ABA House of Delegates Adopts 20-20 Commission's Resolutions

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OVERVIEW:

Last Monday, February 11, 2013, the ABA House of Delegates adopted all four of the resolutions put forward by the ABA Commission on Ethics 20/20. The first three of these resolutions were known as the "inbound foreign lawyer proposals." The fourth resolution added a new sentence to comment [5] of Rule 8.5's choice of law rule to make it clear that ***for conflicts of interest purposes,*** when determining the 'predominant effect" of transactional work under Rule 8.5(b)(2), a lawyer can reasonably take into account an agreement with the client entered into with client consent.

The final section of this memo identifies the portions of the casebook in which you might refer to these new ABA policies. The Spring 2014 MPRE is the earliest exam in which these changes might be reflected. (See p. 11 of the MPRE booklet – "Amendments to the ABA Model Rules of Professional Conduct or the ABA Model Code of Judicial Conduct will be reflected in the examination no earlier than one year after the approval of the amendments by the American Bar Association.)

The three "inbound foreign lawyer" resolutions filled existing ABA policy voids. As a result, the ABA now has policy statements on four of the five ways in which foreign lawyers might practice. In 2011, the Conference of Chief Justices endorsed, in principle, the inbound foreign lawyer proposals. During its January 2013 meeting, the CCJ recommended adoption of the inbound foreign lawyer proposals. The ABA Commission's reports, which accompanied the original filing of Resolutions 107A, 107B, and 107C are excellent and provide useful background information.

As noted above, the February 2013 House of Delegates' action means that the ABA now has policy on four of the five methods in which foreign lawyer might practice in the United States. The 2013 resolutions added methods ##3 and 4, below to methods ##1 and 2, which previously had been adopted as ABA policy.

1) foreign lawyers who have a limited license to practice as foreign legal consultants (FLCs); [adopted 1993; reaffirmed 2002, amended 2006]
2) foreign lawyers engaged in temporary or fly-in/fly-out (FIFO) practice; [adopted 2002]
3) foreign lawyers who practice as in-house counsel; [adopted 2013]
4) foreign lawyers who appear permission to appear in court pro hac vice [adopted 2013].

The fifth way in which a foreign lawyer might practice in the U.S. is through full admission – *i.e.*, by qualifying as a fully-licensed state lawyer. The ABA does not currently have any policy on the issue of when a jurisdiction should grant a foreign applicant full admission (either through admission on motion or by allowing the applicant to sit for a bar exam). In 2010, the Council of the ABA Section of Legal Education and Admissions to the Bar circulated for comment a cover memo, a proposed model rule on full admission (after completing a certified LL.M). After receiving extensive comments, many of which were negative, the Council did not pursue the

matter. (The Council also chose to accept the recommendation of the Council committee which recommended that it not accredit law schools located outside the U.S.).

MORE INFORMATION ABOUT THE FEBRUARY 2013 ABA RESOLUTIONS

- **Revised Resolution 107A expanded the safe harbor provision found in ABA Model Rule of Professional Conduct 5.5(d) to include foreign in-house counsel, as well as U.S.-licensed in-house counsel.**

  Background: Some corporate clients want the ability to bring into the U.S. their foreign-licensed in-house counsel. For example, they may want the foreign counsel in the U.S. to provide special expertise that counsel has or to gain experience in the U.S. or get to know the U.S. constituents. This resolution expanded Rule 5.5(d) to allow this.

  The revised resolution contains language limiting the *"scope of practice"* of the foreign in-house counsel. The rule, as amended, states that if advice on U.S. law is required, then the foreign in-house counsel's advice "shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice." The foreign in-house counsel must satisfy the conditions set forth in Rule 5.5(e), which states that the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority. (Resolutions 107B and 107C impose the same conditions.)

- **Revised Resolution 107B amended the ABA Model Rule on Registration of In-House Counsel to make it consistent with amended Rule 5.5(d) and to allow for registration of foreign in-house counsel.**

- **Resolution 107C as Amended (ABA Model Rule on Pro Hac Vice Admission) amended the model rule on pro hac vice by adding a new section that forth the conditions for granting pro hac vice admission to foreign lawyers.**

  Background: The ABA had adopted a Model Rule on Pro Hac Vice Admission in 2002 as part of the MJP proposals, but that rule was limited to U.S.-licensed lawyers. The 2013 resolution establishes, for the first time, ABA policy on the issue of the conditions for granting pro hac vice admission to foreign lawyers. According to the report accompanying the original proposal filed with the House of Delegates, a form of pro hac vice admission for non-U.S. lawyers is permitted in at least fifteen states, and is allowed in the U.S. Supreme Court. The states that want to allow foreign lawyer pro hac vice have not had any guidance from the ABA on this topic (or any easy way to compare the practices in other states). The foreign lawyer addition is found in new Section III of the Model Rule. The resolution and proposed rule were amended after the November 2012 submission to the House of Delegates as part of a compromise between the resolution sponsors and the Section of Litigation, which originally had opposed the resolution. In addition to the foreign lawyer provision, the amended Model Rule include minor changes

to the "process" sections and some minor housekeeping changes (*e.g.*, lawyers must now comply with all applicable rules of professional conduct, not just "the" rules of professional conduct.) There is a new provision that states that ***all*** pro hac vice lawyers, not just foreign lawyers, must pay any required assessment to the lawyers' fund for client protection.

- **Resolution 107D (Disciplinary Authority; Choice of Law) added a new paragraph in comment [5] indicating that when a lawyer is trying to determining where the "predominant effect" of the representation will occur for purposes of determining whether a conflict of interest exists, the lawyer can take into account an agreement obtained with client consent that specifies the governing jurisdiction.**

  Background: It can sometimes be difficult in transactional matters for lawyers to determine the where the predominant effect of their conduct will occur and thus which ethical rules govern their conduct. See Rule 8.5(b)(2). This difficulty is particularly acute at the outset of the representation, but that is the time period during which lawyers must decide which jurisdiction's version of Rule 1.7 applies (or its equivalent conflicts rule). The new sentence that was added to comment [5] indicates, in essence, that for conflict of interests purposes, if a lawyer and a client have reached an agreement on the governing conflicts rules, then the lawyer may take that agreement into account when evaluating whether he or she has a reasonable belief that the predominant effect of the conduct will be in a particular jurisdiction. The Commission report that accompanied Resolution 107D is useful. As it explains, the new sentence that was added to Rule 8.5[5] is limited to conflicts of interest. The Commission analogized the addition to waivers of future conflicts, which are already authorized in Comment [22] of Rule 1.7. The report explains why the new sentence in Rule 8.5 comment [5] covers situations that might not be covered by Rule 1.7 [22].

INCORPORATING THESE CHANGES INTO THE CASEBOOK

1. The In-Bound Foreign Lawyer Proposals:

- **Ch. 2(II), p. 26 et. Seq: ,** You could refer to these resolutions in Chapter 2 when talking about nonlawyers providing legal assistance. They raise the question of what we mean by "nonlawyers" and whether foreign lawyers should be treated differently than other U.S. lawyers on the one hand and U.S. nonlawyers (e.g. assistants) on the other hand.

- **Ch. 4 (III)(C), p. 333 et. Seq:** One of the arguments against the inbound foreign lawyer proposals was that it would lead to a waiver of attorney-client privilege. You should ask whether it should? Should foreign lawyers be treated equivalent to U.S. lawyers? U.S. lawyers are currently quite upset that the European Union only recognizes attorney-client privilege if the client is represented by an independent (read not in-house counsel) EU lawyer. (Note: Individual EU members states may recognize the privilege, but the EU does not. See here for more information.)

- **Ch. 4(IV), p. 373 et. Seq:** You could talk about the foreign in-house counsel proposals when discussion Rule 1.13 and the obligations of corporate counsel. You could ask the students whether they agree with the policy decision to grant admission to foreign in-house counsel? You might ask whether there is something about representing a single client that makes this type of foreign lawyer admission more acceptable than the other types of admission? If so, why should corporate clients be privileged?

- **Ch. 6, p. 513 et seq:** You could ask whether foreign lawyers will have the same understanding as U.S.-trained lawyers about their obligations to the courts, to third parties, and others. This was one of the arguments against the pro hac vice rule in particular. Part of the changes negotiated during the ABA meeting were amendments that indicated that a court had discretion to admit a foreign lawyer pro hac vice provided that the in-state lawyer is responsible to the client, responsible for the conduct of the proceeding, responsible for independently advising the client on the substantive law of a United States jurisdiction and procedural issues in the proceeding, and for advising the client whether the in-state lawyer's judgment differs from that of the foreign lawyer. You could ask the students what they think of these provisions.

2. The New Sentence About Conflicts Added To Comment [5] To The Choice Of Law Provision in Rule 8.5:

- **Ch. 2(II), pp. 55-56:** You could ask the students their views about the new sentence added to Rule 8.5, comment [5]. You could ask them whether they agree with the decision to limit the new sentence to agreements about conflicts of interest ethical rules. The Commission's memo explains why they did not expand the comment beyond conflicts situations.

- **Ch. 5(II)(A), p. 388 et. Seq.** You could ask, as a threshold matter, which jurisdiction's conflict of interest rules apply and how the new sentence in comment [5] changes the analysis, if at all? **You could also refer to in in Ch. 5(II)(B)(7) at p. 419 when talking about waiving future conflicts of interest.**