Columbia jurisdiction to which application is being made be accepted toward the durational  
32 requirement:  
33

- 34 (a) Representation of one or more clients in the private practice of law;
- 35 (b) Service as a lawyer with a local, state, territorial or federal agency, including military  
36 service;
- 37 (c) Teaching law at a law school approved by the Council of the Section of Legal  
38 Education and Admissions to the Bar of the American Bar Association;
- 39 (d) Service as a judge in a federal, state, territorial or local court of record;
- 40 (e) Service as a judicial law clerk; or
- 41 (f) Service as in-house counsel as corporate counsel provided to the lawyer's employer  
42 or its organizational affiliates.

- 43
- 44 3. For purposes of this rule, the active practice of law shall not include work that, as  
45 undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was  
46 performed or in the jurisdiction in which the clients receiving the unauthorized services were  
47 located.
- 48
- 49 4. An applicant who has failed a bar examination administered in this jurisdiction within five  
50 years of the date of filing an application under this rule shall not be eligible for admission on  
51 motion.

## REPORT

The Section of Legal Education and Admissions to the Bar recommends that the House of Delegates amend the Model Rule on Admission by Motion to eliminate the provision in paragraph 2 that prohibits in-house counsel and judicial law clerks from qualifying on the basis of practice performed in the jurisdiction where admission on motion is being sought. That provision currently states: “however, in no event shall activities listed in (2)(e) [in-house counsel] and (f) [judicial law clerk] that were performed in advance of bar admission in the jurisdiction to which application is being made be accepted toward the durational requirement.”

The Standing Committee on Client Protection raised the concern that this language creates “an unfair and unnecessary distinction” between in-house counsel and judicial clerks, and the other categories of lawyers listed in paragraph 2. The Section agrees. For example, Attorney 1 licensed in State A who practices with a federal agency in State B for five years would qualify for admission on motion in State B, while Attorney 2 licensed in State A who practices as in-house counsel in State B for five years would not.

Other provisions of the Rule, which are retained, make clear that the practice has to occur in a jurisdiction “that affirmatively permits such activity by a lawyer not admitted” and “shall not include work that, as undertaken, constituted the unauthorized practice of law.” These provisions prevent an attorney from qualifying if he has skirted any admission or registration requirements a jurisdiction imposes. Thus, in the above example, if State B had not adopted Model Rule 5.5(d)(1) providing “safe harbor” to in-house counsel, Attorney 2 must have complied with any registration or admission requirements in State B in order for the practice to count.

In addition to the elimination of this provision of paragraph 2, other amendments to the Rule are proposed. The other amendments relate to all categories of practice, not just practice as in-house counsel or a judicial clerk.

Paragraph 2 is amended to make clear that any activities undertaken before the applicant was admitted to the bar in some jurisdiction will not count toward the durational requirement under any circumstances. When seeking admission on motion, applicants often expect to count their employment during the period between graduating from law school and passing the bar examination as qualifying practice. This arises most often in the context of service as a judicial clerk, but the Section suggests this bright-line rule should apply to all categories.

In paragraph 2, a new provision is added clarifying that the activities must be performed where the applicant is “authorized to practice” in order to count as the active practice of law under the Rule. This new provision is intended to address situations where an applicant is admitted in a jurisdiction but not authorized to practice because of inactive status. Some jurisdictions classify lawyers as in “good standing” even if the lawyer is inactive, so the provision of paragraph 1(d) [“the applicant is currently a member in good standing in all jurisdictions where admitted”] is inadequate to address this.

It is recommended that paragraph 1(b) be revised to include a degree from a law school that was ABA approved at the time the lawyer matriculated or graduated. This is common under the admission on motion rules already adopted in many jurisdictions. It also is consistent with Interpretation 102-10 of the Standards.

Finally, paragraph 2(f) is revised from “service as corporate counsel” to “service as in-house counsel provided to the lawyer’s employer or its organizational affiliates.” This is more consistent with the wording used in Model Rule 5.5 and the Model Rule for Registration of In-House Counsel.

Respectfully submitted,

Hon. Christine M. Durham, Chair  
ABA Section of Legal Education  
and Admissions to the Bar

February 2011

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association  
Section of Legal Education and Admissions to the Bar

Submitted By: Hon. Christine M. Durham, Chair  
Section of Legal Education and Admissions to the Bar

1. Summary of Recommendation(s).

The Section of Legal Education and Admissions to the Bar recommends that the House of Delegates adopts the proposed amendments to the Model Rule on Admission by Motion to eliminate the provision in paragraph 2 that prohibits in-house counsel and judicial law clerks from qualifying on the basis of practice performed in the jurisdiction where admission on motion is being sought.

2. Approval by Submitting Entity.

The Council of the Section of Legal Education and Admissions to the Bar approved the amendments at its meeting on June 11 - 12, 2010.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The proposed changes modify the existing ABA Model Rule on Admission by Motion.

5. What urgency exists which requires action at this meeting of the House?

The proponents believe that the Model Rule should be amended as quickly as possible to correct the discrepancy that exists.

6. Status of Legislation. (If applicable.)

n/a

7. Cost to the Association. (Both direct and indirect costs.)

n/a

8. Disclosure of Interest. (If applicable.)

n/a

9. Referrals.

Prior to the submission of this report to the House of Delegates, it was circulated to all ABA entities and other interested parties for comment. All comments received have been considered and incorporated into the report as appropriate.

10. Contact Person. (Prior to the meeting.)

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## **EXECUTIVE SUMMARY**

### **A. Summary of Recommendation**

The Section of Legal Education and Admissions to the Bar recommend that the House of Delegates adopts the proposed amendments to the Model Rule on Admission by Motion to eliminate the provision in paragraph 2 that prohibits in-house counsel and judicial law clerks from qualifying on the basis of practice performed in the jurisdiction where admission on motion is being sought.

### **B. Issue Recommendation Addresses**

The recommendation addresses the concern that the current Model Rule creates “an unfair and unnecessary distinction” between in-house counsel and judicial clerks, and the other categories of lawyers listed in paragraph 2 of the rule.

### **C. How Proposed Policy Will Address the Issue**

The recommendation eliminates the provision in paragraph 2 that prohibits in-house counsel and judicial law clerks from qualifying on the basis of practice performed in the jurisdiction where admission on motion is being sought.

### **D. Minority Views or Opposition**

None

**AMERICAN BAR ASSOCIATION**

**ABA Commission on Ethics 20/20**

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**To: ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, Individuals, and Entities**

**From: ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies<sup>1</sup>**

**Re: For Comment: Issues Paper Concerning Client Confidentiality and Lawyers' Use of Technology**

**Date: September 20, 2010**

**I. Introduction**

The American Bar Association's Commission on Ethics 20/20 is examining technology's impact on the legal profession, including confidentiality-related concerns that arise from lawyers' increasing transmission and storage of electronic information.<sup>2</sup> One of the Commission's objectives is to determine what guidance to offer to lawyers who want to ensure that their use of technology complies with their ethical obligations to protect clients' confidential information. The goal of this paper is to invite comments on the Commission's efforts to date and, specifically, to the questions posed at the end of this paper. Comments may be posted to the Commission's website and should be sent to the Commission as requested below by **December 15, 2010**.

The Commission has taken no positions about the matters addressed in this paper. Rather, the Commission expects to use any comments that it receives to supplement the research that the Commission has completed and to facilitate the development of various reports and proposals that the Commission plans to draft during the next two years.

**II. A Brief Overview of Law Practice Technology**

The Working Group and Commission have focused on two related types of technology that lawyers commonly employ. The first type has become known as "cloud computing,"<sup>3</sup> a term that usually refers to services that are controlled by third-parties and accessed over the Internet.

<sup>1</sup> Members of the Working Group are: Fred S. Ury and Carole Silver (Co-Chairs), Robert E. Lutz, Herman J. Russomanno, Judith A. Miller, Carl Pierce (ABA Standing Committee on Delivery of Legal Services), Michael P. Downey (ABA Law Practice Management Section), Paula Frederick (ABA Standing Committee on Ethics and Professional Responsibility), Stephen J. Curley (ABA Litigation Section), Youshea A. Berry (ABA Young Lawyers' Division). Andrew M. Perlman serves as Reporter, and Will Hornsby, Martin Whittaker, and Sue Michmerhuizen provide counsel.

<sup>2</sup> The Commission is considering other technology-related ethical concerns, but the goal of this paper is to solicit feedback only on issues relating to confidentiality.

<sup>3</sup> There are many different types of cloud computing. This paper uses the term generically to refer to any service provided online and operated by a third party.

Examples include online data storage (e.g., Mozy.com, Carbonite.com), Internet-based email (e.g., AOL, Yahoo, or Gmail), and software as a service (“SaaS”).<sup>4</sup> SaaS includes a variety of services that lawyers now use, such as law practice management applications that can help lawyers with conflicts checking, document management and storage, trust account management, timekeeping, and billing.

The second type of technology – technology controlled by lawyers or their employees – has received less recent media attention than cloud computing, but it is more ubiquitous and raises similar confidentiality-related concerns as cloud computing. This category includes many devices that can store or transmit confidential electronic information, such as laptops, cell phones, flash drives, and even photocopiers (e.g., copiers that scan and retain information).

### I. Confidentiality-Related Issues of Interest to the Commission

The Commission is studying how lawyers use these forms of technology as well as the current state of data security measures for each form of technology. The Commission’s efforts have been guided by the reality that information, whether in electronic or physical form, is susceptible to theft, loss, or inadvertent disclosure. The Commission’s goal is to offer recommendations and proposals regarding how lawyers should address these risks. To that end, the Commission invites comments on several confidentiality-related issues arising from lawyers’ use of technology.

#### A. The Form of the Commission’s Recommendations

As an initial matter, the Commission recognizes that there may be a gap between technology-related security measures that are ethically required and security measures that are merely consistent with “best practices.” For example, it may be consistent with best practices to install sophisticated firewalls and various protections against malware (such as viruses and spyware), but lawyers who fail to do so or who install a more basic level of protection are not necessarily engaged in unethical conduct. Similarly, it might be inadvisable to use a cloud computing provider that does not comply with industry standards regarding encryption, but it is not necessarily unethical if a lawyer decides to do so.

In light of these distinctions, the Commission is currently considering three options, which are not mutually exclusive. First, the Commission could produce a white paper or some other form of practice guidance with regard to lawyers’ use of technology. The Commission invites comments on whether the Commission should offer such guidance, and if so, how specific the guidance should (or could) be given the rapid pace

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<sup>4</sup> In the past, software had to be installed on a computer to take advantage of certain applications, such as word processing. Today, it is possible to access similar applications online without installing the software on a computer or storing the data (such as word processing files) locally. These online applications are known as “software as a service” and, depending on how they are configured, enable multiple users to access information from different locations. See ABA Legal Technology Resource Center, FYI: Software as a Service (SaaS) for Lawyers (2010), <http://www.abanet.org/tech/ltrc/fyidocs/saas.html>.

of technological change. Moreover, the Commission is interested in learning how lawyers currently determine their ethical obligations in these areas. For example, do lawyers hire technology experts or consultants? Do lawyers review bar association materials, including ethics opinions and best practices guidelines, and if so, which materials do they review and find to be helpful? The Commission is also interested in learning whether any guidance it offers should vary depending on a law office's size, its resources, its practice areas, and the type of clients it serves.

A second option is to create an online resource that describes existing practices and emerging standards regarding lawyers' use of technology. This resource could be operated and continuously updated by the American Bar Association in coordination with various entities, such as the ABA Center for Professional Responsibility, the ABA Legal Technology Resource Center, the ABA's Division for Legal Services, and outside experts on legal technology and legal ethics. This approach has the benefit of ensuring that lawyers have access to regularly updated information about security standards as new technology-related ethical concerns arise.

Finally, a third option (either instead of or in addition to offering a white paper or an interactive online practice guide) is for the Commission to propose amendments to the Model Rules of Professional Conduct, such as Model Rules 1.1 (competency), 1.6 (duty of confidentiality), 1.15 (safeguarding client property), or the comments to those Rules. These amendments could emphasize that lawyers have particular ethical duties to protect clients' electronic information beyond mere practice norms. The Commission invites comments on which Rules or comments should be amended and what issues those amendments should address.

The Commission recognizes that any guidance or rule amendments that it offers would have to operate within an increasingly large body of law that governs data privacy, some of which already applies to lawyers. For example, Massachusetts recently adopted a rigorous law on data privacy, <http://www.mass.gov/Eoca/docs/idtheft/201CMR1700reg.pdf>, which applies to many lawyers and law firms (including those outside of Massachusetts) that have confidential information about Massachusetts residents. The Commission invites comments on whether any existing state or federal regulations, or any guidance offered in non-legal industries, would serve as a good model for the legal profession.

#### B. Confidentiality-Related Concerns from Cloud Computing

Lawyers in different practice settings have taken advantage of cloud computing's many benefits, but cloud computing also raises several specific issues and possible concerns relating to the potential theft, loss, or disclosure of confidential information. They include:

- unauthorized access to confidential client information by a vendor's employees (or sub-contractors) or by outside parties (e.g., hackers) via the Internet

- the storage of information on servers in countries with fewer legal protections for electronically stored information
- a vendor's failure to back up data adequately
- unclear policies regarding ownership of stored data
- the ability to access the data using easily accessible software in the event that the lawyer terminates the relationship with the cloud computing provider or the provider changes businesses or goes out of business
- the provider's procedures for responding to (or when appropriate, resisting) government requests for access to information
- policies for notifying customers of security breaches
- policies for data destruction when a lawyer no longer wants the relevant data available or transferring the data if a client switches law firms
- insufficient data encryption
- the extent to which lawyers need to obtain client consent before using cloud computing services to store or transmit the client's confidential information

The Commission invites comments on how it should approach each of these issues as well as information about other confidentiality-related concerns that the Commission should be addressing with regard to cloud computing.

#### 1. Cloud Computing and Outsourcing

Because cloud computing is arguably a form of outsourcing, the Commission welcomes feedback on the extent to which the procedures outlined in ABA Formal Ethics Opinion 08-451 (describing a lawyer's obligations when outsourcing work to lawyers and non-lawyers) should apply in the cloud computing context.

Similarly, the Commission seeks input into whether cloud computing should affect the Commission's ongoing examination of possible amendments to Model Rule of Professional Conduct 5.3 and the comments to that Rule. In particular, Model Rule 5.3 currently describes a lawyer's ethical obligations when supervising non-lawyer assistants, and a comment to that Rule clarifies that the duty extends to non-lawyers who serve as independent contractors. The Commission is considering possible amendments that would clarify the extent to which lawyers have a duty to supervise non-lawyer assistants who perform their work outside of the law firm. The Commission invites comments on whether Model Rule 5.3 or its comments should be revised to reflect that cloud computing falls under the Rule and, if so, what a lawyer's ethical obligations should be when using cloud computing services.

## 2. Cloud Computing Industry Standards and Terms and Conditions

The Commission seeks more information about existing cloud computing industry standards with regard to data privacy and security. The Commission also seeks to determine which terms and conditions (if any) are essential for lawyers. Such terms and conditions could address:

- the ownership and physical location of stored data
- the provider's backup policies
- the accessibility of stored data by the provider's employees or sub-contractors
- the provider's compliance with particular state and federal laws governing data privacy (including notifications regarding security breaches)
- the format of the stored data (and whether it is compatible with software available through other providers)
- the type of data encryption
- policies regarding the retrieval of data upon the termination of services

The Commission invites comments on whether lawyers have an obligation to negotiate particular terms and conditions before incorporating cloud computing services into their law practices. And if lawyers should have such an obligation, the Commission seeks input into what the terms and conditions should state and what the Commission's recommendations in this area should be.

### C. Confidentiality-Related Concerns from "Local" Technology

Forms of technology other than cloud computing can produce just as many confidentiality-related concerns, such as when laptops, flash drives, and smart phones are lost or stolen. Because these forms of technology can store vast amounts of confidential information, the Commission is considering whether to recommend that lawyers take certain precautions, such as:

- providing adequate physical protection for devices (e.g., laptops) or having methods for deleting data remotely in the event that a device is lost or stolen
- encouraging the use of strong passwords
- purging data from devices before they are replaced (e.g., computers, smart phones, and copiers with scanners)

- installing appropriate safeguards against malware (e.g., virus protection, spyware protection)
- installing adequate firewalls to prevent unauthorized access to locally stored data
- ensuring frequent backups of data
- updating computer operating systems to ensure that they contain the latest security protections
- configuring software and network settings to minimize security risks
- encrypting sensitive information, and identifying (and, when appropriate, eliminating) metadata from electronic documents before sending them<sup>5</sup>
- avoiding “wifi hotspots” in public places as a means of transmitting confidential information (e.g., sending an email to a client)

The Commission invites comments on how it should approach each of these issues as well as information about other confidentiality-related concerns that the Commission should be addressing.

#### D. Cyberinsurance and Cyberliability Insurance

The Commission has learned of the increasing availability of cyberinsurance and cyberliability insurance. Cyberinsurance provides coverage for some technology-related losses, such as the cost to replace lost information due to cyberattacks or the expense of post-cyberattack compliance obligations. A related insurance product is cyberliability insurance, which provides coverage for lawsuits that might not be covered by some professional liability policies, such as claims by third parties arising out of a lawyer’s failure to protect confidential electronic information.

The Commission seeks more information about cyberinsurance and cyberliability insurance, including the underwriting requirements for such insurance and whether typical professional liability policies provide inadequate coverage for technology-related claims and losses. The Commission invites comments on the prevalence of cyberinsurance and cyberliability insurance among lawyers, how lawyers currently manage the risks associated with technology (including whether lawyers believe their

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<sup>5</sup> The Commission is considering two other issues that relate to the subject of metadata but are outside the scope of this paper. In particular, the Commission is considering whether any guidance is needed beyond ABA Formal Opinion 06-442 concerning a lawyer’s surreptitious review of another party’s metadata. The Commission is also considering whether any guidance is needed regarding a lawyer’s receipt of materials from a third party that the lawyer knows or has reason to believe were unlawfully obtained, such as through a cyberattack.

current professional liability policies provide adequate coverage), and whether the advisability of such policies should vary depending on a law office's size, its resources, its practice areas, and the type of clients it serves. The Commission also seeks to learn whether smaller law firms and solo practitioners have had difficulty obtaining cyberinsurance or cyberliability insurance because of the underwriting requirements involved.

## II. Conclusion

Lawyers must take reasonable precautions to ensure that their clients' confidential information remains secure. When data was strictly in hard copy form, lawyers could easily discern how to satisfy their professional obligations and did not need elaborate ethical guidance. Now that data is predominantly in electronic form, however, the necessary precautions are more difficult to identify. One of the Commission's goals is to identify the precautions that are either ethically necessary or professionally advisable. To that end, the Commission invites comments on the questions and issues posed above, including the following:

1. Should the Commission offer some form of white paper that offers practice guidance with regard to lawyers' use of technology? (See [Part III.A](#) above.)
  - a. If so, which issues should the document address and what advice should it offer? Should the guidance vary depending on a law office's size, its resources, its practice areas, and the type of clients it serves?
  - b. How do lawyers currently determine their ethical obligations when using technology? For example, do they rely on information technology experts (either full or part-time)? Do they consult bar association materials, including ethics opinions and best practices guidelines, and if so, which materials do they consult? Are there resources other than the materials listed in the [bibliography](#) at the end of this paper that the Commission should review?
2. Should the Commission recommend that the ABA create an online and continuously updated resource that describes existing practices and emerging standards regarding lawyers' use of technology? (See [Part III.A](#) above.)
3. Should the Commission propose any amendments to the Model Rules of Professional Conduct, such as Model Rules 1.1 (competency), 1.6 (duty of confidentiality), or 1.15 (safeguarding client property), or the comments to those Rules? If so, which Rules or comments should be amended and what issues should those amendments address? (See [Part III.A](#) above.)
4. Do any existing state or federal regulations, or any best practices documents offered in non-legal industries, serve as a good model for the legal profession regarding the use of technology? For example, for law firms that have had to

comply with the new [Massachusetts statute](#) on data security, have those law firms found the new requirements to be consistent with existing practices, and if not, are the new requirements useful? Do the requirements impose any unnecessary burdens on law practices? (See [Part III.A. above.](#))

5. With regard to cloud computing, which confidentiality-related issues require the Commission's attention, and what particular guidance should the Commission offer regarding those issues? (See [Part III.B above.](#))
  - a. Is cloud computing a form of outsourcing that should be analyzed under ABA Formal Ethics Opinion 08-451 or governed by Model Rule 5.3 and its comments? (See [III.B.1 above.](#))
  - b. Should lawyers have an obligation to negotiate particular terms and conditions before incorporating cloud computing services into their law practices? If so, which terms and conditions are essential, and what should the Commission's recommendations be regarding these terms and conditions? (See [III.B.2 above.](#))
  - c. What are the cloud computing industry's standards regarding data security? Does the industry have standard terms and conditions? To what extent are they negotiable? (See [III.B.2 above.](#))
6. Should the Commission offer guidance on various precautions that lawyers should take regarding the use of various devices that are capable of storing or transmitting confidential information, such as laptops, flash drives, smart phones, and photocopiers? If so, which precautions should the Commission recommend? And should those recommendations take the form of practice guidance or proposed amendments to the Model Rules of Professional Conduct? (See [III.C above.](#))
7. Do professional liability policies typically cover claims arising out of technology-related thefts, losses, or inadvertent disclosures of confidential digital information? If not, should lawyers consider purchasing cyberinsurance or cyberliability insurance? Should the decision to buy such coverage depend on a law office's size, its resources, its practice areas, and the type of clients it serves? What are the underwriting requirements for such insurance? Have lawyers and law firms had difficulty satisfying the underwriting requirements for such policies? (See [III.D above.](#))

Responses to these questions or comments on any related issues should be directed by **December 15, 2010**, to:

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Comments received may be posted to the Commission's website.

#### Select Bibliography

The Commission has had the benefit of reviewing numerous materials, a select number of which are included in this sample bibliography. The Working Group and Commission welcome recommendations for additional resources that address the issues in this paper.

#### Ethics Opinions and Related Materials

1. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008).
2. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999).
3. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-398 (1995).
4. [State Bar of Arizona Op. 09-04](#) (2009).
5. [State Bar of Arizona Op. 05-04](#) (2005).
6. [Florida Bar Op. 06-01](#) (2006).
7. Illinois State Bar Ass'n Op. 96-10 (1997).
8. [Maine Prof'l Ethics Comm'n Op. no. 194](#) (2008).
9. [Nevada State Bar Formal Op. 33](#) (2006).
10. [New Jersey Advisory Comm. on Prof'l Ethics Op. 701](#) (2006).
11. [New York State Bar Ass'n Op. 820](#) (2008).

12. [New York State Bar Ass'n Op. 782](#) (2004).
13. North Carolina Bar Ass'n Proposed Op. 7 (2010).
14. [State Bar Ass'n of N. Dakota Op. 99-03](#) (1999).
15. Pennsylvania Bar Ass'n Inquiry No. 2010-014 (2010).
16. Pennsylvania Bar Ass'n Op. 2005-105 (2005).
17. Technology Advisory Comm. of North Carolina Bar Ass'n, Comments to State Bar's Request for Comments on Ethics Opinion (May 10, 2010).
18. Memorandum from the ABA eLawyering Task Force of the Law Practice Management Section, to the North Carolina Ethics Committee, "*Cloud Computing*", *Solos and Small Law Firms, and Consumer Access Affordable Legal Services* (Oct. 15, 2009).
19. Letter from Carolyn Elefant, Attorney, Creator of MyShingle.com, to Alice Neece Mine, Assistant Executive Director, North Carolina State Bar, *Re: Ethics Inquiry on Cloud Computing*, (April 9, 2010).

#### Background on Cloud Computing

20. ABA Legal Technology Resource Center, [FYI: Software as a Service \(SaaS\)](#) for Lawyers (2010).
21. Roland L. Trope & Claudia Ray, *The Real Realities of Cloud Computing: Ethical Issues for Lawyers, Law Firms, and Judges* (2010).
22. David Bilinsky and Matt Kesner, *Introduction to Cloud Computing*, ABA Techshow (2010).
23. Nicole Black, *Lawyers Should Not Be Wary of Cloud Computing*, 72 Tex. B.J. 746 (2009).
24. Stephanie Kimbro, *Chapter 3: Choosing the Technology, Cloud Computing and Software as a Service (SaaS)*, in [Delivering Legal Services Online: How to Set Up and Operate a Virtual Law Practice](#) (2010).
25. Edward A. Pisacreta, [A Checklist for Cloud Computing Deals](#) (2010).
26. Catherine Reach and Erik Mazzone, *Hey, You, Get ~~Off~~ Onto My Cloud: Tools to Run Your Practice in the Cloud*, ABA Techshow (2010).

## Background on Lawyers' Use of Technology

27. Erik Mazzone & David Ries, [\*A Techno-Ethics Checklist, Basics for Being Safe, Not Sorry\*](#), ABA Law Practice Magazine, Vol. 35 No. 2 (2009).
28. Roland L. Trope & E. Michael Power, *Lessons in Data Governance: A Survey of Legal Developments in Data Management, Privacy and Security*, 61 Bus. Law. 471 (2005).
29. John D. Comerford, *Competent Computing: A Lawyer's Ethical Duty to Safeguard the Confidentiality and Integrity of Client Information Stored on Computers and Computer Networks*, 19 Geo. J. Legal Ethics 629 (2006).
30. Faith M. Heikkila, *Data Privacy in the Law Firm*, 88-JUL Mich. B.J. 33 (2009).
31. Tonya L. Johnson, [\*Is Your Copy Machine A Security Risk?\*](#), ABA Site-tation Posts (May 18, 2010).
32. Ash Mayfield, *Decrypting the Code of Ethics: The Relationship Between an Attorney's Ethical Duties and Network Security*, 60 Okla. L. Rev. 547 (2007).
33. Dan Pinnington, [\*Managing the Security and Privacy of Electronic Data in a Law Office- Part 1\*](#), Law Practice Today (Jan. 2005).