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Why U.S. Jurisdictions Should Adopt 'Regulatory Objectives' for the Legal Profession

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GLOBALIZATION AND THE ABA COMMISSION ON ETHICS 20/20: REFLECTIONS ON MISSED OPPORTUNITIES AND THE ROAD NOT TAKEN

*Laurel S. Terry**

I. INTRODUCTION

The ABA Commission on Ethics 20/20 (“Commission”) was established in order “to perform a thorough review of the ABA Model Rules of Professional Conduct (“Model Rule(s)”) and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.”¹ The thesis of this Article is that the

* Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law, Penn State Dickinson School of Law. The author was a member of the 20/20 Commission’s Inbound Foreign Lawyers Working Group. The urls in this Article were accurate as of October 13, 2014. The author would like to thank Susan Saab Fortney and the Maurice A. Deane School of Law at Hofstra University for their hospitality when she delivered the *Howard Lichtenstein Distinguished Professorship in Legal Ethics Lecture* in February 2014. Because that lecture concerned Regulatory Objectives, which are the subject of two of the authors’ publications, this Article focuses on a different topic. I am most appreciative for the helpful comments on this Article from Susan Saab Fortney, Elyn Rosen, and Ted Schneyer; and comments on my presentation of this topic by Carole Silver and the participants in the New York Legal Ethics Scholars Roundtable. None of the opinions in this Article, however, should be attributed to anyone other than the author.

The author would like to note that, although this Article suggests that the ABA Commission on Ethics 20/20 (“Commission”) was less successful than it might have been with respect to its globalization mission, she has great respect and admiration for the Commission members, liaisons, and staff, and for the ABA Center of Professional Responsibility (“CPR”). The U.S. legal profession owes a debt of gratitude to everyone involved in the 20/20 project for their hard work and dedication. The work the Commission undertook has had, and will continue to have, an impact on the knowledge base and level of dialogue that surround globalization and lawyer regulatory issues. It is in this spirit of respect that this Article is written. In the domestic arena, the CPR’s work is invaluable and irreplaceable. The author believes that the CPR’s work in the global arena does not yet match its work in the domestic arena, but that it could and should. The author hopes that the suggestions in this Article will stimulate further dialogue and support for the CPR’s work.

1. ABA Comm’n on Ethics 20/20, *About Us*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Nov. 23, 2014) [hereinafter ABA Comm’n on Ethics 20/20, *About Us*].

Commission was much more successful with the technology aspect of its work than it was with the globalization aspect of its work. This Article offers an explanation for these differing levels of success, and identifies an alternative path the Commission might have taken that might have led to greater success with respect to its globalization mission.

Part II begins by offering background information about the Commission.² Part III discusses the current impact of the Commission's work.³ Part IV explains why the Commission's technology work arguably will continue to have a greater impact than its work with respect to globalization.⁴ Part V identifies a "road not taken," and explains why I believe the Commission missed important opportunities with respect to globalization.⁵ That Part also includes concrete steps that the Commission might have undertaken to make the globalization aspect of its work more successful.⁶ Part VI to this Article suggests that the ABA could still—and should still—undertake these steps in order to have a greater impact in a globalized world of lawyer regulation.⁷

II. THE ABA COMMISSION ON ETHICS 20/20

The Commission was created in August 2009 in order to study the impact of technology and globalization on legal practice and regulation.⁸ The Commission first met in September 2009 and "agreed that transparency, broad outreach and opportunities for frequent input into its work would be crucial."⁹ In November 2009, the Commission circulated its Preliminary Issues Outline and solicited initial comments—to be submitted by December 31, 2009—for consideration at its first public business meeting, which was held in Orlando in February 2010.¹⁰ The Preliminary Issues Outline played an influential role in the issues the

2. *See infra* Part II.

3. *See infra* Part III.

4. *See infra* Part IV.

5. *See infra* Part V.

6. *See infra* Part V.B.2.

7. *See infra* Part VI.

8. ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1 (2012) [hereinafter ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2012)], available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.pdf.

9. *Id.* at 2.

10. *See generally* ABA COMM'N ON ETHICS 20/20, PRELIMINARY ISSUES OUTLINE (2009), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.pdf; ABA Comm'n on Ethics 20/20, *Priorities & Initiatives*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/priorities_policy.html (last visited Nov. 23, 2014).

Commission chose to examine, and the way in which it structured its work.

The Commission was an active one: it held hearings; considered a wide range of issues; had representatives from a range of ABA and outside entities participate in the development of its work product; circulated discussion papers; and participated in a number of “outreach” events.¹¹ At the outset, it envisioned its work taking three years.¹² It stayed relatively on track, and completed its work within three and a half years.¹³ In August 2012, it presented six resolutions to the ABA House of Delegates for consideration.¹⁴ The topics addressed in these six resolutions were: Technology and Confidentiality; Technology and Client Development; Outsourcing; Practice Pending Admission (by lawyers who move from one state to another); Admission by Motion (reducing the recommended time in practice); and Model Rule 1.6 Detection of Conflicts of Interest (when a lawyer is considering a change of law firms).¹⁵ All of these resolutions were adopted by the ABA House of Delegates (although some were amended before their adoption by the House in order to reflect comments the Commission had received).¹⁶ While all six of these resolutions might be viewed as primarily affecting

11. See, e.g., ABA Comm’n on Ethics 20/20, *Meetings and Minutes*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/events_cle.html (last visited Nov. 23, 2014) (listing meeting dates); ABA Comm’n on Ethics 20/20, *Outreach*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/outreach.html (last visited Nov. 23, 2014) (detailing outreach efforts and reports submitted); ABA Comm’n on Ethics 20/20, *Work Product*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html (last visited Nov. 23, 2014) (listing topics considered and reports issued by the Commission).

12. See, e.g., ABA Comm’n on Ethics 20/20, *About Us*, *supra* note 1. Commission Co-Chairs Jamie S. Gorelick and Michael Traynor outlined the three years as follows:

Year one will consist of research, outreach, and analysis of information regarding critical issues identified in each of the three major subject areas; Year two will focus on development of proposed policies, principles and, if necessary, model rules for wide circulation and comment; and Year three will involve continued vetting of proposals and presentation.

Id.

13. The Commission was established in August 2009 and concluded its work at the ABA Midyear Meeting in February 2013. See ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2012), *supra* note 8, at 1; ABA Comm’n on Ethics 20/20, *ABA Commission on Ethics 20/20*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Nov. 23, 2014).

14. ABA Comm’n on Ethics 20/20, *House of Delegates Filings*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/house_of_delegates_filings.html (last visited Nov. 23, 2014) (identifying the six resolutions that passed and indicating the resolutions subject to amendment).

15. *Id.*

16. *Id.*

“domestic practice,” the Information Report that accompanied these resolutions explicitly noted that globalization of legal practice was one of the driving forces behind the resolutions.¹⁷

In November 2012, the Commission filed with the ABA House of Delegates an additional four resolutions for consideration at the February 2013 ABA Midyear Meeting; the first three of these have been referred to as the “inbound foreign lawyer proposals.”¹⁸ The first and second proposals addressed the ability of foreign lawyers to practice in the United States as in-house counsel.¹⁹ The third in-bound foreign lawyer proposal added foreign lawyers to the ABA’s *Model Rule on Pro Hac Vice Admission*.²⁰ Prior to adoption of these resolutions, the ABA had no policy statement regarding foreign in-house counsel or *pro hac vice* by foreign lawyers, even though a number of states have found the need for these types of rules.²¹ The fourth proposal from the Commission recommended adding new language to Comment [5] in Model Rule of Professional Conduct 8.5, Choice of Law.²² The new language addresses the “predominant effect” test found in Model Rule

17. ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2012), *supra* note 8, at 5-7 (explaining why globalization is one of the factors that has changed the ways in which lawyers practice).

18. See ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 5-8 (2013) [hereinafter ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2013)], available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf; James Podgers, *Closing Act: Ethics 20/20 Proposals Crack Open the Door for Foreign Lawyers to Practice in the U.S.*, A.B.A. J., Jan. 2013, at 20, 21; Joan C. Rogers, *Final Ethics 20/20 Commission Proposals Focus Mostly on Inbound Foreign Lawyers*, 28 LAW. MAN. PROF. CONDUCT 722, 722 (2012).

19. See ABA COMM’N ON ETHICS 20/20, REVISED 107A, at 2-5 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107a_resolution_only_redline.authcheckdam.pdf; ABA COMM’N ON ETHICS 20/20, REVISED 107B, at 1-2 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107b_resolution_only_redline.authcheckdam.pdf; see also Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs ABA Comm’n on Ethics 20/20, to ABA Entities, Courts, Bar Associations, Law Schools, Individuals, and Entities, Memoranda and Templates for Comment - Inbound Foreign Lawyer Issues (June 1, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/inbound_foreign_lawyer_memo_templates.authcheckdam.pdf.

20. See ABA COMM’N ON ETHICS 20/20, 107C AS AMENDED 1-6 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107c_redline_with_floor_amendment.authcheckdam.pdf.

21. Laurel S. Terry et al., *Transnational Legal Practice*, 43 INT’L LAW. 943, 952-53 (2009) (noting that Arizona, Connecticut, and Wisconsin had amended their in-house counsel rules to include foreign in-house counsel); see also *infra* Part V.B.3 (explaining that resolutions serve a valuable role because, in the absence of a formal policy on point, the ABA cannot respond to requests from external parties, such as the U.S. government, regarding the position of the U.S. legal profession).

22. ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2013), *supra* note 18, at 4; see *infra* note 23.

8.5(b)(2), and explains that with respect to conflicts of interest, when the predominant effect is uncertain, a lawyer and client can agree that the lawyer's work on a matter will be governed by the conflict of interest rules of a particular jurisdiction, provided certain conditions are met.²³ This latter issue has transnational legal practice implications. For example, lack of certainty about the applicable conflicts of interest rules in transnational legal practice was a focus of the Commission's October 2010 hearing that included testimony from representatives of the Association of the City Bar of New York.²⁴ The adopted versions of the first three resolutions were different than the versions originally filed with the ABA House of Delegates.²⁵ Ultimately, however, all four proposals were approved by the ABA House of Delegates in February 2013.²⁶

Although all of these resolutions are related in some way to technology and globalization, some of these ten resolutions might be

23. ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2013), *supra* note 18, at 4. The February 2013 filing used a different approach than the proposal the Commission had previously circulated, which would have added "choice of law" language to Model Rule 1.7 concerning conflicts of interest. *Compare* ABA COMM'N ON ETHICS 20/20, 107D (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107d.authcheckdam.pdf, *with* ABA COMM'N ON ETHICS 20/20, INITIAL PROPOSAL-CHOICE OF LAW AND CONFLICTS OF INTEREST (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_1_7_choice_of_law_conflicts_initial_resolution_and_report_for_comment.authcheckdam.pdf.

24. ABA COMM'N ON ETHICS 20/20, MINUTES OF OCTOBER 15, 2010 MEETING 3-5, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20101510_minutes.authcheckdam.pdf.

25. *Compare* ABA COMM'N ON ETHICS 20/20, REVISED 107A, *supra* note 19, at 2, 5 *with* ABA COMM'N ON ETHICS 20/20, RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW 2, 5 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_model_rule_5_5_foreign_in_house_resolution_report_final.authcheckdam.pdf; *compare* ABA COMM'N ON ETHICS 20/20, REVISED 107B, *supra* note 19, at 2, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20130201_revised_resolution_107b_resolution_only_redline.authcheckdam.pdf, *with* ABA COMM'N ON ETHICS 20/20, MODEL RULE FOR REGISTRATION OF IN-HOUSE COUNSEL 1-2 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_registration_in_house_foreign_lawyers_resolution_report_final.authcheckdam.pdf; *compare* ABA COMM'N ON ETHICS 20/20, 107C AS AMENDED, *supra* note 20, at 5-6, *with* ABA COMM'N ON ETHICS 20/20, ABA MODEL RULE ON PRO HAC VICE ADMISSION 5 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_pro_hac_vice_foreign_lawyers_resolution_report_final.authcheckdam.pdf. All of these versions, including some additional interim versions, are available on the Commission's "House of Delegates Filings" webpage. *See* ABA Comm'n on Ethics 20/20, *House of Delegates Filings*, *supra* note 14; *see also* ABA COMM'N ON ETHICS 20/20, 107D, *supra* note 23.

26. ABA Comm'n on Ethics 20/20, *ABA Commission on Ethics 20/20*, *supra* note 13.

viewed as primarily addressing “technology” issues,²⁷ whereas other resolutions primarily address domestic lawyer mobility²⁸ or foreign lawyer mobility issues.²⁹ The outsourcing and choice of law resolutions might be viewed as having equal application to domestic and foreign practice.³⁰

In addition to these ten resolutions, the Commission’s work product included a number of discussion papers and drafts that the Commission circulated for comment, but did not recommend to the ABA House of Delegates. For example, after receiving extensive comments on a discussion paper, the Commission announced that it would not consider any changes to the Model Rules dealing with fee sharing or partnerships with non-lawyers.³¹ The Commission also chose not to request from the ABA House of Delegates any changes to the fee-division provision in Model Rule 1.5, although it referred the issue to the ABA Standing Committee on Ethics and Professional Responsibility (“Committee”) for further consideration, and that Committee subsequently issued a Formal Ethics Opinion.³² The Commission circulated an “Issues Paper” on the

27. See ABA COMM’N ON ETHICS 20/20, REVISED 105A AS AMENDED 1 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf; ABA COMM’N ON ETHICS 20/20, 105B, at 1 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.authcheckdam.pdf.

28. See ABA COMM’N ON ETHICS 20/20, 105D, at 1 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.authcheckdam.pdf; ABA COMM’N ON ETHICS 20/20, 105E, at 1 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e.authcheckdam.pdf; ABA COMM’N ON ETHICS 20/20, 105F REVISED 1 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105f.authcheckdam.pdf.

29. See *supra* notes 18-20 (citing the inbound foreign lawyer rules adopted in 2013, and found in Revised Reports 107A and 107B, and Report 107C, as amended).

30. See ABA COMM’N ON ETHICS 20/20, 105C, at 4-5 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.authcheckdam.pdf; ABA COMM’N ON ETHICS 20/20, 107D, *supra* note 23, at 2-3.

31. See, e.g., Press Release, ABA Comm’n on Ethics 20/20, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Non-lawyer Ownership of Law Firms (Apr. 16, 2012) (on file with the *Hofstra Law Review*); ABA Comm’n on Ethics 20/20, *All Comments Received to Date (Listed by Issue)*, ABA, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/all_comments_received_to_date_by_issue.authcheckdam.pdf (last visited Nov. 23, 2014) (including comments on uniformity/choice of law, and on alternative law practice structures); see also ABA Comm’n on Ethics 20/20, *Work Product*, *supra* note 11.

32. See generally Joan C. Rogers, *Ethics 20/20 Commission Sets Final Table Without Proposal on Interfirm Fee-Sharing*, 28 LAW. MAN. PROF. CONDUCT 684 (2012), available at http://lawyersmanual.bna.com/mopw2/3300/split_display.adp?fedfid=28571823&vname=mopcnotalissues&jd=a0d5d4f4t2&split=0 (“But a majority of the commissioners did not see enough need for the [Rule 1.5] proposal to warrant a possible battle. Instead of making any proposal on the subject, the commission decided to request an opinion on the issue from the ABA Standing Committee on

topic of alternative litigation finance—however, for this topic and the topic of lawyer and law firm ratings and rankings, the Commission ultimately produced “Informational Reports” for the ABA House of Delegates, but did not propose any rule changes.³³ The Commission also considered, but chose not to pursue, an initiative to explain the conditions under which virtual law practice would constitute “systematic and continuous presence.”³⁴ As noted in its Informational Report to the ABA House of Delegates, the Commission also “referred specific topics to ABA entities with the necessary expertise to address them, e.g., by asking the Center for Professional Responsibility (“CPR”) to report on constitutional issues associated with lawyer advertising rules in a digital age and requesting the Committee to develop ethics opinions.”³⁵ It also “recommended that the CPR coordinate with other ABA entities to establish centralized and up-to-date websites to help lawyers address critical and constantly evolving ethical and other issues relating to technology and outsourcing.”³⁶ In sum, by the time it concluded its work, the Commission had successfully introduced ten resolutions, had launched additional work, and had raised the awareness of many U.S.

Ethics and Professional Responsibility.”); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 464 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_464.authcheckdam.pdf (discussing the division of legal fees with other lawyers who may lawfully share fees with non-lawyers).

33. *See, e.g.*, ABA Comm’n on Ethics 20/20, *Priorities and Initiatives*, *supra* note 10 (providing links to the Commission’s Informational Reports to the ABA House of Delegates under subheadings entitled “Ratings and Rankings” and “Alternative Litigation Financing”); ABA Comm’n on Ethics 20/20, *Work Product*, *supra* note 11.

34. *See* ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2013), *supra* note 18, at 9-10; Letter from ABA Comm’n on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest, to ABA Entities, Courts, Bar Associations, Law Schools, Individuals, and Entities, for Comment: Issues Paper Concerning Model Rule of Professional Conduct 5.5 and the Limits on Virtual Presence in a Jurisdiction (June 19, 2012) (on file with the *Hofstra Law Review*).

35. ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2012), *supra* note 8, at 2. The Commission also filed an Informational Report that accompanied the February 2013 resolutions. *Id.* at 1.

36. *Id.* The Commission may have concluded that it was unnecessary to state that the ABA should develop “centralized and up-to-date websites to help lawyers address critical and constantly evolving ethical and other issues relating to [globalization]” because the ABA already had websites devoted to globalization and lawyer regulation that could provide the basis for ongoing work. *Id.* In my view, however, the failure to refer to *both* globalization and technology websites was unfortunate. First, the inclusion of globalization might have made it easier for the appropriate ABA entities to argue for additional ABA resources devoted to improving the ABA’s globalization webpages. Second, outsiders might read too much into this omission, as I originally did, since the ABA also has technology webpages, and thus, the reasoning for including technology and excluding globalization may not be obvious to outsiders.

and foreign lawyers and regulators to issues stemming from technology and globalization developments.³⁷

III. THE IMPACT OF THE ABA COMMISSION ON ETHICS 20/20'S WORK³⁸

Before discussing the impact of the Commission's work, it is worth noting that the Commission and its members and liaisons conducted a significant amount of "outreach" *before* the Commission presented its resolutions to the ABA House of Delegates.³⁹ In my view, one of the explanations for the extensive outreach is that a number of Commission members were concerned about avoiding what they considered to be the fate of the ABA Multidisciplinary Practice Commission ("MDP Commission"): the MDP Commission was perceived to have gotten out ahead of the ABA House of Delegates' members and the public, and did not conduct sufficient outreach and education regarding its proposals, all of which contributed to the defeat of the MDP Commission proposals in the ABA House of Delegates.⁴⁰

Although the Commission conducted significant outreach *before* its resolutions were adopted, this Part focuses on the time period *after* adoption of the Commission's proposals and on the impact of the Commission's work.⁴¹ This Article was written one year after the

37. Those outside, as well as inside the United States, followed the Commission's work. *See, e.g.*, Jonathan Goldsmith, *Cloud Computing: An Ethical Challenge for Lawyers*, L. SOC'Y GAZETTE (Sept. 5, 2011), <http://www.lawgazette.co.uk/analysis/cloud-computing-an-ethical-challenge-for-lawyers/62033.article>; Jonathan Goldsmith, *Third-Party Funding of Litigation - Views from the U.S. and Australia*, L. SOC'Y GAZETTE (Sept. 12, 2011), <http://www.lawgazette.co.uk/analysis/third-party-funding-of-litigation-views-from-the-us-and-australia/62114.article>.

38. This Article was written in February 2014, approximately one year after the Commission concluded its work. Although this may not be sufficient time to fully understand the impact of the Commission's work, I hope that it will prove useful to the ABA, its future Commissions, and perhaps others.

39. *See* ABA Comm'n on Ethics 20/20, *Meetings, Public Hearings, Speaking Engagements & Educational Programs*, ABA (May 24, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/combined_overall_outreach_chart.authcheckdam.pdf; *see also* ABA Comm'n on Ethics 20/20, *Outreach*, *supra* note 11 (noting the outreach organized by type of entity).

40. My views about the attitudes of some members of the Commission are based on my observations during several public Commission meetings. My summary of the MDP Commission is obviously a condensed version of a story that might be told at greater length. *See, e.g.*, Bruce A. Green, *ABA Ethics Reform from "MDP" to "20/20": Some Cautionary Reflections*, 2009 J. PROF. LAW. 1, 1-2, 5-7; Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, in *MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS, AND CLIENTS* §§ 2.02, 2.05 (Stephen J. McGarry ed., 2002).

41. I recognize that when one speaks of the "impact" of the work of the Commission, one need not limit oneself to implementation efforts or post-adoption efforts. The Commission's work product stimulated many discussions, and likely had an indirect impact. In this Article, however, I

Commission concluded its work, and its thesis is that the Commission was more successful with respect to its technology mission than it was with respect to its globalization mission. My conclusion is based on both the nature of the Commission's work, and the degree to which the legal community has taken notice of the Commission's work. I will begin with the latter point.

To measure the impact of the Commission's work on the legal community, I began by examining the Commission's "implementation" charts in order to determine which aspects of the Commission's work have led to the greatest number of regulatory changes.⁴² This research, however, yielded inconclusive results. The February 2014 implementation charts might lead one to conclude that the technology resolutions and the globalization resolutions have had a similar impact. These charts show, for example, that as of February 12, 2014, six jurisdictions have amended their rules of professional conduct in light of the Commission's resolution.⁴³ The chart that tracks implementation of foreign lawyer rules does not indicate the date of implementation, but as a result of my prior work, I know that most, if not all, of the jurisdictions listed on this chart had rules that predated the Commission. Thus, I ultimately concluded that given the length of time it takes for states to consider and implement ABA recommendations, and the paucity of

focus on the post-adoption impact of the Commission's work.

42. As has been true in the past, the ABA Center for Professional Responsibility Policy Implementation Committee is an invaluable resource. Its webpage contains a variety of charts that track the implementation of the Commission resolutions. See, e.g., ABA Ctr. for Prof'l Responsibility, *Policy & Initiatives*, ABA, http://www.americanbar.org/groups/professional_responsibility/policy.html (last visited Nov. 23, 2014) (including links to "State by State Adoption of Selected Ethics 20-20 Commission Policies" and "Chronological Adoption of Ethics 20-20 Amendments," as well as links to updated preexisting CPR charts, such as the "Charts Comparing State Variations in Individual Rules with Model Rules"); ABA Ctr. for Prof'l Responsibility Policy Implementation Comm., *State by State Adoption of Selected Ethics 20/20 Commission Policies and Guidelines for an International Regulatory Information Exchange*, ABA (May 20, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_selected_e20_20_rules.authcheckdam.pdf.

43. ABA Ctr. for Prof'l Responsibility Policy Implementation Comm., *Chronological List of States Adopting Amendments to Their Rules of Professional Conduct Based upon the August 2012 Policies of the ABA Commission on Ethics 20/20*, ABA (May 1, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chron_adoption_e_20_20_amendments.authcheckdam.pdf (listing Iowa, Delaware, Connecticut, Pennsylvania, New Mexico, Oregon, Kansas, Nevada, and Idaho as having revised their Rules of Professional Conduct in light of the Commission proposals; at the time this Article was drafted, there were fewer states listed); see also *Variations of the ABA Model Rules of Professional Conduct, Rule 1.1: Competence*, ABA, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_1.authcheckdam.pdf (last updated May 8, 2014) (highlighting the states that changed Model Rule 1.1 in light of the Commission's technology competence resolution).

adoptions so far, as of February 2014, “implementation” does not yet provide a useful measure of the degree to which the legal community has taken notice of the Commission’s work.

The next step was to attempt to measure the volume of post-adoption outreach in order to gauge whether there is more interest in, or information circulating about, the Commission’s technology or globalization work. My starting impression was that there was a greater “buzz” about technology and that I had, for example, seen many more listserv messages related to the Commission’s technology resolutions than its globalization resolutions. I attempted to verify this by looking for an official summary of outreach events. Unfortunately, however, this type of master list does not exist. The most recent list of outreach events is the May 2012 list on the Commission’s webpage that predates the adoption of the resolutions.⁴⁴ However, by examining my copies of the CPR’s “Highlights of Activities” reports,⁴⁵ ABA listserv messages, and a legal database, I confirmed that there have been a number of educational ABA outreach events, the majority of which seem to have focused on technology and competence.⁴⁶ I also took note of state bar programs and articles that focused on technology and cited the Commission’s work (and the fact that these outnumbered globalization programs and articles).⁴⁷ The ad hoc nature of this research prohibits me from conclusively relying upon it, but it did not lead me to change my belief that, to date, the Commission’s technology work has had the greatest impact on the hearts, minds, and legal practices of U.S. lawyers.

44. See ABA Comm’n on Ethics 20/20, *Meetings, Public Hearings, Speaking Engagements & Educational Programs*, *supra* note 39.

45. These unpublished reports are circulated by ABA’s CPR to its members and others. I consulted the “Center for Professional Responsibility, Highlights of Activities” mailings that were distributed between April 2012 and February 2014. However, I did not have in my files, and thus, did not review “Highlights” for July–October 2012, April–June 2013, or December 2013. Moreover, I have been advised that not all 20/20 related outreach events necessarily will be listed in these documents, and that some events that appear to be technology-oriented may have also addressed globalization issues. Thus, the sources I relied upon may not be a reliable way to research the level of post-Commission activities.

46. See, e.g., *Am I Competent? The Ethical Use of Evolving Technologies*, ABA (Oct. 25, 2013), <http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=216000>. It should be noted, however, that programs that focus on technology may also raise globalization issues since the two topics are often intertwined.

47. See, e.g., N.Y.C. BAR ASSOC., COMM. ON SMALL LAW FIRMS, THE CLOUD AND THE SMALL LAW FIRM: BUSINESS, ETHICS AND PRIVILEGE CONSIDERATIONS 14-17, 20-21 (2013), available at <http://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf>; Darla Jackson, *Can Lawyers Be Luddites? Adjusting to the Modification of the ABA Model Rules of Professional Conduct Regarding Technology*, 84 OKLA. B. J. 2637, 2639-40 (2013), available at <http://www.okbar.org/Portals/13/PDF/OBJ/2013/OBJ2013Dec14.pdf>.

If this Article is correct that the Commission's technology work has captured lawyers' attention to a greater degree than its globalization work, the obvious question to ask is "why?" One explanation for this difference in interest might be that the "technology" related resolutions were adopted six months earlier than the mobility resolutions.⁴⁸ Thus, there has been more time for them to "sink in" and for entities to request or to be receptive to Continuing Legal Education sessions on these topics. Another explanation might simply be that technology issues are of greater interest to lawyers because almost every lawyer uses technology, and thus, is exposed to potential discipline and liability if the lawyer makes a mistake, for example, by disclosing confidential client information. In contrast to the widespread interest in technology, some lawyers may believe that globalization issues are only relevant to large law firms (I disagree with this view, but understand that it is commonly held). Although these two explanations may provide part of the reason for the greater "buzz" regarding the Commission's work on technology, for the reasons discussed in the next Part of this Article, I believe that the Commission's differing approaches to these two topics are significant, and will affect both the short- and long-term impact of the Commission's work.⁴⁹

IV. WHY THE ABA COMMISSION ON ETHICS 20/20'S WORK ON TECHNOLOGY WILL HAVE A GREATER IMPACT THAN ITS WORK ON GLOBALIZATION

In my view, a major reason why the Commission's work on technology will have a greater impact is because it provided *structural* responses to issues related to technology and law practice, in addition to addressing specific issues.⁵⁰ In contrast, the overwhelming majority of the Commission's work with respect to globalization focused on specific issues, rather than structural issues.

To illustrate the distinction I am drawing between changes that are "structural" and those that address specific issues, it is useful to compare the Commission's technology resolutions on the one hand, and its mobility and globalization resolutions on the other hand. The technology resolutions have had—and will continue to have—a greater impact, not because of the specific issues they addressed, but because they *created a framework to address future issues*.⁵¹ This is what I mean when I refer to

48. ABA Comm'n on Ethics 20/20, *ABA Commission on Ethics 20/20*, *supra* note 13.

49. *See infra* Part IV.

50. *See infra* notes 52-59 and accompanying text.

51. *See infra* notes 54-56 and accompanying text.

“structural” changes. Consider, for example, some of the key amendments found in Revised Resolution 105A that addressed technology and confidentiality.⁵² In my view, the most significant change in this resolution is the new language that was added to what is now Model Rule 1.1, Comment [8]. As revised, Comment [8] now states:

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.⁵³

The beauty of this change is that it is the gift that keeps on giving—it requires lawyers to keep abreast of technology changes without any additional action required on the part of the ABA. To state it differently, Resolution 105A added a principle that can be applied to future technology and developments, and in doing so, made explicit an important principle that will remain relevant in the future, and that lawyers will need to follow.⁵⁴ I consider this to be a structural change.

Resolution 105A also included important changes to Model Rule 1.6 on confidentiality. One of these changes, like the change to Model Rule 1.1, Comment [8], added a new principle with which lawyers must now comply. This new principle states: “(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure

52. See ABA COMM’N ON ETHICS 20/20, REVISED 105A AS AMENDED, *supra* note 27, at 3-4.

53. *Id.* at 3 (emphasis added). Report 105A changed what was then Comment [6] of Model Rule 1.1. *Id.* Report 105C added two new paragraphs to the Comment so that Comment [6] became Comment [8]. ABA COMM’N ON ETHICS 20/20 105C, *supra* note 30, at 2.

54. ABA COMM’N ON ETHICS 20/20 105C, *supra* note 30, at 2. One might argue that this change was unnecessary because Model Rule 1.1’s competence requirement already required a lawyer to stay abreast of technology changes and to be aware of their risks and benefits. In my view, however, making this principle explicit means that the obligation is clear, and that there is no room for argument on this point. It is perhaps worth noting that in a number of jurisdictions, there is great interest in having lawyer regulation based on “principles,” which is sometimes referred to as “outcome focused regulation.” See, e.g., VICTORIA REES, TRANSFORMING REGULATION AND GOVERNANCE IN THE PUBLIC INTEREST 41-51 (2013), available at <http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf>; Laurel S. Terry et al., *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 FORDHAM L. REV. 2661, 2681-83 (2012) [hereinafter Terry et al., *Trends and Challenges*]; *Outcomes Focused Regulation at a Glance*, SOLICITORS REGULATION AUTH., <http://www.sra.org.uk/solicitors/freedom-in-practice/ofr/ofr-quick-guide.page> (last visited Nov. 23, 2014). While I have some doubts about the degree to which outcomes-focused regulation can be used to discipline lawyers, I have no doubt that in a situation such as that involving technology, a principles-based approach is the superior approach, even if due process concerns mean that the first of a particular type of violation cannot be the basis for discipline.

of, or unauthorized access to, information relating to the representation of a client.”⁵⁵

The revised comment provides additional detail and makes it clear that lawyers will need to stay abreast of technology developments that could have an impact on client confidentiality.⁵⁶ Model Rule 1.6(c) and its comment are powerful because they provide principles that are *adaptable* to changed circumstances and new technology.⁵⁷ In other words, they are structural changes. Consider, for a moment, what this Model Rule might have looked like. The Commission might have proposed a Model Rule amendment that specified the conditions a lawyer should insist on in a cloud-computing contract.⁵⁸ Instead of addressing such specific issues, however, the revised Model Rule requires lawyers to “act competently to safeguard information . . . against unauthorized access by third parties and against inadvertent or unauthorized disclosure” with respect to both *existing* and *future* technological developments.⁵⁹ Thus, similar to the changes to Comment [8] of Model Rule 1.1 on competence, the changes to Model Rule 1.6 on confidentiality are a gift that will keep on giving. These changes will require lawyers to stay abreast of developments that implicate confidentiality concerns; the rule can adapt to the future with no further action by the ABA.

Although these technology developments provide the most notable examples, some of the Commission’s other resolutions might also be viewed as having established structural changes that are adaptable to future developments. For example, similar to the parts of Resolution 105A described earlier, Resolution 105C regarding outsourcing might be viewed as establishing a general principle or framework that lawyers can use when retaining or contracting with those outside of the lawyer’s own

55. ABA COMM’N ON ETHICS 20/20, 105F REVISED, *supra* note 28, at 2.

56. *Id.* at 3.

57. *See id.* As Ted Schneyer reminded me, the concept of preventing inadvertent or unauthorized disclosures is not a new one, and was reflected in DR 4-101(D) of the ABA Model Code of Professional Responsibility, which stated: “(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.” MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(D) (1969), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf>. Although Model Rule 1.6(c) may not reflect a new idea, it is an important one, and remains a powerful addition to the Model Rules.

58. *See, e.g.*, NICOLE BLACK, CLOUD COMPUTING FOR LAWYERS 39 (2012); ABA Legal Tech. Res. Ctr., *Cloud Ethics Opinions Around the U.S.*, ABA, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html (last visited Nov. 23, 2014).

59. ABA COMM’N ON ETHICS 20/20, REVISED 105A AS AMENDED, *supra* note 27, at 5.

firm.⁶⁰ These changes are arguably less significant than the changes to Model Rule 1.1 and Model Rule 1.6 because they reflect less of a change from the status quo. They do, however, establish general principles that provide guidance on the issues of outsourcing and disaggregation, and that are adaptable to future developments.

In addition to Resolutions 105A and 105C, which focused on lawyer conduct, the Commission recommended *both* structural and issue-specific changes to the way in which the ABA operates with respect to lawyers and technology. As noted earlier, it recommended that other ABA entities conduct follow-ups on specific issues,⁶¹ and it recommended the establishment of a new webpage to track technology developments and challenges.⁶²

Not all of the ABA's technology resolutions involved structural change. For example, Resolution 105B on technology and client development addressed a number of specific discrete issues, including pay-per-click website advertising,⁶³ Internet banner ads,⁶⁴ and whether responding to a lawyer's website contact information presumptively creates a lawyer-client relationship.⁶⁵ In my view, the Commission's most important technology changes are the structural changes, and not these specific-issue changes. The changes found in Resolution 105B undoubtedly will be useful to lawyers, but I suspect that in ten or twenty years, they will seem "quaint" and reflective of a bygone era. In contrast, I predict that the new principles that were added to the Model Rules by Resolution 105A will not appear "quaint," and will continue

60. ABA COMM'N ON ETHICS 20/20, 105C, *supra* note 30, at 2 (adding new Comments [6] and [7] to Model Rule 1.1 regarding competence to address the situation of disaggregation and the allocation of responsibility). This resolution specifies that when lawyers from different firms are working on a client matter, they "ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them." *Id.* The amendments to Model Rule 5.3 regarding non-lawyer assistance similarly provide general, structural guidance to lawyers who work with non-lawyers on a client matter. *Id.* at 3 (adding new Comments [3] and [4] to Model Rule 5.3 regarding non-lawyer assistance). Among other things, the amendments specify that "[w]here the client directs the selection of a particular non-lawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer." *Id.*

61. *See supra* notes 34-36 and accompanying text.

62. *See supra* note 36 and accompanying text.

63. ABA COMM'N ON ETHICS 20/20, 105B, *supra* note 27, at 4-5 (changing Comment [5] to Rule 7.2 on advertising).

64. *Id.* at 6 (changing Comment [1] of Model Rule 7.3 on solicitation).

65. *Id.* at 2 (changing Comment [2] of Model Rule 1.18 on duties to prospective clients); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 465 (2013) (addressing, through an ethics opinion, "deal of the day" marketing programs, which was one of the questions that was raised during the course of the Commission's work).

to provide important principles that can be applied whenever lawyers use new technology.

In contrast to this structural approach to technology issues, the Commission's resolutions on domestic and foreign lawyer mobility focus on specific issues. For example, the first round of resolutions reduced the time needed for domestic lawyers or foreign legal consultants for admission on motion, created a temporary safe harbor for practice pending admission when a domestic lawyer or foreign legal consultant moves from one jurisdiction to another, and created an exception to the confidentiality rule for laterally-moving lawyers that allows them to check for conflicts of interest.⁶⁶ The second set of resolutions recommended that foreign lawyers be permitted to work as in-house counsel or appear *pro hac vice*.⁶⁷ While each of these topics is important, and while these ABA resolutions are likely to have an impact on the specific issues they address, they are focused on specific issues, rather than establishing a set of principles that address whether U.S. lawyers or the ABA should change, in any way, the manner in which they will operate in the future, in light of globalization.⁶⁸ In other words,

66. See ABA COMM'N ON ETHICS 20/20, 105D, *supra* note 28, at 3; ABA COMM'N ON ETHICS 20/20, 105E, *supra* note 28, at 2; ABA COMM'N ON ETHICS 20/20, 105F REVISED, *supra* note 28, at 2. The report accompanying the original draft explained the rationale for these revisions as follows: "These proposed amendments would codify what has long been common practice and acknowledged as essential in ethics opinions: Lawyers must have the ability to disclose limited information to lawyers in other firms in order to detect and prevent conflicts of interest." ABA COMM'N ON ETHICS 20/20, 105F REPORT TO THE HOUSE OF DELEGATES 1 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105f.authcheckdam.pdf.

67. ABA COMM'N ON ETHICS 20/20, REVISED 107A, *supra* note 19, at 2, 5; ABA COMM'N ON ETHICS 20/20, REVISED 107B, *supra* note 19, at 1; ABA COMM'N ON ETHICS 20/20, 107C AS AMENDED, *supra* note 20, at 1.

68. *Cf. infra* note 160 (noting that among other things, the author had suggested to the Commission that it consider whether there is a "better way than the status quo for the ABA and the U.S. legal profession to be responding and commenting on and participating in lawyer regulatory developments elsewhere in the world"). Although I wish that the Commission had focused on "structural" changes, as well as specific issues, I have no doubt that the Commission's three resolutions related to global lawyer mobility are likely to have an impact on future developments with respect to the specific issues they address. For example, these three resolutions were discussed at the January 2014 Midyear Meeting of the Conference of Chief Justices' Task Force on Foreign Lawyers ("CCJ"). Conference of Chief Justices, Task Force on Foreign Lawyers and the Int'l Practice of Law 2014 Mid-Year Meeting (Jan. 27, 2014) (agenda on file with the *Hofstra Law Review*). At that time, the CCJ adopted a resolution that urged each state's highest court to consider the so-called "toolkit" as a way of responding to globalization issues. The "toolkit" included information about the 20/20 resolutions, and encouraged states to form a committee to consider the foreign lawyer "cluster" of rules, including these 20/20 recommendations. ABA TASK FORCE ON INT'L TRADE IN LEGAL SERVS., INTERNATIONAL TRADE IN LEGAL SERVICES AND PROFESSIONAL REGULATION: A FRAMEWORK FOR STATE BARS BASED ON THE GEORGIA EXPERIENCE 1 (2014), available at <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/ITILS%20Toolkit.authcheckdam.pdf>; CONF. OF CHIEF JUSTICES, RESOLUTION 11: IN SUPPORT OF

each of the six resolutions mentioned above might be said to address specific mobility issues, rather than establishing a structural or framework approach to the Commission's "globalization" mission. There was no structural globalization counterpart to the structural approach the Commission used when responding to its "technology" mission.

In my view, the closest the Commission came to a broad "structural" response to its globalization mission was Resolution 107D, which added new language to Comment [5] of Model Rule 8.5, Disciplinary Authority; Choice of Law.⁶⁹ Although this change provides a useful principle, it is narrowly tailored to a specific (but important) issue and does not address the topic of globalization more broadly. Indeed the Commission's February 2013 Informational Report to the ABA House of Delegates stated that the Commission had "focused on several discrete ethics-related issues arising out of globalization."⁷⁰

The future work the Commission recommended was also focused on specific issues. For example, the Informational Report noted that the Commission had asked "the Standing Committee on Ethics and Professional Responsibility to draft a Formal Opinion that provides greater guidance on how to resolve conflicts-related inconsistencies in the absence of the kinds of agreements anticipated by the proposed new Comment language."⁷¹ This Informational Report mentioned its prior referral of the fee-sharing and fee-division issue to the Committee,⁷² and announced that the relationship of virtual practice and the "systematic

THE FRAMEWORK CREATED BY THE STATE BAR OF GEORGIA AND THE GEORGIA SUPREME COURT TO ADDRESS ISSUES ARISING FROM LEGAL MARKET GLOBALIZATION AND CROSS-BORDER LEGAL PRACTICE 1-2 (2014), available at http://nacmnet.org/sites/default/files/Resolutions/2014/Resolution11_LegalMarketGlobalization.pdf (urging jurisdictions "to consider the 'International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience' . . . as a worthy guide for their own state endeavors to meet the challenges of ever-changing legal markets and increasing cross-border law practices").

69. MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt.5 (2014). This Comment states:

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

Id.

70. ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW, *supra* note 18, at 1.

71. *Id.* at 4.

72. *Id.* at 8-9.

practice” requirement “may be best addressed in the future as the nature of virtual law practice becomes clearer and as relevant technology continues to evolve.”⁷³ None of these actions, however, provided a clear counterpart to the “structural” changes the Commission established with respect to its technology mission, nor did they involve the types of changes discussed in the next Part of this Article.

V. REFLECTING ON THE ABA COMMISSION ON ETHICS 20/20’S MISSED OPPORTUNITIES AND THE ROAD NOT TAKEN

The Commission has been heavily criticized in some quarters for its lack of activity with respect to its globalization mission. For example, the lead paragraph in a story in the ABA/BNA Lawyers Manual on Professional Conduct quoted Susan Martyn as saying: “[n]ot much happened.”⁷⁴ Others have predicted that if the United States fails to make rule changes in response to developments by the United Kingdom, it may lead to the demise of the U.S. legal profession.⁷⁵ While I believe that both of these conclusions are too harsh, I also believe that, with respect to its globalization mission, the Commission missed an opportunity for its work to have an even longer-lasting impact.

What could the Commission have done differently? In my view, the Commission’s work might have turned out differently if it had created a globalization “big picture committee” (“BPC”) in February 2010 at the time it established its seven working groups. I view this as a significant

73. *Id.* at 10. There may, of course, be additional reasons why it is better to simply state the principle without attempting to define it.

74. *See, e.g.*, Elizabeth J. Cohen, *Modest Changes That Ethics 20/20 Urged Can Be Seen as Positive, or Lost Opportunity*, 29 *LAW. MAN. PROF. CONDUCT* 690, 690 (2013).

75. *See, e.g.*, Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, 19 *PROF. LAW.*, 2009, at 1, 10; *see also* James E. Moliterno, *The Trouble with Lawyer Regulation*, 62 *EMORY L.J.* 885, 888-89 (2013) (describing the Commission, *inter alia*, as management by looking backward and inward, and management in service of the status quo); Laurel S. Terry, *Transnational Legal Practice (United States)*, 47 *INT’L LAW.* 499, 503 (2013). My earlier summary of the Commission’s work was as follows:

Most would agree that the ABA 20/20 Commission’s responses to globalization and technology developments have been quite modest. There is less agreement about whether the modest changes were appropriate because the basic regulatory framework was sound or whether the modest developments reflect a lost opportunity. Some have faulted the ABA for going too far with its proposals, whereas others have argued that the failure to respond to change will spell the demise of the U.S. legal profession. Some of the differences in viewpoint reflect varied views on the likely success of the U.K.’s radical changes to lawyer regulation. Only time will tell which world view will prove more accurate. One thing seems clear, however: the Commission’s work demonstrates the difficulty of mobilizing a large, decentralized organization to respond to issues as complex and multifaceted as technology and globalization.

Terry, *supra*, at 503 (footnotes omitted).

missed opportunity. The remainder of this Article focuses on the road that was not taken—but perhaps might have been taken—had such a globalization BPC been established.

A. The Road Not Taken—Not Creating a “Big Picture Committee”

At the conclusion of its first public meeting (and hearing), which was held in Orlando, Florida in February 2010, the Commission agreed that it would divide into seven working groups.⁷⁶ These working groups were tasked with very specific concrete issues,⁷⁷ many of which had been identified in the Preliminary Issues Outline that the Commission had circulated for comment in November 2009.⁷⁸ Because each of these seven working groups had been asked to address a specific set of issues

76. See ABA COMM’N ON ETHICS 20/20, MINUTES 9-10 (Feb. 4, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/feb_2010_minutes_authcheckdam.pdf (noting that the seven working groups were titled: Implications of New Technologies; Data Security and Confidentiality; Legal Process Outsourcing; Law Firm Regulation/Alternative Business Structures; Third-Party Financing of Litigation; Uniformity and Choice of Law; and Inbound Foreign Lawyer Issues). In 2010, following an ABA House of Delegates resolution, and in response to a request from ABA President Carolyn Lamm to address these issues, the Commission added an eighth working group devoted to law firm and lawyer ratings and rankings. ABA COMM’N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 1 (2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rankings_2011_hod_annual_meeting_informational_report_authcheckdam.pdf (noting that after the February 2010 ABA resolution on rankings, the Commission created a new committee). The Commission was created in August 2009, and held its first business meeting in September 2009. ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2012), *supra* note 8, at 1-2. The Commission may have informally agreed upon the working groups at that time period, but they were publicly announced during the February 2010 Orlando meeting. Although the names of some of these eight working groups evolved over time, and two of these working groups were merged, they remained the structure by which the Commission conducted its work. See *infra* note 77.

77. ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2012), *supra* note 8, at 3 & n.9 (“The Commission created seven Working Groups with participants from relevant ABA and outside entities.”). The report listed the working groups, and explained each group’s assigned area of focus:

Those Working Groups were tasked with studying and developing recommendations regarding the following topics: [1] Implications of New Technologies; [2] Domestic and International Outsourcing; [3] Conflicts of Interest, Uniformity, and Choice of Law; [4] Alternative Litigation Financing; [5] Law Firm Ratings and Ranking; [6] Alternative Law Practice Structures; and [7] Inbound Foreign Lawyers.

Id. Although this Information Report lists as a single working group “Implications of New Technologies,” the original mandate had seven groups, and then added an eighth group regarding rankings. The discrepancy in numbers appears because the Commission originally created two different technology-related groups, one of which focused on marketing-related issues, and one on confidentiality-related issues. See *id.* at 7-10. As the 2012 Information Report indicates, these groups were later consolidated into one. See *id.* at 3 & n.9.

78. See ABA COMM’N ON ETHICS 20/20, PRELIMINARY ISSUES OUTLINE, *supra* note 10, at 3-9.

rather than the “big picture,” none of them publicly asked what types of structural or systemic changes, if any, might help U.S. lawyers or the ABA operate in a globalized world.⁷⁹ In the area of technology, the failure to create a BPC did not matter because the Commission sensibly concluded that its work had to be “technology neutral” and adaptable to the future. In other words, the technology topic itself drove the Commission to consider the “big picture” and structural issues. That was not true, however, with respect to the Commission’s globalization mission. Thus, in my view, the biggest opportunity the Commission missed was the opportunity to establish a BPC that would have asked whether, and how, lawyer regulation and the ABA should adapt in light of global developments.

Would it have been appropriate for the Commission to create this type of BPC? I believe that the answer to this question is a resounding “yes.” First of all, there was support for this approach in the Commission’s mission language. It is noteworthy that the Commission was not only asked “to perform a thorough review of the ABA Model Rules of Professional Conduct” in the context of advances in technology and global legal practice developments, but it was also asked to review the “U.S. system of lawyer regulation” in light of these developments.⁸⁰ Second, one can look at the press release and other statements that were issued at the time the Commission was created to support the view that the Commission’s mandate was not limited to conducting a review of the Model Rules.⁸¹ Indeed, as Part II of this Article clearly illustrates, the

79. Since the working group minutes are not publicly available, we do not know the full range of issues and background material that each working group considered. As far as I know, however, none of the working groups was tasked with asking the very general question of whether there were any general systemic changes that might help the ABA operate in a globalized world. I was a member of the Inbound Foreign Lawyers working group, and I do not recall that we ever framed our issues this broadly. Our working group arguably examined the “big picture” context relevant to the inbound foreign lawyer issues, but we did not ask what types of systemic changes, if any, might help the ABA function better in a globalized world of lawyer regulation.

80. ABA Comm’n on Ethics 20/20, *About Us*, *supra* note 1.

81. *See, e.g., id.* Co-Chairs Gorelick & Traynor stated:

Our challenge over the next several years is to study these [globalization and technology] issues and, with 20/20 vision, propose policy recommendations that will allow lawyers to better serve their clients, the courts and the public now and well into the future. We look forward to engaging in this exciting, challenging, and important undertaking.

Id.; *see also* News Release, Am. Bar Ass’n, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009) (on file with the *Hofstra Law Review*) [hereinafter News Release]. The news release announced:

Technological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure. Technologies such as e-mail, the Internet and smart phones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded

Commission evidently thought it had a mandate to consider more than the Model Rules since its resolutions and additional action went beyond that type of narrow review.⁸² Finally, from a policy perspective, it clearly would have made sense for the Commission to consider the “big picture” since there were no other ABA entities conducting this type of review. Thus, to the extent that the Commission did not interpret its mandate as broadly as it might have, I think that was regrettable.⁸³

Would it have been politically feasible for the Commission to create a BPC? I believe that the answer to this question is “yes.” Some may believe that because of “politics,” the Commission could not have achieved anything more than it did with respect to its globalization mission. While I agree that the Commission was subject to political limitations, some of which are described below,⁸⁴ I do not believe that “politics” would have prevented the Commission in February 2010 from creating a BPC. I may be naïve, but I simply do not believe that there would have been organized opposition if the Commission had

international business opportunities for our clients.

News Release, *supra* (internal quotation marks omitted). The ethics commission, according to ABA President Carolyn B. Lamm, will review lawyer ethics rules and regulation in the context of a global legal services marketplace:

Its work will be guided by three simple principles: protect the public, preserve core professional values, and maintain a strong, independent and self regulated profession. Reshaping the U.S. legal profession to better serve clients and lawyers in this evolving environment will require a clear vision of the future. It will require 20/20 vision.

Id. (internal quotation marks omitted).

82. *See supra* Part II.

83. The Commission’s Alternative Law Practice Structure Committee (“ALPS”) provides an example of the Commission interpreting its mandate more narrowly than I believe was necessary. ALPS’s Co-Chair has advised me that ALPS “was originally, tasked with studying and potentially developing proposals concerning both proactive management-based regulation (PMBR) and non-lawyer ownership of law practice entities.” *See* E-mail from Ted Schneyer, Professor of Law, James E. Rogers College of Law at Arizona University, to Laurel S. Terry, Professor of Law, Penn State Dickinson Law School (Feb. 28, 2014, 12:54 PM) (on file with the *Hofstra Law Review*). The ALPS Working Group thought both of “these topics were globalization-relevant because they were suggested by major developments abroad. But others doubted that they fell under the Commission’s globalization ‘jurisdiction.’ And so, [ALPS] soon told to drop [their] study of PMBR.” *Id.* For example, the Commission’s discussion papers are useful, but they do not reflect any of the recent Canadian developments. *Compare* ABA Comm’n on Ethics 20/20, *Work Product*, *supra* note 11, with ABA CTR. FOR PROF’L RESPONSIBILITY, 40TH ANNUAL NATIONAL CONFERENCE. ON PROFESSIONAL RESPONSIBILITY – REGULATORY INNOVATION IN ENGLAND AND WALES AND AUSTRALIA: WHAT’S IN IT FOR US? (2014) [hereinafter REGULATORY INNOVATION], available at http://www.personal.psu.edu/faculty/l/s/lst3/Terry_Regulatory_Innovation_Materials_TOC.pdf. If the Commission had viewed its mandate as developing structural changes that would promote an ongoing exchange of information and dialogue, then it might have asked ALPS whether, and how, the ABA should monitor and promote dialogue about global proactive management-based regulation and non-lawyer ownership developments, even if these issues were not ripe for the House of Delegates’ consideration.

84. *See supra* note 31; *infra* notes 106-08 and accompanying text.

announced a BPC as its eighth working group. The initial charge to the BPC could have been framed quite broadly: the BPC could have been asked to consider whether, as a result of globalization, any changes were warranted, including changes to the ways in which the ABA monitors and responds to lawyer regulation developments.⁸⁵ I find this sort of organizational issue to be so innocuous that it is hard for me to imagine the grounds upon which someone would have objected, or that such an objection, if voiced, would have gained enough adherents to block the creation of such a committee.

I do not know what type of work product would have emerged if a BPC had been created. Indeed, one of the reasons why I wish there would have been such a group is because it could have harnessed the power of collective thinking.⁸⁶ What follows, then, are simply my thoughts about what might have emerged from the BPC, and thus, some, but not all, of the ideas that a BPC might have considered.

*B. The ABA Standing Committee on Ethics and Professional
Responsibility's Charge*

If the Commission had established a BPC as an eighth working group, how might that committee have organized its work? We will never know. But if I had been responsible for setting out the committee's work plan, I would have asked it to address the following: (1) identify what the ABA's goals should be with respect to globalization and lawyer regulation; (2) determine whether there might be "structural" changes

85. It is certainly possible that there might have been political opposition to a BPC if the BPC Committee was framed in a manner that made it appear as though the BPC was infringing on the "jurisdiction" of other ABA groups. For example, if the Commission had announced in February 2010 that the BPC was being established in order to recommend changes to ABA structure and operations to adapt to global developments, the ABA Board of Governors might have intervened, believing that the Commission was usurping the Board's authority. I continue to believe, however, that a committee could have been established using vague and non-threatening language. For example, the Commission might have said that it had created a number of committees to look at discrete issues, but it had also created an eighth committee that would look at the "big picture" of globalization and the system of lawyer regulation. I believe that the initial mission of the BPC could have been articulated in quite broad and general terms that would not have triggered opposition. For a description of the work plan I would have given the committee once it was established, see *infra* Part V.B.

86. By way of example, I was fairly far into my research and writing when I discovered the article by Elizabeth Chambliss and Bruce Green that offered concrete suggestions that might lead to more successful bar-led reforms. See Elizabeth Chambliss & Bruce A. Green, *Some Realism About Bar Associations*, 57 DEPAUL L. REV. 425, 444-45 (2008) (discussing the empirical research relevant to bar associations, and offering suggestions for structuring the collective debate). Among other items, the BPC might have considered suggestions and insights such as those found in the Chambliss and Green article, and in articles by Professors Stephen Gillers, James Moliterno, and Ted Schneyer. See *supra* note 75; *infra* notes 96, 107.

that could be made to the Model Rules that would be comparable to the “technology” structural changes that the Commission ultimately recommended; (3) determine whether any structural changes in the way the ABA operates would be desirable, as well as any issue-specific changes not previously identified by other working groups; (4) determine whether any new resources would be needed and whether any existing resources should be reallocated; and (5) in light of numbers 1-4 above, evaluate whether any of the ABA’s governing documents or procedures should be amended, and if so, recommend changes to the appropriate body. These points are addressed below.⁸⁷

1. Identifying the ABA’s Goals with Respect to Globalization and Lawyer Regulation

As I have written about previously, I believe that before an individual or entity begins to make policy recommendations or rules, it should consider its goals and what it is trying to achieve.⁸⁸ If one fails to do this, it will be difficult to know whether the resulting recommendations or rules are over-inclusive or under-inclusive, or how to measure whether one has achieved one’s goals. Thus, as a starting point, I would have asked the BPC to identify its recommended goals for the ABA with respect to globalization and lawyer regulation.

If I had been on the BPC, I would have suggested this overarching goal: the ABA should strive to be as useful to lawyers and regulators who operate in a global world as it has been to lawyers and regulators who previously were concerned solely with domestic legal practice and developments.

In order to explain why I selected this goal, it is useful to articulate my two starting assumptions. My first assumption, which is supported by the Commission’s Discussion Papers⁸⁹ and the literature,⁹⁰ is that there are a number of significant developments around the world related to lawyer regulation, and that it is unlikely these developments will disappear.⁹¹ My second assumption is that lawyer regulation developments elsewhere in the world have had—and will continue to

87. See *infra* Part V.B.1–4.

88. See, e.g., Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 *FORDHAM L. REV.* 2685, 2727-30 (2012) [hereinafter Terry et al., *Adopting Regulatory Objectives*]. See generally Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22 *PROF. LAW.*, 2013, at 28 [hereinafter Terry, *Why Your Jurisdiction Should Consider*].

89. See ABA Comm’n on Ethics 20/20, *Work Product*, *supra* note 11.

90. See, e.g., Terry et al., *Trends and Challenges*, *supra* note 54, at 2670-74; Laurel S. Terry, *Trends in Global and Canadian Lawyer Regulation*, 76 *SASK. L. REV.* 145, 146-51 (2013).

91. See *supra* notes 89-90 and accompanying text.

have—an effect on U.S. lawyer regulation because clients, lawyers, regulators, and academics from different parts of the world talk to each other about legal practice and lawyer regulation developments, and because many clients have global legal needs and thus they—and their lawyers—frequently cross borders.⁹²

Bearing these assumptions in mind, what should the ABA's role be in the future when acting as a "quasi-regulator?"⁹³ I use the term "quasi-regulator" because I find it to be a useful way to distinguish between the ABA's two major roles. I submit that, depending on the circumstances, the ABA wears two very different "hats," and that it is useful to distinguish between: (1) situations in which the ABA wears its "trade group" or "representational" hat, and openly and appropriately acts as a trade group to benefit its members; and (2) situations in which the ABA wears a "quasi-regulator" hat, and endeavors to put aside member self-interest, and provide fair and balanced recommendations to regulators, knowing that the state courts that are the true lawyer regulators rely heavily on recommendations from the "quasi-regulator" ABA.

For example, while wearing its "quasi-regulator" hat, the ABA has drafted for regulators' consideration the Model Rules, and many other model policies.⁹⁴ When serving as a "quasi-regulator," the ABA strives to "promote competence, ethical conduct and professionalism," to advance the rule of law, and to adopt rules that are appropriate for adoption by the highest court in each U.S. state.⁹⁵ I do not believe that anyone would seriously argue that when drafting Model Rules, it would be appropriate for the ABA to wear its "trade group" hat and promote

92. Laurel S. Terry, *A "How to" Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course*, 51 ST. LOUIS U. L.J. 1135, 1136-40 (2007). For a description of the Jacoby & Myers lawsuits that have cited developments in other countries, see *infra* note 99.

93. Although a random ABA member may not think in these terms, I believe that the ABA serves two quite distinct roles with respect to lawyer regulation issues. The ABA, clearly, is a trade group whose mission it is to further the interests of its members. See, e.g., *ABA Mission and Goals*, ABA, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Nov. 23, 2014) ("Goal I: Serve Our Members. Objective: 1. Provide benefits, programs and services which promote members' professional growth and quality of life.") But, the ABA clearly has a second hat that it wears as well, in which it acts as a "quasi-regulator," and endeavors to offer fair and balanced advice to regulators, not advice driven by its members' own self-interest. See Carole Silver, *What We Don't Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009, 1073 (2010); see also Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 371-74 (2013). With respect to the second role, some commentators believe that the ABA has not always been successful in putting aside its members' self-interest when functioning with its "quasi-regulator" hat. See, e.g., sources cited *infra* notes 111-12.

94. See ABA Ctr. for Prof'l Responsibility, *Policy & Initiatives*, *supra* note 42 (listing many of the ABA's most recent model policies relating to lawyer regulation).

95. *ABA Mission and Goals*, *supra* note 93.

the interests of its member lawyers over the interests of clients, the courts, or the public. In short, I believe that in light of the historic deference that has been given to Model Rules by regulators, when the ABA prepares model rules, it should not be acting with its “trade representative” hat on, nor should it try to advance the self-interest of its members. It should instead try to stand in the shoes of the regulators and develop well-balanced rules that properly take into account all of the competing interests. This latter role is what I have in mind when I refer to the ABA as a “quasi-regulator.” It is what Professor Stephen Gillers has referred to as the “professional responsibility” of the legal profession when recommending rules.⁹⁶

This Article focuses on the ABA’s activities when wearing its “quasi-regulator” hat.⁹⁷ Taking globalization into account, I recommend that if the ABA wants to continue to be relevant and useful to its members and to U.S. regulators, then it should strive to do the following:⁹⁸ (1) operate as an “early warning system” that would identify difficult lawyer regulation issues that other countries are encountering and that U.S. regulators might expect to encounter in the future, so that U.S. jurisdictions may consider these issues proactively, rather than

96. See, e.g., Gillers, *supra* note 93, at 371-74. Some readers may find it more useful to refer, as Professor Gillers has done, to the professional responsibility of the legal profession when drafting model rules and policies, rather than referring to the ABA as a “quasi-regulator.” Despite the fact that the term “quasi-regulator” may not resonate with all readers, I have used this term because I think it is useful way to remind ABA members of the two different “hats” that the ABA wears, one of which is a “representational” hat and the other of which is a “regulatory” hat. In my experience, members of voluntary bar associations sometimes “switch hats” when considering whether to recommend a particular rule or policy change. The two-hat imagery can be a useful way to remind lawyers about the objectives they should be trying to achieve when making rule or policy recommendation to each state’s highest court or regulatory body. See also *supra* note 88 (regarding “regulatory objectives”).

97. See *infra* note 103. I have a number of suggestions regarding what the ABA should be doing when wearing its trade group or “representational” hat. I originally had planned to include these points in this Article. I ultimately decided, however, that there was less room for confusion if I omitted the trade group goals from this Article.

98. See, e.g., Terry et al., *Adopting Regulatory Objectives*, *supra* note 88, at 2719-23. It may be true that the ABA’s current goals *already* include all of the items listed *infra* at text accompanying notes 99-105. I have articulated these items as goals for the BPC, not because I think the ABA currently disagrees with these goals, but because one should always articulate explicitly the goals that one is trying to achieve. See Terry, *Why Your Jurisdiction Should Consider*, *supra* note 88, at 6-9. I feel so strongly about this topic that I selected it as the focus of my *Howard Lichtenstein Distinguished Professorship in Legal Ethics Lecture* at the Maurice A. Deane School of Law at Hofstra University. See Laurel S. Terry, Professor of Law, Penn State Dickinson School of Law, *Howard Lichtenstein Distinguished Professorship in Legal Ethics Lecture* at the Maurice A. Deane School of Law at Hofstra University: Regulatory Objectives for the Legal Profession (Feb. 12, 2014), available at http://www.personal.psu.edu/faculty/l/s/lst3/Laurel_Terry_2014_regulatory_objectives_Hofstra.pdf.

reactively;⁹⁹ (2) share information about approaches that have been used elsewhere in the world, including any data about their successes and failures;¹⁰⁰ (3) if there are potential regulatory changes elsewhere in the world that might have a direct impact on U.S. lawyers or regulators, share that information with U.S. lawyers and regulators so that they can comment on the proposed changes and offer U.S. perspectives to foreign regulators;¹⁰¹ and (4) facilitate global conversations about lawyer regulation, which may, in the long term, contribute to a reduced number of conflicting rules globally.

These four strategies take into account both the current global situation and what I believe are the ABA's strengths and weaknesses when it comes to lawyer regulation. In other words, my selection of the strategies listed above has been influenced by my views about what the ABA does best. In my view, when it comes to lawyer regulation, the ABA strengths include: (1) its ability to serve as an information aggregator,¹⁰² (2) its role as a network facilitator,¹⁰³ (3) its ability to

99. This advice to act proactively has frequently been given by Bill Smith, the General Counsel Emeritus of the State Bar of Georgia. Memorandum from the ABA Task Force on Int'l Trade in Legal Servs. to the State Supreme Courts and State and Local Bar Ass'ns 1 (Feb. 4, 2012) (on file with the *Hofstra Law Review*). I find this advice very sensible. An example of issues that have arisen outside of, but migrated to, the United States, can be found in the Jacoby & Myers lawsuits, which were filed in federal court, that challenge the validity of state ethics rules prohibiting outside investment in law firms. Amended Complaint for Declaratory and Injunctive Relief at 2-3, *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Dep'ts, Appellate Div. of the Supreme Court of the State of N.Y.*, No. CV-11-3387, 2011 WL 7102185 (S.D.N.Y. 2011). These lawsuits cite, inter alia, developments in England and Australia. *Id.* at 3-4. For links to these complaints and additional material, see *Legal Filings*, LEGAL ACCESS FOR ALL, http://legalaccessforall.org/?page_id=45 (last visited Nov. 23, 2014).

100. While the ABA may be doing some of this, I think there is more that it could be doing. For example, I think it would be very useful for the ABA to post Professor Parker's article showing a dramatic reduction in client complaints when regulators require law firms to use "appropriate management systems." See Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & SOC'Y 466, 493 (2010).

101. I recommend that the ABA have a dedicated page on its website on which it posts links to the consultation portals operated by lawyer regulators elsewhere in the world. There might be some consultations that would be particularly relevant to U.S. lawyers or regulators and that are worthy of a direct link. For example, such a webpage might have included a link to some of the Solicitors Regulation Authority Consultations that had the potential to directly affect U.S. lawyers and firms. See, e.g., *SRA Consultation on Handbook Amendments Relating to International Practice*, SOLIC. REG. AUTHORITY (Mar. 14, 2013), <http://www.sra.org.uk/sra/consultations/international-practice.page>.

102. See, e.g., Ctr. for Prof'l Responsibility, *State Rules Comparison Charts*, ABA, http://www.americanbar.org/content/aba/groups/professional_responsibility/policy/rule_charts.html (last visited Nov. 23, 2014). For anyone who has taught Professional Responsibility, written an ethics law review article, or sat on a state ethics committee that is considering a proposed rule change, these charts are absolutely invaluable.

103. The ABA has information about state bar activities and a network of contacts that allow it

speak for more U.S. lawyers than any other organization, given the occasional request from U.S. governmental bodies and others to hear about the views of “the U.S. legal profession;”¹⁰⁴ and (4) its ability to bring together a relatively diverse group of stakeholders.¹⁰⁵

In contrast to these strengths, I believe that when it is wearing its “quasi-regulator” hat, one of the ABA’s weaknesses is that it does not move quickly, particularly with respect to complex, controversial lawyer regulation issues.¹⁰⁶ In addition to being slow, the ABA has, on more than one occasion, been accused of acting out of self-interest, and of failing to take into account interests—such as a client’s interests—that should properly be taken into account by a regulator.¹⁰⁷ In other words, the ABA has, on occasion, been accused of wearing its “trade representative” hat, when it should have been wearing its “quasi-regulator” hat.¹⁰⁸ I think this type of failure is more likely to occur with respect to issues that are complex and controversial.

Thus, if I had been on the BPC and had been asked to consider how the ABA should adapt its “quasi-regulator” function in light of globalization, which has raised many novel and controversial issues, I

to serve as a conduit for information sharing and networking among those with shared interests. *See, e.g., ABA TASK FORCE ON INT’L TRADE IN LEGAL SERVS., supra* note 68, at 7.

104. Although membership in the ABA has contracted in recent years, I am not aware of any other U.S. organization that represents a greater number of lawyers. *See About the American Bar Association, ABA, http://www.americanbar.org/about_the_aba.html* (last visited Nov. 23, 2014) (“The American Bar Association is one of the world’s largest voluntary professional organizations, with nearly 400,000 members and more than 3,500 entities.”).

105. The Commission is to be commended for including in its working groups those who belonged to other organizations and those who were not Commission members. *See ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2012), supra* note 8, at 3. To my knowledge, however, none of the working groups had lay members, as opposed to lawyers or judges.

106. *See, e.g., Stephen Gillers, A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It, 63 HASTINGS L.J. 953, 960-62, 970-72, 997-99 (2012); Moliterno, supra* note 75, at 889-90, 896. In my view, slowness can sometimes be beneficial, but it can also be a weakness.

107. *See, e.g., Susan Saab Fortney, Law as a Profession: Examining the Role of Accountability, 40 FORDHAM URB. L.J. 177, 188-209 (2012)* (discussing the U.S. failure to have mandatory malpractice insurance, in contrast to the practice in many countries, and the U.S. debates regarding mandatory malpractice insurance); Green, *supra* note 40, at 8-9; Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA’s Ancillary Business Debate as a Case Study, 35 ARIZ. L. REV. 363, 383-84, 386-87, 389-91 (1993)*; Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 LAW & SOC. INQUIRY 677, 725-28 (1989)*; Ted Schneyer, “Professionalism” as Pathology: *The ABA’s Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities, 40 FORDHAM URB. L.J. 75, 90-93, 116, 134-36 (2012)* [hereinafter Schneyer, “Professionalism” as Pathology] (articulating the 20/20 ALPS Chair’s views regarding the Commission’s failure to act, the critiques directed towards the Commission, and the “idiom of professionalism”); Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change, 50 ARIZ. L. REV. 289, 302-03, 307-10 (2008)*.

108. *See supra* note 96.

would have tried to build upon the ABA's "strengths."¹⁰⁹ Accordingly, I would have asked how the ABA, when acting as a "quasi-regulator," could serve as a global information aggregator; a global network facilitator; a convener of diverse global stakeholders; and as a representative of the legal profession to global external bodies.¹¹⁰ I would have asked the BPC to offer concrete suggestions about ways in which the ABA could best serve as an "early warning system;" share information about successful global regulatory practices; share information about global changes that might impact U.S. lawyers or regulators; and promote global dialogue and understanding about lawyer regulation.¹¹¹

2. Structural Changes and Specific Actions that Might Help the ABA Achieve Its Goals

As noted above,¹¹² I would have encouraged the BPC to identify the overarching goal and strategies that it believed the ABA should focus on in a globalized world. Once those were identified, the BPC could have focused on structural changes and specific actions to help achieve these goals. For the first part of this analysis, I would have encouraged the BPC to ask whether there were any Model Rule changes that might create "structural" changes regarding globalization that were comparable to the "structural" technology changes found in Model Rule 1.1 and Model Rule 1.6.¹¹³ Unfortunately, with respect to globalization, I cannot think of any changes to the Model Rules that would have been comparable to the changes to Model Rule 1.1 and Model Rule 1.6.

Although the BPC might have concluded that there were not any Model Rule changes that would create a globalization "gift that keeps on giving," the BPC's inquiry need not have ended at that point. If the BPC remembered the overarching goal of making the ABA as useful and active in the global arena of lawyer regulation as it is in the domestic arena,¹¹⁴ the BPC might have concluded that there were both structural

109. See *supra* notes 102-05 and accompanying text.

110. As an example of this latter role, the ABA, in conjunction with the International Bar Association and the Conference of Bars and Law Societies of Europe, recently took a leadership role in developing a guide for lawyers on issues related to the Financial Action Task Force, which is an intergovernmental international organization. See generally ABA, IBA & COUNCIL OF BARS & LAW SOCIETIES OF EUR., A LAWYER'S GUIDE TO DETECTING AND PREVENTING MONEY LAUNDERING (2014), available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf.

111. See *supra* notes 99-105.

112. See *supra* notes 88-89 and accompanying text.

113. See *supra* notes 53-56 and accompanying text.

114. See *supra* notes 103-06.

changes and specific actions the ABA might take that would help advance this goal and build upon the ABA's strengths. There are five items I would have recommended the BPC consider as part of this analysis.

My first suggestion to the BPC would have been to focus on issues related to "communication." In my view, global communication regarding lawyer regulation is necessary in order to achieve the goals identified in Part V.B.1.¹¹⁵ Accordingly, I believe that it would be useful for the ABA to have established regular and institutional lines of communication with all of the key actors in the English-speaking lawyer regulation world. This list is not exhaustive, but at a minimum, I would have encouraged the BPC to make sure that the ABA has official lines of communication and institutional relationships with the following entities: The Federation of Law Societies of Canada ("FLSC"); The Law Society of Upper Canada (and perhaps other Canadian law societies); The Law Council of Australia; The Conference of Regulatory Officers (in Australia and New Zealand); The Council of the Bars and Law Societies of Europe ("CCBE"); The UK Legal Services Board; The UK Solicitors Regulation Authority; The UK Bar Standards Board; The Law Society of England and Wales; The Bar Issues Commission of the International Bar Association; The International Conference of Legal Regulators; and The International Association of Legal Ethics.¹¹⁶

As part of the project to establish regular communication between the ABA and each of these entities, the BPC might have begun by first surveying the current method(s) of communication, and then memorializing and sharing that information. After it had collected and memorialized information about the existing methods of communication and institutional relationships, the BPC would have been in a position to evaluate whether there were any ways in which the ABA could improve its communication and relationship with each identified entity.

To provide just one of many possible examples, one can look at what I understand to be the relationship between the ABA and the FLSC. The FLSC is the coordinating body for Canada's law societies, each of which regulates the lawyers in its own province or territory.¹¹⁷ The FLSC is engaged in policy work related to lawyer regulation, and holds regular meetings for FLSC members in which it addresses topical

115. See *supra* Part V.B.1.

116. There may be additional entities engaged in tasks relevant to lawyer regulation with which it would be appropriate for the ABA to be in contact, but these are the entities I am most familiar with.

117. *About Us*, FED'N L. SOCIETIES CAN., <http://www.flsc.ca/en/about-us> (last visited Nov. 23, 2014).

issues related to lawyer regulation.¹¹⁸ To my knowledge, there is no institutionalized relationship between the “quasi-regulator” part of the ABA and the FLSC. As a result, although there are periodic exchanges between these entities, there is not a mechanism—which an official liaison role might create—that ensures regular exchanges of information about lawyer regulatory issues that are of interest in both countries. Thus, if a BPC had existed, it might have explored ways to institutionalize communication between the FLSC and the ABA.¹¹⁹ I do not know the degree to which either organization would have been open to this suggestion, but this is an issue that the BPC could have explored.

As noted, I would have urged the BPC to determine whether any improvements could be made in the ways in which the ABA communicates with the entities listed above.¹²⁰ In considering whether any improvements should be made, my bias would have been in favor of establishing permanent relationships and ongoing lines of communication. Thus, I would have focused on communication at a staff level, not just among ABA members. The reason why I would want to ensure ongoing staff communication is because staff members are more likely to have an institutional memory, they are less likely to be distracted by their “day job,” and I believe they are in a better position to foster ongoing cooperation and to share information, know-how, and experiences.¹²¹

The second question I would have asked is whether there are global entities involved in lawyer regulation that would welcome, and would benefit from, ABA support. As I have noted in previous articles, I believe that networks are powerful, and that they can be quite useful to

118. *Id.*; *Council*, FED’N L. SOCIETIES CAN., <http://www.flsc.ca/en/council> (last visited Nov. 23, 2014).

119. For example, in addition to senior executive level or staff members who could serve as liaisons to each other’s organization generally, the ABA’s CPR might have been asked whether it would be willing to add the FLSC as a liaison to the CPR/SOC Professional Responsibility Committee, which monitors professional responsibility developments throughout the ABA. Similarly, the FLSC might have been asked whether it would consider designating the CPR as an “observer” that was entitled to attend the FLSC’s Midyear or Annual Meeting.

120. *See supra* Part V.B.1.

121. A lawyer from outside the United States once told me that the ABA has a very different attitude towards staff than that found in some of the other English-speaking common-law jurisdictions, because the ABA would prefer to rely on member efforts, rather than the efforts of professional (lawyer) staff. While this observation had not occurred to me previously, I find much truth in this statement. While I cannot speak to other fields, in my view, in the field of lawyer regulation, it is important to have an experienced professional staff that is given significant responsibilities. I also think that a member-driven model is increasingly placing the U.S. legal profession at a competitive disadvantage. Because this issue involves the ABA wearing its “representational” hat, rather than its “quasi-regulator” hat, I will simply flag this issue without expanding upon it.

lawyer regulation stakeholders.¹²² In the domestic context, one of the ABA's strengths is the role it plays in serving as a network facilitator.¹²³ I would have asked the BPC to consider whether the ABA should occupy a similar role globally. If so, the BPC could have considered whether there is anything additional or different that the ABA could be doing in order to serve as a global network facilitator.

The BPC might very well have concluded that there *are* additional things the ABA could do to facilitate global lawyer regulation networks. The BPC might have asked if the ABA should issue a standing offer to publish the papers from various international lawyer regulation conferences. For example, for many years, some of the "cutting edge" information about global legal practice and lawyer regulation has been presented at the international meetings of the Association of Professional Responsibility Lawyers ("APRL"). Although my law school's law review has published the papers from two of these international conferences, I have not always been able to convince the current student editors to commit the future editors to a Symposium Issue devoted to the APRL conference.¹²⁴ In my view, if the ABA worked out an agreement with the relevant entities pursuant to which the ABA agreed to publish the papers from international conferences, this would help nurture and support a small, but growing, global lawyer network.¹²⁵

122. Laurel S. Terry, *Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators*, B. EXAMINER, June 2013, at 18, 18-19, 22-23 [hereinafter Terry, *Creating an International Network*]; Laurel S. Terry, *Preserving the Rule of Law in the 21st Century: The Importance of Infrastructure and the Need to Create a Global Lawyer Regulatory Umbrella Organization*, 2012 MICH. ST. L. REV. 735, 745, 752-53, 756-57.

123. See *supra* note 103 and accompanying text.

124. See Laurel S. Terry, *Foreword: 2008 Global Legal Practice Symposium*, 27 PENN. ST. INT'L L. REV. 269, 269-70 (2008); Laurel S. Terry, *Foreword: 2004 Global Legal Practice Symposium*, 22 PENN. ST. INT'L L. REV. 527, 527 (2004); see also Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 1, 1-2 (1999) (publishing the papers from the 1998 Paris Forum). *But see* Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, 2010 J. PROF. LAW. 3, 3-5 (papers from this Association of American Law Schools ("AALS") Annual Meeting program were published in the *Professional Lawyer*, rather than the law review at my law school). To my knowledge, the papers from the 2012 APRL Istanbul conference were never published.

125. The BPC might recommend, for example, that the ABA attempt to become a regular publication outlet for papers presented at the biennial International Legal Ethics Conferences ("ILEC") sponsored by the International Association of Legal Ethics ("IAOLE"). I do not know if the ABA would be interested in doing this, but speaking as an IAOLE Board Member, I certainly would encourage the IAOLE Board to include the *Journal of the Professional Lawyer* (or a law school's law review), as well as a commercial journal, as an outlet for publication of ILEC conference papers. Unlike some commercial publishers, articles published in the *ABA Journal of the Professional Lawyer* are available online and may be reprinted on Social Science Research Network and on an author's webpage. The ABA might not be needed if a law school's law review agreed to publish these papers on a standing basis (as happens with the AALS' *Journal of Legal Education*). In the absence of this kind of agreement, however, it would be preferable to have a standing

If the ABA decided that it wanted to serve as one of the leading facilitators for global lawyer regulation networks, there might be additional actions it could consider, including asking the National Organization of Bar Counsel (“NOBC”) whether there was anything the ABA could do to help the NOBC maximize the benefit of its international membership.¹²⁶ One might also ask the nascent International Conference of Legal Regulators (“ICLR”) whether there was any administrative or other support the ABA might provide.¹²⁷ During the ICLR meeting I attended, regulators offered to share with each other their policies on similar topics.¹²⁸ To my knowledge, however, this has not happened. Nor does it appear that the ICLR has the type of robust intranet that the CPR or NOBC have. If I had been on the BPC, I would have asked the ICLR whether it would like the ABA’s assistance in posting or distributing lawyer regulation policies from around the world. It is certainly possible that neither the NOBC nor the ICLR would have wanted the ABA’s assistance. It is also possible that there would have been resistance within the ABA to helping other organizations. But, because these issues were never explored, we do not know whether there might have been support for having the ABA facilitate global lawyer regulation networks.

The third concrete issue that I would have asked the BPC to examine is whether there is anything the ABA could be doing better to facilitate data-driven decision-making in the area of lawyer regulation. One of the issues that has repeatedly troubled ABA-policy-making is the question of where the “burden of proof” should lie when voting on lawyer regulation proposals.¹²⁹ Commentators on both sides have

arrangement to publish ILEC articles in a journal that allows electronic access to the final versions. Cf. Laurel S. Terry, *Reflections on US Policies Regarding ‘Effective Regulation and Discipline’ and Foreign Lawyer Mobility: Has the Time Come to Talk About the Elephant in the Room?*, 16 LEGAL ETHICS 284, 294, 296-97, 302-04 (2014) (limited access).

126. In my view, the NOBC has not done nearly as much as it could have to take advantage of its international membership. Given the ABA’s strengths as an information aggregator and as a network facilitator, I think there might be additional ways in which the ABA and NOBC could work together to develop global legal practice resources and facilitate the NOBC’s global network.

127. See generally Terry, *Creating an International Network*, *supra* note 122 (providing additional information about the ICLR).

128. See generally *id.*

129. See, e.g., Gillers, *supra* note 93, at 407-10 (addressing the issue of burden of proof when discussing how to improve the Bar’s contribution to self-regulation); Schneyer, “*Professionalism as Pathology*,” *supra* note 107, at 120-22 (discussing the role of burden of proof and empirical evidence in the negative comments to the Commission’s ALPS discussion draft); see also Laurel S. Terry, *An “Issue Checklist” for the ABA Commission on Multidisciplinary Practice* (1999), reprinted in MULTIDISCIPLINARY PRACTICE: STAYING COMPETITIVE AND ADAPTING TO CHANGE 129, 131 (Gary A. Munneke & Ann L. MacNaughton eds., 2001). Question D in the “Issue Checklist” I developed for the ABA Commission on Multidisciplinary Practice (“CMDP”) stated

repeatedly pointed to the lack of data with respect to many lawyer regulation issues. The reason why I consider this to be a “globalization” big picture issue is because there have been influential examples outside of the United States of cooperation and data-sharing among regulators and academics. Professors Christine Parker and Susan Saab Fortney, for example, have published influential papers that have used Australian regulatory data.¹³⁰ Regulators around the world have been interested to learn that in Australia, a particular type of lawyer regulation significantly reduced client complaints.¹³¹ If I had been on the BPC, I would have encouraged it to explore whether there is anything the ABA could be doing differently in order to facilitate greater cooperation and data-sharing amongst regulators and academics.¹³² Could the ABA, for example, act as a “matchmaker,” who puts together academics with empirical research expertise and regulators who are interested in

the following:

Where does the “burden of proof” lie? That is, should the ABA revise MRPC 5.4 *unless* it is convinced the standards in Section A, above (for example, client protection/public interest) will be injured? Or should the CMDP recommend maintaining the status quo unless it is convinced that these values will *not* be injured?

Id. My recommended answer was that:

Those seeking the status quo have the “burden of proof”: Since MRPC restricts both lawyer and client autonomy and choice and since all lawyer regulation should be justifiable, the ABA should retain the current version of MRPC 5.4 only if it is convinced that the regulatory interests set forth in A above require the current rule.

Id. The alternative answer that I identified said:

Those seeking to change the rule have the “burden of proof”: Before it recommends any change in the status quo, the ABA should be convinced that the core values of the legal profession will not be harmed and that the regulatory aims can be protected should MRPC 5.4 be revised and MDPs permitted.

Id.

130. See Susan Saab Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152, 165-82 (2012); Parker et al., *supra* note 100, at 481-93. See generally Susan Saab Fortney, *The Role of Ethics Audits in Improving Ethical Conduct: An Empirical Study on Management-Based Regulation of Law Firms*, 4 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 112 (2014).

131. Cf. Terry, *Creating an International Network*, *supra* note 122, at 21-24 (summarizing topics at the inaugural ICLR); see also *Proactive Regulation*, INT’L CONF. LEGAL REGULATORS, <http://www.international-conference-of-legal-regulators.org/past-conferences/london-2012/proactive-regulation> (last visited Nov. 23, 2014) (listing a session on Proactive Regulation).

132. See, e.g., Laurel S. Terry, *Regulation and Theory: What Does Reality Have to Do with It?*, JOTWELL (Apr. 2, 2012), <http://legalpro.jotwell.com/regulation-and-theory-what-does-reality-have-to-do-with-it> (reviewing Christine Parker & Lyn Aitken, *The Queensland “Workplace Culture Check:” Learning from Reflection on Ethics Inside Law Firms*, 24 GEO. J. LEGAL ETHICS 399 (2011)).

academic studies about the efficacy of their policies, and who are willing to share their data?¹³³

The fourth question I would have asked is whether there is anything additional the ABA should be doing in order to identify on an ongoing basis: (1) specific issues that need additional work; and (2) pilot projects or policies that seem innovative, and that might be worth monitoring and publicizing. A 2013 law review article by former Commission member, Professor Gillers, provides an example of the types of “specific issues” that the ABA might publicize.¹³⁴ In that article, Professor Gillers identified a number of specific issues that he believed were ripe for additional work.¹³⁵ The BPC might have considered what type of structure would be most effective to communicate these types of “hot topic” issues to the U.S. legal profession. It might have asked whether the ABA should host a new webpage devoted to cutting-edge global lawyer regulation issues similar to the webpage it recommended for technology issues.¹³⁶

In addition to considering webpage changes regarding “hot topics,” the BPC might have asked whether it would be useful to have the ABA list interesting pilot project or empirical work on a webpage. For example, although many lawyer regulation academics and some regulators are familiar with the paper written by Parker, Tahlia Gordon, and Steve Mark, finding a two-thirds reduction in client complaints after implementation of an “appropriate management systems” requirement, and the follow-up article written by Fortney and Gordon,¹³⁷ not all U.S. regulators may be familiar with these articles. The BPC might have concluded that there is a useful role the ABA can play in publicizing pilot projects and these types of empirical studies.¹³⁸ The BPC might also have recommended that the ABA add a webpage or modify its

133. For information about what is involved, see Susan Saab Fortney, *Taking Empirical Research Seriously*, 22 GEO. J. LEGAL ETHICS 1473, 1477-82 (2009).

134. See Gillers, *supra* note 93, at 406-18.

135. *Id.*

136. See *supra* note 77 and accompanying text (discussing the Commission’s 2012 Informational Report that recommended the creation of a website devoted to technology and outsourcing issues).

137. See Fortney & Gordon, *supra* note 130, at 172; Parker et al., *supra* note 100, at 471, 493.

138. Because the Commission cited Professor Parker’s paper in one of its discussion papers, the BPC might have concluded that nothing additional needed to be done. On the other hand, if it examined this issue, the BPC might have concluded that there were additional steps that the ABA could take to publicize innovative lawyer regulation developments that have had a proven positive impact—such as, by highlighting them on a new webpage. In addition to the Parker et al. article, this type of webpage could include the resource material and links that were distributed in 2014 in conjunction with the “Regulatory Innovations” panel at the ABA’s annual ethics conference. See REGULATORY INNOVATION, *supra* note 83.

webpages, so that it collects in one spot, sources of information about global lawyer regulation, including the free quarterly Council of Bars and Law Societies of Europe (“CCBE”) Info newsletter,¹³⁹ the CCBE Committees webpage,¹⁴⁰ and the lawyer regulation page of the International Bar Association (“IBA”).¹⁴¹

As the fifth and final task, I would have asked the BPC to consider whether it would be appropriate for the ABA to “nudge” a particular state or states to adopt policies based on global developments, so that this state could serve as a “living laboratory” to which other states might look. For example, in light of the Australian data, should the ABA encourage a U.S. jurisdiction to adopt either proactive regulation, entity regulation, or both? I can imagine arguments on both sides of this issue. Some might argue that it would be inappropriate for the ABA to “nudge” states in the absence of existing ABA policy. Others, however, might think that it is perfectly appropriate for the ABA to share information about existing global developments, and brainstorm with U.S. jurisdictions about the pros and cons of trying out various innovations, especially if the state agreed to collect data so that it could serve as a living laboratory.¹⁴² The BPC might have been a useful forum in which to have this conversation about whether, and how, the ABA should

139. See, e.g., *Newsletter: CCBE Info*, COUNCIL BARS & L. SOCIETIES EUR., <http://www.ccbe.eu/index.php?id=9&L=0> (last visited Nov. 23, 2014).

140. *CCBE Committees and Working Groups*, COUNCIL BARS & L. SOCIETIES EUR., <http://www.ccbe.eu/index.php?id=25&L=0> (last visited Nov. 23, 2014).

141. *Documents on the Regulation of the Legal Profession*, INT’L BAR ASS’N, http://www.ibanet.org/documents_on_the_regulation_of_the_legal_profession.aspx (last visited Nov. 23, 2014). I have tried to include some of these citations on my “Global Legal Practice Resources” webpage. See Laurel S. Terry, *Global Legal Practice Resources*, PENN ST. DICK. SCH. L., <http://www.personal.psu.edu/faculty/l/s/lst3/globalprac.htm> (last visited Nov. 23, 2014).

142. See generally Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV. 233 (2013). Professor Fortney has a number of ideas, based upon her research, about possible pilot projects that might improve lawyer conduct. I would like to see a pilot project in which a U.S. jurisdiction implemented its existing Model Rule 5.1 in an Australian-like fashion. As I have spoken about (but not yet written about), I would like to see one or more states add two questions to their bar dues statements: (1) are you subject to Model Rule 5.1?; and (2) are you in compliance with Model Rule 5.1? The first question would go a long way towards ensuring that lawyers were familiar with Model Rule 5.1, which requires “systems” to reduce the chance of rule violations. The second question would require every law firm partner and supervisory lawyer to assure themselves that their firm has systems in place to promote compliance with the rules of professional conduct, which the research suggests makes a difference. The state regulator could post on a webpage a list of some of the key problem areas (e.g., communication, deadlines, and fees), along with law practice management-type information about systems one can use to minimize the chance of these problems occurring. This approach could come close to emulating the successful Australian “appropriate management systems” approach without a rule change, and with relatively little additional expense.

“nudge” states on controversial issues on which it may be premature or difficult to obtain ABA policy through the ABA House of Delegates.

In sum, I believe that it would have been worthwhile to have had a BPC identify structural changes and specific steps that the ABA should undertake in order to help it retain its relevance and its usefulness to U.S. lawyers and regulators who operate in a global environment.

3. Resource Allocation

It is rare that an organization does not have to consider its resources when determining how best to move forward. Thus, one of my “charges” to the BPC would have been to consider whether, in light of the goals and recommendations described above, the ABA would require any new resources, or whether it could reallocate any of its existing resources. This analysis would obviously depend on what actions the BPC, the Commission, and ultimately, the ABA governing powers, decided to take.

I believe that many of the suggestions found in this Article would not require extensive resources to implement. Some of them, however, might require additional resources. For example, if the ABA were to serve as a global information aggregator, it might need to devote additional staff resources to creating and maintaining these webpages.¹⁴³ Other suggestions might require more significant resources. For example, if the ABA staff is to establish liaison relationships with other organizations involved in lawyer regulation issues, there may need to be additional travel funds made available.¹⁴⁴ Thus, the ABA might need to add or reallocate staff resources in order to implement some of the suggestions in this Article.

143. See *supra* notes 122-41 and accompanying text.

144. Much can be accomplished virtually, but the literature suggests that virtual relationships work better after an initial face-to-face meeting. See, e.g., Frank Siebdrat et al., *How to Manage Virtual Teams*, MIT SLOAN MGMT. REV., Summer 2009, at 63, 67-68. The authors stated that:

Periodic face-to-face meetings of dispersed team members can be particularly effective for initiating and maintaining key social processes that will encourage informal communication, team identification and cohesion. A project kick-off meeting, for example, can be used to bring everyone together in one location for several days so that people can develop a shared understanding of the task at hand and begin to identify with the team. These processes, in turn, will support task collaboration during the project. The time and expense necessary to provide such opportunities for face-to-face interactions then become an investment that can lead to large returns if the virtual team is able to take full advantage of its diverse expertise and heterogeneity.

Id.; see also JARED Z. FERRELL & KELSEY C. HERB, SOC’Y FOR INDUSTR. & ORGANIZATIONAL PSYCHOL., IMPROVING COMMUNICATION IN VIRTUAL TEAMS 5 (2012), available at <http://www.siop.org/WhitePapers/Visibility/VirtualTeams.pdf>; Mark Mortensen & Michael O’Leary, *Managing a Virtual Team*, HARV. BUS. REV. BLOG NETWORK (Apr. 16, 2012, 9:52 AM), <http://blogs.hbr.org/2012/04/how-to-manage-a-virtual-team>.

I assume that the likelihood of additional resources is small. Thus, when putting forth the recommendations in this Article, I have assumed that resources will need to be reallocated from an existing source. Therefore, the BPC might have been asked to consider whether there were any resource reallocations that it recommended. Although the following might have been beyond the scope of the authority of the BPC, if I had been on this committee, I would have suggested that the BPC and the Commission make the recommendations discussed in this Part to the appropriate authorities within the ABA. These suggestions are likely to be unpopular in many quarters, but they strike me as sensible recommendations in light of the goals that I would have articulated for the ABA in a global lawyer regulatory environment.

One way in which resources might be reallocated is by avoiding lengthy and expensive efforts to obtain an ABA House of Delegates resolution on an issue that is complex, and that is likely to be perceived as controversial. As noted earlier, I think that moving quickly on complex, controversial issues is not one of the ABA's attributes.¹⁴⁵ For this reason, rather than attempting to obtain an ABA House of Delegates resolution on an issue such as alternative legal practice structures, which one can predict has a high probability of lengthy debate, and perhaps, failure, I think the ABA would be better off investing the same amount of money in activities that play to the ABA's strengths as an information aggregator, information distributor, network facilitator, and magnet for gathering diverse perspectives.¹⁴⁶ This is why, for example, in Part IV.B.2, above, I did not recommend that the ABA respond to new and controversial lawyer regulation issues by attempting to obtain a resolution from the ABA House of Delegates.

I do not mean to say that the ABA should never address through the resolution process lawyer regulation issues. There are certainly times when it is important to have an ABA resolution on the books. This is particularly true when external actors—such as the Office of the U.S. Trade Representative—want to know the position of the U.S. legal profession on a particular issue.¹⁴⁷ Because the ABA is the largest legal profession representational body in the United States, it is the natural entity to respond; but, the ABA cannot provide an answer unless it has adopted a policy on point. One of the benefits of the Commission's globalization work is that the ABA now has policies in place on four of

145. See *supra* note 106 and accompanying text.

146. See *supra* notes 102-05 and accompanying text.

147. For example, I know from personal experience that the USTR has asked the ABA Task Force on International Trade in Legal Services for input on a number of issues that have come up during trade negotiations.

the five ways in which foreign lawyers might actively practice in the United States.¹⁴⁸ These issues arise in discussions about legal services and trade negotiations.

While ABA policies can serve a useful purpose, I submit that when trying to respond to global legal practice developments, the ABA would be better off by allocating most of its resources in the manner outlined in this Article, rather than by spending the resources on efforts to obtain an ABA House of Delegates resolution that responds to a complex, controversial, contemporary issue. Moreover, recent experience has shown that even if the ABA successfully adopts a policy, not all states will follow the ABA's lead.¹⁴⁹ In sum, in my view, it would be better for the ABA to spend its limited resources: establishing institutional lines of communication; facilitating global lawyer regulation networks; identifying appropriate issues; nudging one or more U.S. jurisdictions to start a pilot project using that idea; publicizing these state experiments; and then encouraging academic-regulator cooperation that will facilitate data-driven decision-making.

My second recommendation regarding resources is that the ABA should reallocate resources from its travel budget for members, and reassign some of those resources to its staff travel budget. My understanding is that the ABA spends a relatively significant sum on international travel for its members who are in leadership positions. It also reimburses members who attend some of the international organizations mentioned previously. While I recognize that a leadership role entails many sacrifices in a lawyer's practice and that these international trips may be viewed as a member's "reward" for service, I recommend that the BPC (and later the ABA itself) should examine the spending patterns to see if some money that is spent on member trips might be reallocated to staff trips. The reason why I have suggested this is because I believe that an international trip by a staff member is more likely to establish an ongoing permanent relationship, thus facilitating

148. See, e.g., Laurel S. Terry, *Summary of State Foreign Lawyer Practice Rules*, ABA (Feb. 9, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf.

149. See ABA Standing Comm. on Client Prot., *State Implementation of ABA Model Court Rule on Insurance Disclosure*, ABA (Aug. 9, 2011), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/malprac_disc_chart.authcheckdam.pdf (listing the states that adopted, considered adopting, and decided not to adopt, the Model Rule on Insurance Disclosure); ABA Standing Comm. on Client Prot., *State Implementation of ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*, ABA (Apr. 17, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf.

the goals identified previously.¹⁵⁰ My sense is that money paid for a member trip may reward the member and may provide goodwill within the international counterpart organization, but that the money is not serving as an investment in an ongoing, long-term relationship.¹⁵¹ Thus, when evaluating whether and how resources need to be reallocated, I would put a priority on resources that serve as an investment in future, ongoing institutional relationships. It may turn out that neither of these resource allocation suggestions are sensible or politically acceptable. But, I would have at least asked the BPC to consider the issue of resources, and whether any reallocation was appropriate, given the globalized world in which the ABA and U.S. lawyers now operate.

4. Examining the ABA's Governing Documents

After the BPC concluded its work with respect to the "charges" discussed earlier,¹⁵² I would have had the BPC review the ABA's governing documents to see if any changes needed to be made before the BPC's recommendations could be implemented. The documents that I would have encouraged the BPC to examine would have included: the ABA's mission statement;¹⁵³ the ABA Constitution;¹⁵⁴ and the information on international activities found in the ABA manual of internal policy and procedures, informally known as the "Green Book."¹⁵⁵ Given the power of inertia and the difficulty involved in changing these types of documents, I would have asked the BPC to recommend only those changes that it deemed absolutely necessary.

While it is difficult to predict what changes, if any, might be needed in the absence of a BPC set of recommendations, there were a few changes that struck me as absolutely necessary. I might prefer a

150. See *supra* Part V.B.1.

151. See *supra* notes 120-21 and accompanying text.

152. See *supra* Part V.B.

153. See *ABA Mission and Goals*, *supra* note 93.

154. AM. BAR ASS'N, CONSTITUTION AND BYLAWS: RULES OF PROCEDURE HOUSE OF DELEGATES 2013-2014, at § 1.2 (2013). The Constitution states:

The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.

Id.

155. See AM. BAR ASS'N, POLICY AND PROCEDURES HANDBOOK 139-43 (2013-14), available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_2014_greenbook_optimized.pdf.

somewhat different version of both the ABA's Mission and Goals and its Constitution, but neither of these documents would prohibit the types of changes I have suggested in this Article. If my suggestions were adopted, however, there would probably need to be additions to the International Chapter of the "Green Book."¹⁵⁶ It is possible that there are additional governing documents, of which I am unaware, that would need to be reviewed. I would have asked the BPC to evaluate all relevant documents, and, if necessary, recommend changes to the appropriate ABA body.

C. Is It Fair to Criticize the ABA Commission on Ethics 20/20 for this "Missed Opportunity"?

The thesis of this Article is that the Commission accomplished less than it might have with respect to its globalization mission.¹⁵⁷ This Article criticizes the Commission for its failure to establish a BPC,¹⁵⁸ and for focusing exclusively on specific globalization issues, rather than establishing a structural approach comparable to what the Commission did with respect to its technology mission.¹⁵⁹ One might ask whether it is fair for this Article to criticize the Commission *after* it completed its work, rather than submitting these comments to the Commission while it was still in existence. While the "fairness" charge might be warranted,¹⁶⁰

156. See, e.g., *id.* at 140 (specifying representation to the IBA). In my view, a new subsection should be added to chapter eleven that addresses the topic of communication between the ABA and the entities discussed *supra* at notes 115-21 and accompanying text with respect to lawyer regulation issues.

157. See *supra* Parts III-IV.

158. See *supra* Part IV.A.

159. See *supra* Part IV.

160. Although I never formally submitted the comments found in this Article to the Commission, I shared some of these ideas with the Commission in February 2010. During the Commission's first public hearing held in Orlando, Florida, I agreed to testify when another witness could not appear. Although I had not prepared remarks ahead of time, and my testimony is not as articulate as it might have been, part of my advice to the Commission was that it should find room within the committee structure it had just created to address issues of a more structural nature, as well as the specific issues (and committees) it had identified. I testified that: "[s]o again, I know you set up the subcommittee structure yesterday, but those are three issues that I hope find a home at someplace in one of the committees," referring to the issues of: (1) whether there is a "better way than the status quo for the ABA and the U.S. legal profession to be responding and commenting on and participating in lawyer regulatory developments elsewhere in the world;" (2) whether the U.S. should develop regulatory objectives; and (3) whether the Commission should address the issue of differential regulation, which has been a topic of interest elsewhere in the world and an argument increasingly likely to be heard in the United States. Laurel S. Terry, Professor of Law, Penn State Dickinson Sch. of Law, Statement at the ABA Commission on Ethics 20/20 Proceeding 153-65 (Feb. 5, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/feb_2010_hearing_transcript.pdf.

I hope that if some of the ideas in this Article are useful, its timing may be excused.

The second reason why this Article might be viewed as unfair is because it arguably suggests solutions that were outside the scope of authority granted to the Commission, or that were politically impossible to achieve. I do not accept the validity of either of these points, however. The Commission's response to its technology mission included not only rule changes, but a number of recommendations regarding the methods or "systems" by which the ABA responds to technology developments.¹⁶¹ I believe that the Commission had similar latitude under its mission statement to develop "systems" and "big picture" recommendations regarding globalization.

I also am not convinced that "politics" would have prevented the sorts of measures addressed in this Article. Once again, I may be naïve, but as noted earlier, I do not think there would have been overwhelming opposition if the Commission had created eight, rather than seven, working groups in February 2010 at its first public meeting, and if the eighth working group had been given the title of "Big Picture Committee" and had been given the broad charge of asking what kind of forward-looking structural changes, if any, might be appropriate in light of globalization. It is difficult for me to imagine that there would have been overwhelming opposition if the BPC had recommended ongoing and improved communication between the ABA and lawyer regulators—or "quasi regulators"—located around the world. It is similarly hard for me to imagine an outpouring of opposition if the BPC encouraged regulators and academics to cooperate to develop data, or if it had advised the ABA to publicize pilot projects and their results, and to operate as an early warning and education center with respect to new lawyer regulation issues.

Although the suggestions in this Article may not be particularly innovative or controversial, I do not believe that means that they are unimportant. From my perspective, the ABA has not been doing nearly as good of a job in the global arena of lawyer regulation as it has done in the domestic arena. The ABA has tremendous strengths when it serves as an information aggregator and distributor, a network facilitator, and when it is able to bring together representatives from diverse perspectives.¹⁶² I would like to see the ABA operate as strongly in these areas in the global lawyer regulation arena as it does in the domestic arena.

161. See *supra* notes 51-61 and accompanying text.

162. See *supra* notes 102-05 and accompanying text.

VI. CONCLUSION

The Commission was asked to “to perform a thorough review of the Model Rules and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.”¹⁶³ Although some have criticized the Commission for its lack of results, I believe this critique is unfair. The Commission successfully shepherded ten resolutions through the ABA House of Delegates.¹⁶⁴ Several of these “technology” resolutions are likely to have a long-lasting impact because they established principles that will adapt to future technological developments, and they recommended new tasks for the ABA going forward.

With respect to its globalization mandate, the Commission’s work led to the adoption of the three inbound foreign lawyer resolutions which provided ABA policy on two methods by which foreign lawyers might practice in the United States, and for which there previously had been an absence of ABA policy.¹⁶⁵ The Commission’s globalization work extended further because its referral provided the impetus for the August 2013 adoption of a Formal Ethics Opinion regarding the division of fees with firms that legally include non-lawyers.¹⁶⁶ The Commission also produced a number of thoughtful and well-researched discussion papers on globalization-related topics;¹⁶⁷ these papers undoubtedly will be useful resources for years to come. Finally, the Commission heightened awareness within the United States of a number of important global developments. Although the Commission did not offer any recommendations with respect to these issues, I predict that the discussion of many of these issues has not concluded, and that the framework for discussion that the Commission provided will prove useful.¹⁶⁸

163. ABA Comm’n on Ethics 20/20, *About Us*, *supra* note 1.

164. ABA Comm’n on Ethics 20/20, *ABA Commission on Ethics 20/20*, *supra* note 13.

165. *See supra* notes 18-21 and accompanying text (noting that the ABA now has policy on four of the five methods by which foreign lawyers may actively practice in the United States).

166. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 464, *supra* note 32 (discussing the division of legal fees with other lawyers who may lawfully share fees with non-lawyers).

167. *See* ABA Comm’n on Ethics 20/20, *Work Product*, *supra* note 11.

168. To take just one example, although the Commission explored, but decided not to move forward with proposals related to fee sharing among lawyers and non-lawyers, *see supra* note 32 and accompanying text, that issue has been actively considered by a committee of the Association of the Bar of the City of New York. *See* E-mail from David Lewis, Chair, The Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Responsibility, to Jamie S. Gorelick & Michael Traynor, ABA Comm’n on Ethics 20/20 (July 19, 2012) (on file with the *Hofstra Law Review*). The Commission’s work will undoubtedly be consulted in this and other projects. For example, the Commission’s work undoubtedly will prove useful to the ABA Commission on the Future of

Despite these accomplishments, which are significant, the thesis of this Article is that the Commission accomplished less than it might have with respect to its globalization mission.¹⁶⁹ In my view, the Commission would have accomplished even more if it had asked how the ABA itself should respond to globalization with respect to its lawyer regulation mission. While the ABA can adapt without the imprimatur of a Commission, I believe that it would have been useful for the ABA to have had the Commission formally (and publicly) consider this question. For this reason, I regret that the ABA did not create a BPC.¹⁷⁰ If the Commission had created a BPC in February 2010, when it established its seven working groups, that committee could have considered whether to recommend any changes in the way in which the ABA functions with respect to global legal practice and lawyer regulation.¹⁷¹ This Article has argued that a BPC could have taken into account the ABA's strengths when designing its goals for operating in a global lawyer regulation arena, and could have suggested structural changes and specific steps that would help the ABA better serve U.S. lawyers and regulators.¹⁷² For example, this Article suggests that the BPC might have identified those global entities with which regular, institutional communication is desired, and then examined whether any improvements could be made in the current systems of communication.¹⁷³ Also, the BPC might have asked whether there are any entities involved in global lawyer regulation issues that might welcome, and benefit from, ABA support.¹⁷⁴ The BPC might have further asked whether there is anything the ABA could be doing to encourage and facilitate greater cooperation among regulators and academics in order to foster data-driven decision-making.¹⁷⁵ Finally, the BPC might have suggested that the ABA create or expand web-based resources that would publicize successful lawyer regulation innovations, and that would serve as an "early warning" system for issues that U.S. regulators might have to confront in the future.¹⁷⁶ The BPC might also have been asked to consider whether there were sufficient resources to

Legal Services, which was established in August 2014. *See Commission on the Future of Legal Services*, ABA, http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html (last visited Nov. 23, 2014).

169. *See supra* Parts IV–V.

170. *See supra* Part V.

171. *See supra* Part V.

172. *See supra* Part V.B.

173. *See supra* Part V.B.2.

174. *See supra* Part V.B.2.

175. *See supra* Part V.B.2.

176. *See supra* Part V.B.

achieve these goals, and whether it would recommend any changes to the ABA's governing documents.¹⁷⁷

Although some may believe otherwise, I am not willing to concede that ABA politics would have prevented the Commission from making some of the changes discussed in this Article. Moreover, the only way to know whether this is true is to try and fail. Thus, although I believe the ABA Commission's failure to appoint a BPC led to missed opportunities, I do not believe this needs to be a permanent situation. In my view, if the ABA is interested in exploring the "road not taken" which was discussed in this Article, it is not too late to do so.¹⁷⁸ The "big picture" is still out there, waiting for analysis.

177. *See supra* Part V.B.3–4.

178. *See supra* Part V.