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Conference Report

Regulation of Bar

International Ethics Conference Speakers Call for Leadership in Addressing Changes

PALO ALTO, Cal.—The globalization of law practice presents all kinds of challenges, both professional and regulatory, that must be addressed, and the sooner the better, according to speakers at the two-day International Legal Ethics Conference held July 16-17 at Stanford University Law School.

Subtitled “The Legal Profession in Times of Turbulence,” the conference included 40 panels addressing topics as varied as access to justice, referral fees, outsourcing, class actions, rural lawyering, legal ethics and constitutional values, social and organizational psychology, and lawsuit financing.

The conference, sponsored by the law school’s Center on the Legal Profession and co-sponsored by the ABA Center for Professional Responsibility, brought together legal experts “from every continent to talk about the issues that really matter,” Stanford law professor Deborah L. Rhode said as she convened the conference.

Preparing Future Leaders. Rhode’s own presentation, on a panel called “Lawyers as Leaders,” stressed the need for law schools to provide leadership training. “No other profession has supplied such a large number of leaders,” she said, adding that lawyers “also advise influential clients, becoming leaders of leaders.” Yet “most don’t get any training” for this, she said. Thirty-eight law schools include “leadership development” as part of their mission statement, but only two actually offer a course on it, Rhode remarked.

Rhode cited statistics indicating that “only 11 percent of Americans have confidence in those running large law firms; less than half trust the federal government.” She explained that “the historical model for law firms is to put people into leadership roles not for their leadership skills, but for their rainmaking abilities.”

In addition, leaders often “overvalue the need to look good,” at the expense of the need to be good, she said. The profession needs to help future lawyers “build an understanding of the rules of conduct” and to “escape the consequences of unchecked ambition,” Rhode said.

Ethical, Regulatory Challenges. As the conference title suggests, a major theme was the effect of globalization on legal ethics and regulation.

Keynote speaker and ABA President Carolyn Lamm addressed the ethical and regulatory challenges created by the increasing mobility of lawyers and clients. “Because of technology and globalization, the relevance of borders to the practice of law truly has waned,” she said, and the changes affect lawyers everywhere, even “on Main Street.”

“Yet,” she added, “the rules governing our profession remain, in many respects, border-bound.” Lamm, who in 2009 established the ABA Commission on Ethics 20/20, explained the commission’s workings and concluded with a “call to action” and a “commitment to increasing collaboration” to bring the regulation of the profession into alignment “with the 21st century practice paradigm.”

Learning From Others. In a panel on “Regulating Legal Practice: Global Perspectives,” University of Arizona law professor Ted Schneyer looked at two major reforms happening abroad: proactive firm-based regulation (PFBR) implemented in New South Wales, Australia, and alternative business structures (ABS) for law firms, approved in Australia and scheduled next year for the United Kingdom. See 25 Law. Man. Prof. Conduct 300.

“Because of technology and globalization, the relevance of borders to the practice of law truly has waned.”

ABA PRESIDENT CAROLYN LAMM

“Both,” Schneyer said, “depart from long-standing traditions.” In the United States, both multidisciplinary practice and certain forms of ancillary business have been considered and rejected.

In the area of lawyer regulation, policymakers in the U.S. “seem to operate under a different epistemology” from that in the U.K. or Australia, he explained. “They have two different frames of reference.” In the United States, regulation is accomplished primarily through the profession. But the approach in the United Kingdom

and Australia is what he described as “top-down command and control,” pointing out that the recent changes in those countries came about through government regulation.

According to Schneyer, the British and Australian governments accepted the proposition that the organized bar and law societies had too much authority. In addition, he noted that competition is a regulatory interest in those countries. “We don’t have much of that in the U.S. since Ralph Nader’s day,” he added.

“In the 1980s,” Schneyer said, “the Kutak Commission [which formulated the first drafts of the ABA Model Rules of Professional Conduct] proposed a version of Rule 5.4 that would have allowed nonlawyer ownership of law firms. But when the question was asked: ‘Would that allow Sears to own a law firm?’ that was the end of that.”

Schneyer did, however, suggest that U.S. regulators might find PFBRs attractive because, in the present economy, “states no longer have the funds to do this.”

In the wake of the U.K. and Australian reforms, he said, the Ethics 20/20 Commission will consider whether states should adopt the idea of proactive firm-based regulation and permit some form of alternative business structures for the practice of law.

Prevent Another MDP Failure. “In 2000,” said New York University law professor Stephen Gillers, the proposal to the ABA House of Delegates to permit lawyers to join with nonlawyers in multidisciplinary practice (MDP) was “an abysmal failure; the profession was not prepared to accept even the pared down version that came around the second time.” See 16 Law. Man. Prof. Conduct 367.

Gillers compared the failure of MDP to the success two years later of getting a rule for multijurisdictional practice. “Birbrower galvanized lawyers” to support MJP, he said, referring to *Birbrower, Montalbano, Condon & Frank PC v. Superior Court*, 70 Cal. Rptr.2d 304 (Cal. 1998), which put into question the ability of lawyers to render legal services beyond the jurisdiction in which they are licensed.

“How do we do this with ABS? We won’t accomplish anything without the substantial support of the bar. Lawyers on the ground must feel a need for it,” he said.

Place-Based Regulation. Reflecting on the gap between the state-based regulatory system used in the United States and the ever-changing reality of how lawyers actually practice law, Gillers stated that “We’ve moved away from geography as the basis of regulation. Today we have what I would call the ‘place of no place’: anything physical tying you to a physical place is not there.”

Rapid changes in technology, such as legal software, outsourcing, and the proliferation of how-to books, have led to “law without lawyers,” Gillers stated.

“We’ve also got ‘law without law firms,’” he added, citing the example of an entity called Axiom, which places teams of lawyers on a case-by-case basis. See Axiomlegal.com.

“The law of ‘anyplace,’” Gillers said, “has antecedent in pro hac vice admission,” which is accepted on the basis that “local law differences are not critical. The law from place to place is similar; the influence of federal law has increased over time.”

Gillers asserted that “The boundaries of my competence are my specialization.” He explained that he feels

competent to advise clients in his own area of expertise in any jurisdiction, but not so competent to give legal advice in an area outside his field, even to a client in his home state where he is authorized to do so.

“The message,” he said, “is: the center isn’t holding. It’s incoherent; we have to think of another way.”

“We can’t stop the future,” Gillers added. The question is not whether we will allow this to happen. The question is how we will accommodate the change in a way that preserves our core values.”

BY ELLEN J. BENNETT

Regulation of Bar

Conference Speakers Express Skepticism On Possibility of Universal Legal Ethics Code

PALO ALTO, Cal.—Serving as reporter for the ABA’s Ethics 2000 Commission a decade ago led Boston University law professor Nancy Moore to the conclusion that it was impossible to come up with a confidentiality rule that all 50 states would agree to accept.

So, in light of the increasingly international nature of law practice, is it realistic to try to create a global code of ethics? Or will there simply develop a haphazard, de facto set of standards and expectations to which lawyers will have to be attuned if the world’s professional and regulatory bodies can’t hammer something out together?

Moore and others expounded on these questions in several programs conducted at Stanford Law School’s Fourth International Legal Ethics Conference, held July 16-17.

Concepts Don’t Translate. In a July 16 panel called “Confidentiality and Conflicts of Interest,” Donald B. Hilliker of Chicago’s McDermott, Will & Emery looked at different approaches that Europe, Canada, and the United States take to confidentiality and loyalty, the two fundamental obligations of every lawyer in America.

Co-panelist Jonathan Goldsmith, secretary general of the Council of Bars and Law Societies of Europe, declared right up front that a global code of conduct is “a very bad idea.”

There are “huge differences” in how different countries conceive of what a lawyer is and what a lawyer does, he said, and the concepts simply “don’t translate.” He gave the audience several examples of his premise:

- In the United States, Goldsmith said, it’s taken for granted that lawyers serve as business advisers. Not so in continental Europe, where, he said, the lawyer’s role is often more of a “pure advocate, associated with the court.”

- While a U.S. lawyer’s conflicting duties to clients, courts, and the public are constantly being recalibrated—not just in legislation such as the PATRIOT Act, but also in judicial decisions, disciplinary rules, and ethics opinions—Goldsmith said, some civil law countries such as Brazil and Italy make it clear that the duty to the client trumps any “officer of the court” role.

- In some civil law jurisdictions, he said, it is a criminal offense to violate “professional secrecy,”

which roughly speaking is the United Kingdom's equivalent to "confidentiality" in the United States. The "legal professional privilege" is closer to the evidentiary attorney-client privilege in the United States, but the terminology can vary, he added.

■ In the United States the evidentiary privilege belongs to the client and can be waived by the client. But in some civil law jurisdictions, Goldsmith said, the lawyer is the one who owns the professional privilege, and only the lawyer has the power to waive it.

■ Americans are accustomed to the role lawyers play as in-house counsel. But in Europe, Goldsmith observed, the role is different: An in-house counsel is more like a part of the company, and the arrangement is not treated as a lawyer-client relationship at all. Indeed, in half of European countries in-house counsel need not even be a member of the bar, he reported; and even where counsel is a member of the bar, if he is a corporate employee he is not considered to be independent. Because of this close relationship, there is no "professional privilege" in communications between a corporation and its in-house counsel, as confirmed in a decision currently on appeal before the European Union's Court of Justice.

Goldsmith drew the audience's attention to the report of the European Court of Justice's advocate general in *Akzo Nobel Chems. Ltd. v. European Comm'n*, 26 Law. Man. Prof. Conduct 284 (Euro. Ct. Justice, 4/29/10), in which the advocate general recommended affirmance of this state of the law in the E.U.

"Let's take it as a given that the rules are going to be different."

NANCY MOORE
BOSTON UNIVERSITY

Goldsmith said the Council of Bars and Law Societies of Europe, which comprises a million lawyers, has intervened in the case to urge the court to adopt "subsidiarity," a sort of blending of principles of comity and full-faith-and-credit under which the European court would have to accord e-mails between an Akzo subsidiary and Akzo's in-house counsel the same level of protection that Dutch law accords them. Goldsmith explained that since Akzo and its in-house counsel had signed off on the guarantees of independence that the Dutch bar requires, the e-mails are privileged under Dutch law. A decision is expected from the Court of Justice on Sept. 14, Goldsmith said.

These differences, Goldsmith said, are just some of the reasons why the idea of a global code of ethics is "crazy."

Different Approaches. At a related panel on "Ethics Under Pressure: Changing Regulation of Global Law Practice," panelist Anthony Davis of Hinshaw & Culbertson in New York offered additional reasons for skepticism.

In England and Australia, Davis said, the solicitors' rules authorize agreements that prospectively limit liability to sophisticated clients. Such agreements are prohibited in the United States. And, he noted in his materials, in most civil law and common law countries,

direct adversity to a current client will not preclude a representation in an unrelated matter if the representation will not involve adverse use of confidential information. In the United States, though, direct adversity is a deal-breaker in almost all situations, although the pertinent conflict rule in Texas allows lawyers to represent concurrent clients with conflicting interests, in certain situations.

In materials offered at a panel on "Conflicts of Interest and Contingency Fees," Simon Chester of Heenan Blaikie in Toronto described the variation in different countries' treatment of screening—for which he prefers the Australian term "information barriers."

During the conflicts and confidentiality program, Nancy Moore agreed that a universal set of lawyer ethics rules is unlikely: "Let's take it as a given that the rules are going to be different," she said.

Moore recalled reviewing a book years ago and noticing that the solicitor rules for England and Wales define conflicts of interest very narrowly, compared to the way U.S. jurisdictions define them. But, she noted, once a conflict is identified, the solicitor rules make the conflict nonconsentable.

How to Select. How do you bridge the gap, as Goldsmith put it, between national (or even local) regulation and global practice? He proposed dealing with these differences via choice-of-law rules. (This topic was addressed by other panels as well. See 26 Law. Man. Prof. Conduct 447.)

But Moore said she is not optimistic about the prospects for solving the problem by making improvements to those rules. The area of greatest difficulty in crafting choice-of-law standards for lawyer ethics, she said, is transactional practice. In an international transaction how do you determine where the lawyer's conduct occurred? she asked. And it gets harder and harder, she said, to figure out where the conduct will have its predominant effect. Where are the third persons who will be affected, she asked, and will that answer change over time?

Even in matters before a tribunal it's problematic, Moore continued. As an example, she pointed out that the situs of an arbitration may have nothing to do with where the conduct occurred or where its predominant effect will be. And what about aggregate litigation: if matters are consolidated for some purposes only, do the ethics obligations of each lawyer participating in it depend on where the lawyer is?

Freedom of Choice? Should we agree on a rule that simply lets the parties and their counsel choose which ethics rules will apply? Moore asked. Columbia University law professor William H. Simon noted from the audience that at least in transactional matters, this might help resolve the conflicts issues if not the confidentiality issues.

But Moore said she has two problems with the free-choice approach. First, she said, in order to accommodate the different levels of client sophistication it would be necessary to regulate different sectors of practice differently.

But Donald Hilliker, who is a former chair of the ABA's Standing Committee on Ethics and Professional Responsibility, pointed out that the Model Rules use only one standard for informed consent; he wondered if that same standard could not work in this context too. Panelist and University of the Pacific law professor Paul

D. Paton questioned how far informed consent really goes. Informed consent will never permit a lawyer to evade the obligation of loyalty, he noted. He wondered if lawyers have “too much moral suasion” over their clients—or, for that matter, “too much trust” in their clients—to make informed consent a realistic proposition. He agreed with Moore that the different levels of client sophistication make informed consent unworkable in some contexts.

The second problem Moore articulated with the choice model is that clients and their counsel may select a set of rules that will be contrary to the interests of third persons. And, she said, using reasoning similar to Paton’s, should a lawyer be allowed to agree to waive his obligation to exercise professional discretion?

Maybe we could try solving our own problems of choice of law and unauthorized practice questions via an act of Congress, and then we could try to harmonize our approach with that of other nations, Moore suggested. Although nationalization has so far been “anathema to the ABA,” Moore said, the fight against it is a “losing battle.” Moore said that based on her own experience with the Ethics 2000 Commission, she does not think that states will fend off federalization by moving towards consensus on their own.

Davis noted in a separate panel that in the United States alone he’s counted 90 separate sources of lawyer regulation.

BY ELIZABETH J. COHEN

Disciplinary Jurisdiction

Professors Call for New Choice-of-Law Rule To Regulate Legal Ethics in Global Practice

PALO ALTO, Cal.—Model Rule 8.5 on choice of law in application of disciplinary standards isn’t sufficient to resolve jurisdictional questions of ethics in international practice, according to panelists who detailed “A Model for International Choice of Law and Coordination of Attorney Regulation” during a July 17 program at Stanford Law School’s Fourth International Legal Ethics Conference.

Although Comment [7] to Rule 8.5 indicates that the rule is intended to apply to “lawyers engaged in transnational practice,” Penn State University law professor Laurel S. Terry told the attendees that it is not up to the task.

As an example, she pointed to Rule 8.5(b)(1), which provides that for matters before a tribunal, the applicable ethics rules will normally be the rules of “the jurisdiction in which the tribunal sits.” But, she said, there is a distinction between where a tribunal “sits” and where it “is seated.” Where the tribunal “is seated” is its home base, but it may “sit” in a variety of locations, she explained.

Terry’s co-panelist and colleague at Penn State, law professor Catherine A. Rogers, said that under Rule 8.5(b)(1), U.S. lawyers appearing before the Iran-U.S. claims tribunal would be bound by Dutch ethics rules, even though Dutch law would have no relation to the underlying matter. Opposing counsel probably would not be bound by Dutch ethics rules, she added.

Rogers explained that “international tribunals are intentionally set in jurisdictions not connected with the

matter.” In addition, “often large international dispute resolution proceedings happen in multiple jurisdictions,” and “some international tribunals sit in the U.S.,” she said. Also complicating matters, Rogers said, is the fact that few countries outside the United States have rules similar to Model Rule 8.5.

There are many areas in which professional obligations may conflict across international borders, Rogers stated. For example, she said, “U.S.-style contingency fees are illegal in most non-U.S. countries.” Other areas of internationally inconsistent ethics standards Rogers mentioned include “confidentiality and privilege, ex parte communication with judges, conflicts of interest, advertising, service of process, and fee-sharing.”

Terry said “we want a multinational solution to this problem.” But, she lamented, “we don’t know much about what other countries are doing in this area. We need much more information-sharing on this.”

Proposals to Change Rule 8.5. Rogers and Terry have proposed a new choice-of-law rule, which would become Model Rule 8.6, specifically addressing the unique issues of international practice. (*See box.*)

Their proposed rule would, among other things,

- acknowledge the power of international tribunals to sanction and regulate lawyers appearing before them;

- authorize disciplinary authorities to consider explanations from foreign or international tribunals or regulatory authorities; and

- establish exceptions where discipline under foreign or international rules would violate public policy or otherwise be unfair.

Terry explained that Rogers and she believe a “standalone rule for outbound international practitioners” stands a better chance of being adopted than would an amendment to Model Rule 8.5. “We think that the U.S. needs this, and that every country needs this. We hope the Ethics 20/20 Commission looks at this,” Terry said.

By the end of their program, Terry and Rogers announced that, based on preliminary comments, they plan to modify their Rule 8.6 proposal and its accompanying report by adding a definition of international tribunals and providing further information about the background and need for the rule. “We plan to submit Rule 8.6 to the Ethics 20/20 Commission,” Terry said, “but we seek comments on this draft before doing so.”

At a July 16 panel examining “Ethics Under Pressure: Changing Regulation of Global Law Practice,” panelist Anthony Davis of Hinshaw & Culbertson in New York also expressed the view that “our choice of law rules don’t work.”

Davis pointed out a problem he sees in the language in Rule 8.5(b)(2) which indicates that the applicable rules in certain circumstances would be those where “the predominant effect of the conduct” occurred. The “serious flaw” in this phrase is that in many cases “there is no such place,” he said.

Davis also discussed the New York City Bar’s recent report on how that state’s Rules 8.5 and 1.10 should be amended to minimize the threat of disqualification or discipline stemming from application of New York rules to lawyers who have little connection to the jurisdiction. See 26 Law. Man. Prof. Conduct 415.

As to the choice-of-law provision in New York Rule 8.5 for matters not before a tribunal, the report proposes a subsection (b)(2) which states:

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.

Welcoming Foreign-Licensed Lawyers. A July 17 program called "Restrictions on Practice and Cross-Jurisdictional Boundaries" focused on the need to lift some of the barriers facing foreign-licensed lawyers who want to work in the United States.

Speaking on that panel, St. Louis University law professor Carol Needham pointed out that most states' in-house counsel rules do not allow foreign-licensed lawyers to register as such.

"Some do come in, under different titles," she said. "But why shouldn't a foreign corporation with offices in the U.S. be able to bring with it its foreign-licensed lawyers, who know their business?" she asked. Needham stressed the need for change in this area, saying "Local governments have huge financial problems and are trying to bring in foreign firms. I've never seen lawyers being able to work here given as one of the incentives."

Most U.S. jurisdictions don't even allow foreign-licensed lawyers to sit for their bar exam, as most of them require applicants to have attended an ABA-accredited law school, said panelist and University of Akron law professor John P. Sahl. Sometimes the educational requirements are waived, "but this is not well-known," he said, since normally there are no waiver provisions in a state's rules.

Sahl recommended that state admissions rules contain specific provisions allowing for waiver of the educational requirements for bar examination. The waiver should be based on the applicant's overall qualifications, education, and experience, he said, and the licensing authority should be given broad discretion.

BY ELLEN J. BENNETT

Private Firm

Panel Sees Competence, Supervision, UPL As Top Issues in Legal Services Outsourcing

PALO ALTO, Cal.—In the growing trend to outsource legal and nonlegal support services overseas, a lawyer's duties to provide competent service, supervise those working on a client's matter, and avoid assisting unauthorized legal practice are the key concerns, according to a panel that discussed "Technology and Outsourcing" July 16 at the Fourth International Legal Ethics Conference, sponsored by Stanford Law School.

U.S. law firms have been outsourcing legal work since 1995, when the Dallas firm of Bickel & Brewer established a document processing center for its U.S. litigation clients in Hyderabad, India, according to panelist Swethaa Ballakrishnen, an Indian lawyer and recent Harvard LL.M. graduate who is researching legal outsourcing as a fellow at Harvard law school.

As the panelists made clear, what started as a tiny acorn in 1995 seems to have become a mighty oak. The industry even has its own acronym: LPO, for "Legal Process Outsourcing."

Nascent, but Growing Fast. The reason Indian LPO business seems to be flourishing, according to panelist and Case Western Reserve law professor Cassandra Robertson, is that labor costs in India are a fraction of those in the United Kingdom and United States, so that U.S. and British law firms and corporate legal departments can achieve a significant pricing advantage over their competition by sending work on labor-intensive matters to Indian LPO firms.

That advantage must be significant because, as Robertson observed, the value of LPO services performed in India for foreign clients was more than \$320 million in 2008. Panelist Vikramaditya Khanna of the University of Michigan law school predicted that by 2015 the value of LPO business will be in the billions of dollars.

But in some respects, Khanna said, the LPO industry is an awkward fit with the legal profession's rules of ethics. The main problems, he remarked, involve the duties to provide competent service and to avoid the unauthorized practice of law.

The Indian lawyers staffing these LPO businesses are performing their work for U.S. and English law firms and corporate legal departments that are practicing American and English law; however, the vast majority of the Indian lawyers are not licensed to practice law by any jurisdiction in the United States or the United Kingdom, Khanna pointed out. So if they are practicing law, he said, they may be violating the prohibition against unauthorized practice in their lawyer-customers' licensing jurisdictions.

(And if they are, their American lawyer-customers may themselves be running afoul of the ethics rules; it is a violation of Model Rule 5.5(a) for a lawyer to "assist another" in unauthorized practice. The UPL aspects of foreign outsourcing were among issues aired at the most recent public hearing held by the ABA's Ethics 20/20 Commission in April. See "Ethics 20/20 Commission Hears Proposals to Relax Restrictions on Foreign Attorneys," 26 Law. Man. Prof. Conduct 295.)

Moreover, both Khanna and Ballakrishnen observed, a lawyer must always ensure that services rendered to a client are provided competently; the U.S. and British lawyers doing the outsourcing are therefore responsible for the quality of the Indian LPO services' work, they said.

American Reaction: So Far, OK. Khanna pointed out that several state and local bars' ethics committees have issued ethics opinions on outsourcing. These include San Diego Ethics Op. 2007-1 (2007); Colorado Ethics Op. 121 (2009); New York City Ethics Op. 2006-3 (2006); and Ohio Supreme Court Ethics Op. 2009-6 (2009). In addition, the ABA's Standing Committee on Ethics and Professionalism has issued its own views on the subject: ABA Formal Ethics Op. 08-451, 24 Law. Man. Prof. Conduct 466 (2008). (See also "NYC Bar Report on Outsourcing Abroad Gives Advice for Several Common Scenarios," 26 Law. Man. Prof. Conduct 19.)

These opinions, Khanna said, have generally approved the practice of outsourcing work to foreign-based LPO businesses, on the rationale that the foreign lawyers performing the LPO services should be treated as the equivalent of paralegals and other nonlawyer support staff who work in U.S. law firms. Khanna noted that the opinions also strongly caution American firms who engage LPO businesses to avoid aiding and abetting unauthorized practice.

The lawyers' duty of supervision creates an ongoing challenge, explained panelist Mark Ross, a British solicitor who is vice-president of Integreon, an LPO business that employs Indian lawyers. The ABA opinion, Ross noted, suggest steps that U.S. lawyers can take, some fairly elaborate, to supervise the LPO's work in order to ensure compliance with the ethics rules in their jurisdiction—for example, evaluating the quality of the LPO's systems for safeguarding client confidences, or even paying a personal visit to the LPO worksite “to get a firsthand sense of its operation.” (See box.)

What's 'Supervision'? One audience member asked the panel to spell out what level of supervision the ethics rules require.

Ross quickly disclaimed any ability to give a precise answer, saying somewhat wryly “that's our [law firm and corporate] clients' problem,” not Integreon's. But he added more soberly that his clients' problems are his problems too, so he is acutely aware of the supervision issue.

To illustrate, Ross related that, while he was working for an LPO provider in India, he was asked by a corporate executive to furnish U.S. patent research services in connection with a challenge to the scope and validity of a competitor's patent. Ross said he responded, “Of course, I think we can handle that. Just put me in touch with your IP general counsel and we'll start to work out the details.” When the executive said he didn't have an intellectual property lawyer in the corporate GC's office, Ross stopped short. “We cannot do any work,”

Speakers Unveil Proposed Standard for Deciding Whose Rules Apply in International Matters

Professors Laurel Terry and Catherine Rogers have recommended that the ABA adopt a new Model Rule 8.6 to govern choice of law issues in ethics and disciplinary matters arising out of international practice. This draft is preliminary and Terry has indicated that changes may be made before Rogers and she submit their proposal.

“[Proposed] RULE 8.6: DISCIPLINARY AUTHORITY; CHOICE OF LAW FOR ACTIVITIES OUTSIDE THE UNITED STATES OR BEFORE INTERNATIONAL TRIBUNALS SEATED IN THE UNITED STATES

“(a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction with respect to conduct that occurs outside the United States or in a matter before an international tribunal seated in the United States. A lawyer may be subject to the disciplinary authority of both this jurisdiction and a foreign jurisdiction, a foreign or international administrative institution or a foreign or international tribunal for the same conduct.

“(b) **Choice of Law.** Subject to the provisions of paragraph (c), 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 foreign or international tribunal seated outside the United States, or an interna-

tional tribunal seated in the United States:

“(i) the pre-established written rules, if any, promulgated by either by the tribunal or an entity authorized to promulgate such rules for the tribunal;

“(ii) if there are no pre-established written rules promulgated either by the tribunal or an entity authorized to promulgate such rules for the tribunal, any rules established by the tribunal as part of its effort to manage the proceedings. Such rules may include actions or rulings by a tribunal that take account of or ratify any agreements between the parties that may affect the ethical obligations of their counsel in the proceedings; or

“(iii) if the provisions of neither (i) nor (ii) apply, the rules of this jurisdiction, including Rule 8.5.

“(2) for conduct that physically occurs outside the United States or before an international tribunal seated in the United States, but is undertaken in connection with a matter that is pending before a tribunal in this jurisdiction:

“(i) if the rules of both this jurisdiction and the relevant foreign jurisdiction or foreign or international tribunal do not directly conflict, both sets of rules apply.

“(ii) if the rules directly conflict, such that a lawyer cannot comply with both sets of rules, the rules that are most directly related to the relevant conduct apply.

“(iii) if a lawyer cannot comply with the rules that would otherwise apply to proceedings before a particular tribunal under para-

graph (ii), that lawyer shall provide timely notice, both to the tribunal and to opposing counsel, of the lawyer's intention not to comply and cite the conflict between the rules.

“(3) 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.

“(c) **Enforcement.** In evaluating whether discipline is appropriate under this rule when the rules of a foreign jurisdiction or an international or foreign tribunal apply under Section (b), this jurisdiction may seek or rely on appropriate guidance from the relevant foreign or international regulatory authority, tribunal or institution, including translations, authoritative interpretations of the foreign rule, and any written findings or recommendations contained in orders, awards or judgments of such entities. In making any final determination, 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.”

Ross explained, unless it is supervised by a qualified American lawyer. If you haven't got one in-house, Ross told him, you must hire an outside IP lawyer to supervise our work.

Fine-tuning the supervision requirement imposed by the ABA outsourcing opinion and Model Rules 5.1 and 5.3—"putting meat on the bone that the opinion supplies," in Ross's words—is clearly the next step, he said.

Scope of Permissible Work. Expressing enthusiasm about the future of the LPO industry, Ross suggested that most of the tasks normally performed by nonlawyer staff at a typical U.S. law firm, and even many of the tasks performed by senior paralegals or junior associates, can and eventually will be outsourced to LPO providers.

The constraints inhibiting LPO growth, Ross said, grow out of a too-broad conception of what constitutes the practice of law. Although most members of Integreon's staff in India are qualified Indian lawyers, much of the work they do shouldn't necessarily be considered the practice of law, he suggested.

From the audience, Donald Hilliker of McDermott Will & Emery, Chicago, a former chair of the ABA ethics committee, asked if the U.S. legal profession as a whole can take better advantage of what LPO businesses are offering. For instance, he asked, "Can't they be used to promote better access to justice" for poor litigants? Hilliker suggested that state governments currently struggling to fund their constitutional obligation to provide legal defense to indigent criminal defendants might be able to outsource some of the work involved to LPO businesses so long as U.S. lawyers supervise and remain responsible for the defense.

Khanna and Ballakrishnen said their research indicates that some governmental agencies have already sent work to Indian LPOs, although they did not know of projects in connection with indigent legal defense. But no one on the panel thought the idea farfetched.

BY MARTIN WHITTAKER

Fees

Outside Funding of Class Suits 'Down Under' Said to Help Align Interests of Counsel, Class

PALO ALTO, Cal.—Class actions in Australia do not tempt class counsel to put their own financial interests above those of class members, whereas plaintiffs' lawyers in U.S. and Canadian class actions have huge monetary incentives to structure the outcome for their personal benefit, according to panelists at a program on "Global Approaches to Legal Ethics in Class Actions" held July 16 at the Fourth International Legal Ethics Conference.

Two professors from North American law schools—Nancy Moore of Boston University and Jasminka Kalajdzic of the University of Windsor, Ontario—explored the recurrent "misalignment of incentives" between class counsel and class members in class actions brought in U.S. and Canadian courts. Contingent fee arrangements make class counsel prefer early settlements with high fees and low class recovery, they asserted.

Down under, lawyers' interests are more closely aligned with the interests of class members, according to law professor Peter Cashman, University of Sydney, Australia. He described how Australian law, which does not permit percentage contingent fees for lawyers, has created a mechanism that he said more evenly aligns financial incentives among lawyers and their class clients and so better avoids conflicts in class actions.

North America: High Fees, Low Class Recovery. A proper "alignment of incentives" between lawyer and client is another expression for the absence of conflicts of interest. This harmony can be particularly hard to achieve in the class action context, however, because several factors—especially representation of multiple parties and large attorneys' fees calculated on a percentage, contingent basis—typically combine to create misalignment of interests among named plaintiffs/class representatives, class counsel, and absent class members.

Attorneys' fees in most class action cases in the United States and Canada are contingent on creating a

ABA Opinion Suggests Variety of Steps to Fulfill Supervisory Duties When Outsourcing Services

ABA Formal Ethics Op. 08-451 (2008) provides the following guidance about fulfilling the duties of competence and supervision when outsourcing legal and nonlegal support services:

"The challenge for an outsourcing lawyer is . . . to ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately.

. . .

"At a minimum, a lawyer outsourcing services for ultimate pro-

vision to a client should consider conducting reference checks and investigating the background of the lawyer or nonlawyer providing the services as well as any nonlawyer intermediary involved, such as a placement agency or service provider. The lawyer also might consider interviewing the principal lawyers, if any, involved in the project, among other things assessing their educational background. When dealing with an intermediary, the lawyer may wish to inquire into its hiring practices to evaluate the quality and character of the employees likely to have

access to client information. Depending on the sensitivity of the information being provided to the service provider, the lawyer should consider investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures. In some instances, it may be prudent to pay a personal visit to the intermediary's facility, regardless of its location or the difficulty of travel, to get a firsthand sense of its operation and the professionalism of the lawyers and nonlawyers it is procuring."

“common fund” for the class, Moore and Kalajdzic explained, from which the lawyers’ fees are deducted. That fund need not be created by a judgment but can also be created by settlement, they noted.

But in many cases, Kalajdzic said, a large portion of the class fund never gets paid out to class members, whether because an individual class member’s share is too small to create a strong incentive to make a claim, or because ineffective class notice leaves many class members ignorant of their right to make a claim.

Moore pointed out, too, that in some U.S. consumer class actions the “fund” consists of discount coupons provided by a corporate defendant to the class members whom it allegedly wronged, with the lawyers’ fees calculated as a percentage of the aggregate value of the discounts distributed. In such cases, Moore said, relatively little value gets distributed to class members; instead, critics complain, the value actually goes to the defendant, because class members must purchase more goods or services from the defendant to get the “discount”—but the cold hard cash goes to the lawyers.

According to one speaker, Australia allows third-party funding of class actions which aggregates a large stake in the outcome of the litigation, creating a genuine, interested adversary with incentive to maximize recovery.

Accordingly, class counsel and class defendants have an incentive to settle cases by negotiating an agreed value to the fund that probably will exceed the actual value to the class if it is to be large enough to satisfy the plaintiffs’ lawyers, who receive their percentage of the fund’s “value” in cash, Moore and Kalajdzic said.

Thus, Kalajdzic stated, collusive settlement negotiation is always a risk in class cases because there is no “genuine plaintiff” who will actually receive the payout fund. Even the named plaintiffs, the nominal representatives of absent class members, usually have such small claims that they cannot act as an effective check

on class lawyers’ incentive to settle, according to Kalajdzic.

(Another concern that has been identified is that class action attorneys may try to align the incentives of the named plaintiff representatives with the lawyers’ interests, rather than those of absent class members. See *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 25 Law. Man. Prof. Conduct 239 (9th Cir. 2009).)

Australia: Third-Party Financier. These problems don’t exist in Australia, Cashman told audience members, because percentage-contingent attorneys’ fees are not permitted. Furthermore, Cashman said, public legal aid is not available in Australia, and the “loser-pays” rule for fees applies in Australian litigation. Because of these factors, he said, litigation of low-stakes claims as in the U.S. and Canadian class action model is simply not economically feasible for Australian plaintiffs’ lawyers.

But class litigation of low-stakes claims nevertheless exists in Australia, Cashman stated, because the prohibition against percentage contingent fees does not apply to nonlawyers. An industry of third-party funding of class actions has developed in Australia and the leading player is a profitable, publicly traded business corporation, he said.

According to Cashman, when these third-party funders identify a potential class claim, they also identify and communicate with class members to contract for authority to hire lawyers and bring a claim on their behalf and keep a percentage of the recovery. The funders will hire lawyers to proceed with the claim only after they sign up a sufficient number of class members to make it economically feasible, he added.

This arrangement cures the risk of collusion described by Kalajdzic and Moore, Cashman said. Because the third-party funder has aggregated a large stake in the outcome of the litigation, it is a “genuine” and interested adversary with an incentive to maximize recovery by litigation, not settlement, he said, and because the class lawyers are not paid on a contingent basis, their incentive to create an early, collusive settlement is eliminated.

Cashman did note, however, that some Australian plaintiffs’ lawyers may be in the process of effectively replicating the U.S./Canadian model by forming litigation funding companies themselves.

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