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

**From: Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20**

**Re: For Comment by April 2, 2012: Final Revised Drafts of First Set of
Commission Proposals**

Date: February 21, 2012

The ABA Commission on Ethics 20/20 is pleased to release final revised drafts of the proposals that it will submit to the ABA House of Delegates for consideration at the August 2012 ABA Annual Meeting in Chicago. The Commission has broadly circulated all of these drafts for comment at least once before in addition to posting them on its website. In most cases, the Commission has released and posted at least two prior drafts. The Commission asks that any remaining comments on these drafts be submitted no later than April 2, 2012 so that the Commission can review them at its meeting in Washington, D.C., on April 12-13, 2012. Soon after that meeting, the Commission will finalize the proposals and accompanying reports for filing with the House.

In addition to the drafts being released today, the Commission continues to study several issues that could result in proposals being submitted to the House of Delegates for its consideration at its February 2013 meeting, including: (1) choice of law issues relating to conflicts of interest, (2) several issues (including choice of law problems) relating to nonlawyer participation and fee sharing in law firms, and (3) issues relating to inbound foreign lawyers. The Commission will decide later this year whether it will make formal proposals to address these topics and, if so, what form those proposals will take. Proposals relating to these topics will not be submitted to the House of Delegates in August 2012.

The remainder of this memorandum highlights the changes that the Commission has made to the draft proposals after its February 2 and 3, 2012 meeting in New Orleans. Nearly all of the changes described below resulted from the helpful comments that the Commission has received in response to earlier drafts. The Commission is grateful to everyone who has submitted comments and testified at the various public hearings.

Technology (Confidentiality)

With regard to the proposal to amend Model Rule 1.6 (Duty of Confidentiality), the Commission concluded that, when handling confidential information, lawyers need to guard against three distinct problems: (1) inadvertent disclosures, (2) unauthorized disclosures, and (3) unauthorized access.

An inadvertent disclosure is one in which confidential information is accidentally disclosed (e.g., a lawyer mistakenly sends an email to the wrong recipient). An unauthorized disclosure is one in which confidential information is disclosed intentionally, but without authority (e.g., a paralegal reveals confidential client information on a social networking site). Finally, unauthorized access occurs when a third party gains access to confidential information (e.g., a “hacker” gains access to a law firm’s network or a lawyer’s laptop). The prior draft of the proposal to add Model Rule 1.6(c) referred to only two of the three categories (inadvertent disclosures and unauthorized access). The proposed new Comment also referred to two of the three categories, but the categories were different – inadvertent disclosures and unauthorized disclosures. The Commission’s new draft identifies all three problems in both the black letter and the Comment.

The Commission is also proposing a new sentence to Comment [16] to Rule 1.6 that explicitly states that the disclosure of information, by itself, does not constitute a violation of the proposed Rule 1.6(c) if a lawyer took reasonable precautions to guard against it.

With regard to the Commission’s proposal to amend Model Rule 4.4 (Respect for Rights of Third Persons), the Commission’s latest revised proposal retains the original phrase “inadvertently sent” rather than changing the phrase to “not intended to be disclosed.” The Commission concluded that it would be more helpful to define the phrase “inadvertently sent” in Comment [2]. Thus, a new sentence has been added to that Comment that defines the kinds of mistakes that are intended to be covered by the Rule.

Technology (Client Development)

The Commission has revised the language in Comment [3] to Rule 1.18 (Duties to Prospective Clients) to make clear that prospective client relationships can arise either when the lawyer initiates the communication with a potential client or when the potential client initiates a communication with the lawyer. The prior draft of that Comment focused only on communications initiated by a potential client, but a lawyer could create a prospective client relationship by initiating contact. For example, a prospective client relationship can arise if the lawyer offers to represent a person by email or letter, the lawyer requests that the person share confidential information with the lawyer, and the person responds by sharing confidential information with that lawyer.

The Commission also has added language to Comment [5] to Rule 7.2 (Advertising) to say that lead generation services should “affirmatively state” that they are not recommending a lawyer.

Finally, the Commission is proposing a technical change to Comment [3] to Rule 7.1 (Communications Concerning a Lawyer’s Services). Currently, the Comment uses the phrase “prospective clients,” which is defined in Rule 1.18 to include only those people who communicate with a lawyer about the possibility of forming a client-lawyer relationship and who have a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship. Rule 7.1 is clearly designed to cover all possible future clients, not just those people who are “prospective clients” as that term is defined in Rule 1.18. For this reason, the Commission is proposing to change the phrase “prospective clients” to “the public” to reflect the Rule’s intended scope. For the same reason, the Commission is

proposing to replace the phrase “prospective clients” with more appropriate language in several other Rules and Comments where the intention is to address communications to the public generally and not to the narrower category of individuals defined as “prospective clients” under Rule 1.18.

Outsourcing

The only substantive change to the Commission’s outsourcing proposals appears in Comment [6] to Rule 1.1 (Competence). That Comment addresses a lawyer’s ethical duties when a portion of a client’s legal work is outsourced to a lawyer in another firm. The last sentence of the prior draft said that, “[w]hen using the services of nonfirm lawyers in providing legal services to a client, a lawyer also must reasonably believe that such services meet the standard of competence under this Rule.” The Commission heard concerns that the sentence as written might be read to impose on lawyers an unnecessary ethical obligation to ensure that the work of a lawyer in another firm was performed competently. The Commission agrees that, in many circumstances, it will be reasonable to rely on the work performed by nonfirm lawyers without independently confirming that that work was performed competently. The Commission does not believe that the prior draft should be read to impose such a duty, but the Commission nevertheless decided to soften the language by replacing the word “must” with the word “should.”

Uniformity/Mobility

The Commission had previously proposed a new paragraph for Model Rule 5.5(d) that, with various restrictions, would have allowed lawyers licensed in a U.S. jurisdiction (and U.S. licensed foreign legal consultants) to establish a practice in another U.S. jurisdiction while diligently pursuing admission in that jurisdiction through one of the jurisdiction’s established procedures (e.g., admission by motion or licensing as a foreign legal consultant). The Commission concluded that this proposal is worth pursuing, but that it should take the form of a standalone Model Court Rule on Practice Pending Admission that would also be cross-referenced in Rule 5.5 of the Model Rules of Professional Conduct. This new Model Rule on Practice Pending Admission contains many of the same restrictions and limitations that appeared in the Commission’s earlier proposal to create a new Model Rule 5.5(d)(3) as well as additional client protections.

Second, the Commission has made two minor changes to the proposal to amend the Model Rule on Admission by Motion. First, because of the generally widespread support for changing the duration of practice requirement from five to three years, the Commission has removed the brackets that would have surrounded the number. Of course, jurisdictions are still free to use a different time-in-practice requirement, but the Commission believes that a three year practice requirement is appropriate. Second, the Commission has added a phrase to Section 2 to make clear that practice pursuant to the proposed Model Rule on Practice Pending Admission (see above) does not count towards the durational requirement necessary to qualify for admission by motion. The Commission determined that this restriction in Section 2 is necessary to prevent lawyers from establishing a practice in a new jurisdiction in fewer than three years and to prevent lawyers from serially relocating to new jurisdictions under the Model Rule on Practice Pending Admission in order to accumulate the necessary practice experience to qualify for admission by motion.

Finally, the Commission has made a number of changes to its proposal to amend Model Rule 1.6 (Duty of Confidentiality). The goal of the proposal is to give lawyers more guidance regarding their authority to disclose confidential information in order to detect potential conflicts of interest. The original proposal had limited these disclosures to situations where a lawyer was seeking to move from one firm to another, but the Commission heard from many commenters who noted that this issue can arise in other situations, such as when two firms seek to merge or a lawyer seeks to purchase the practice of another lawyer. The proposed new paragraph Rule 1.6(b)(7) was revised to reflect this broader scope. Moreover, the Commission revised the proposed new Comment in several important respects, including describing in more detail the protections that firms need to put in place when receiving this kind of information. The Comment also identifies several additional pieces of information that can be disclosed in order to ensure that a proper conflicts check is performed.

Conclusion

The Commission began its work nearly three years ago with the goal of addressing ethics and regulatory issues that arise due to advancing technology and the increasing globalization of law practice. To address those issues, the Commission developed a transparent and collaborative process that produced several rounds of drafts and numerous opportunities for feedback. As a result of that process, the Commission is pleased to note that the proposals that the House of Delegates will consider in August 2012 appear to have widespread support. They provide appropriate and continued protection for clients and offer the profession much needed guidance as the legal marketplace continues to evolve.

The Commission once again wishes to express its gratitude to those of you who have provided comments to date and asks that any remaining comments relating to the Commission's August proposals be submitted no later than April 2, 2012. Those comments may be submitted to Senior Research Paralegal, Natalia Vera at natalia.vera@americanbar.org.