

**Testimony of Thomas M. Gordon, Legal and Policy Director  
Consumers for a Responsive Legal System**

**Before the ABA Commission on Ethics 20/20**

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Consumers for a Responsive Legal System (“Responsive Law”) thanks the Commission for the opportunity to present its testimony on its recommendations to date. Responsive Law is a national, nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people it is meant to serve.

We have comments on several of the proposals and questions raised by the Commission. The fundamental question we asked as we examined each rule was whether it protects those who use lawyers as well as those who do not. The Model Rules often slant toward the former. As lawyers, we are naturally concerned about treating our clients ethically. However, addressing this concern often has a price: A rule that might provide incremental protection to those who already have access to the legal system might also make it harder for outsiders to gain any access to the system at all. It is important that we not let an idealized and often outdated set of legal ethics principles stand in the way of innovation that would benefit both current clients and those who wish to become clients.

**Admission by Motion**

Responsive Law applauds the Commission’s willingness to consider loosening the requirements for admission by motion. We urge the Commission to recommend abolition of section 1(c) of the Model Rule on Admission By Motion. The result of restrictions on multijurisdictional practice is that the cost of legal services increases while the level of convenience for consumers of legal services decreases. We support any efforts to make multijurisdictional practice more available to consumers. In other professions, service providers are free to provide services in whatever jurisdiction they choose, as long as they agree to follow the rules of that jurisdiction. The legal profession has no reason to be excepted from this practice.

The requirement that a lawyer practice outside of a state for a period of time before being admitted by motion to the bar of that state serves no purpose other than to reduce competition among lawyers. If the state has an interest in ensuring that members of its bar are knowledgeable about its laws and procedure, then how does out-of-state practice increase an applicant’s knowledge? Other rationales for this requirement, such as reducing the burden on a state bar’s disciplinary system that

might be created by an influx of lawyers, bear no rational relation to this requirement, as this burden would be caused by any increase in the number of lawyers practicing in the state, not solely by those admitted by motion.

Restricting access to the legal profession for reasons unrelated to ethics and competence, such as to reduce competition, is illegitimate and a betrayal of a state bar duty to the courts and to the public. Allowing competent lawyers to practice across state lines would not only drive down the cost of local legal services but also allow lawyers to serve their clients better in our increasingly mobile and virtual economy. Although some lawyers will not be pleased about increased competition, others will embrace the new opportunities interstate practice will create. Price rationalization and practice modernization are both necessary if the profession is to keep pace with the economy and maintain its commitment to access to justice.

### **Internet-Based Client Development**

Above all, we urge the Committee to give credit to consumers for being at least as internet-savvy as lawyers. Consumers have been using the internet for business transactions for well over a decade, and consumers who do business online are well versed in the existence and function of blogs, web advertising, business websites, and social media. Rather than attempting to parse what portion of these communications is advertising, and determining how to restrict that portion of communications with potential clients, the Model Rules should promote the free flow of information about legal services. This includes research conducted online and by engaging with lawyers through online forums. Denying customers access to information is generally more harmful to those customers than any damage from exposure to information. Additionally, restrictions on communication by lawyers that is not part of an existing attorney-client relationship is contrary to the First Amendment, especially when such communication is general in nature and does not consist of legal advice to a particular individual based on her unique circumstances.

The restrictions in Model Rules 7.2 and 7.3 prevent clients from getting information that they could use to evaluate prospective attorneys. As Comment 1 to this rule points out, the need to know about legal services “is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.”

The Model Rules should be amended to exempt participation in public forums from the solicitation restrictions of Model Rule 7.3. Clients who receive information about legal representation in these forums are not being preyed upon by lawyers; they are seeking them out. Even if they are primarily looking for information about the law, they are not likely to be harmed by information about a lawyer’s abilities or terms of representation. Additionally, the duties of truthfulness imposed by Model Rule 7.1 will and should still apply to these communications, providing further protection to

customers. Finally, unlike oral communication via telephone, internet-based communications create their own record. This benefits attorneys by making them think twice about what they say online and benefits clients by providing them better clarity about the substance of the communication.

The Model Rules should also be amended to affirmatively allow pay-per-click and pay-per-lead advertising. These methods of compensating advertisers are standard on the web. Most web users recognize that advertisers are paying for click. Even if web users are not aware of the underlying payment model, they are aware that the advertisement is an advertisement, not a recommendation from a neutral party.

The Committee raises the question of whether it should “propose more fundamental amendments to Model Rule 7.2(b) that would re- conceptualize the purpose of the Rule in light of these new forms of advertising.” We believe that this would be beneficial, as this Model Rule was designed for an era when person-to-person contacts were the primary means of receiving lawyer information. It is anachronistic to continue this blanket restriction amidst the flood of other information available to consumers.

### **Outsourcing**

Outsourcing can have enormous benefits to clients, as it can result not only in lower prices for legal services, but also in the creation of more flexible staffing arrangements that can provide clients with a wider range of options when choosing a legal service provider. Of course, as in any transaction with a lawyer, clients should be informed about who will be performing the service for which they are paying. We endorse the requirement that the primary lawyer in a case obtain informed consent with respect to lower standards of confidentiality which may apply to an outside lawyer, as we support all efforts to inform clients of their rights with respect to a legal representation.

Proposed Comment 7 reads, in part, “When retaining lawyers and others outside the lawyer’s own firm, the requirements of Model Rule 5.5 (a) must be observed.” – We recommend that, at a minimum, this comment be amended to refer to Model Rule 5.5 generally, not merely subsection (a). Referring merely to subsection (a), which prohibits practice of law “in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction” leaves ambiguity as to whether out-of-state lawyers may assist an in-state lawyer with a matter. Referring to the whole rule would clarify this issue by, for example, incorporating reference to subsection (c)(1), which permits practice in association with an in-state lawyer.

**Unauthorized Practice of Law Restrictions**

UPL restrictions on a broad level are beyond the scope of any of these proposals but not, we hope, beyond the scope of this Commission. Meaningful reform of legal ethics rules must be relevant to the 21<sup>st</sup> century economic environment of unbundled services, internet-savvy consumers, and do-it-yourselfers. Ignoring these market forces will not only place unnecessary obstacles in the way of lawyers trying to adapt to a quickly changing market for their services, it will also infringe upon the ability of consumers to obtain affordable legal help, thus lowering the trust of those consumers in the legal profession. We urge the Commission to review restrictions on unauthorized practice with an eye toward ensuring that a continuum of legal services—provided by lawyers and others—exists to meet the full range of legal needs.