Task Force on International
Trade in Legal Services
AMERICAN BAR ASSOCIATION
740 Fifteenth Street, NW
Washington, DC 20005

Defending Liberty
Pursuing Justice

October 3, 2011

Ms. Jamie Gorelick and Mr. Michael Traynor
Co-Chairs
ABA Commission on Ethics 20/20

Via email: ethics2020@americanbar.org

Dear Ms. Gorelick and Mr. Traynor:

The ABA Task Force on International Trade in Legal Services (ITILS) is writing to request that the ABA Commission on Ethics 20/20 reconsider its position related to Rule 8.5(b)(1)'s choice of law "fallback provision" in situations involving international and foreign tribunals, including international arbitral tribunals. ITILS believes that it is appropriate for this issue to receive a more thorough airing than it is has to date and that there is more interest in this issue than the public response might suggest.1

ITILS has not yet taken an official position on the 8.5(b)(1) international tribunal fallback provision, but hopes to do so in the future. In the meantime, we understand that because of the schedule of the Commission's in-person meetings, it might be useful for ITILS to provide some preliminary feedback on this issue. Accordingly, we are writing to advise the Commission that based on discussion of this issue at our August 7 and September 22, 2011 meetings, there is significant (albeit not uniform) support within ITILS for modifying the "fallback provision" in Rule 8.5(b)(1) as it applies to U.S.-licensed lawyers appearing before foreign and international tribunals. The current fallback rule – the status quo – states that U.S. lawyers who appear before a foreign or international tribunal must comply with the ethics rules of the [foreign] jurisdiction in which the tribunal sits unless the tribunal's rules specify otherwise. Those individuals who have signed the attached page are among those who believe that the status quo in Rule 8.5(b)(1) is problematic in the international setting and should be changed. Because ITILS has not yet formed an official position on this issue, we are signing this letter in our individual capacities.

One of the rationales for the Commission's preliminary determination to leave Rule 8.5(b)(1) untouched was the Commission's view that the ABA should work with others to encourage international tribunals to develop rules that would apply to all advocates appearing before them. ITILS and the undersigned individuals wholeheartedly agree that this is an appropriate and

1 To date, the Commission has received two comments in support of changing the "fallback" provision of Rule 8.5(b)(1) and one comment in opposition to this idea. In October 2010, Professors Terry and Rogers presented a proposal for change to the Commission. The Commission referenced this proposal in its January 18, 2011 "Issues Paper: Choice of Law in Cross-Border Practice" and requested comments. The Commission received one comment in support of this proposal from Gary Born and one comment in opposition to this proposal. (The comment in opposition was jointly submitted by from Brian Toohey and Anne Marie Morris.) These Comments are available at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rule_8_5_comments.authcheckdam.pdf

worthwhile goal. We will support those efforts. We also agree that if these efforts are successful, the problems addressed in this letter will disappear because U.S.-licensed lawyers will not need to use the "fallback" choice of law provision found in Rule 8.5(b)(1).

Although such efforts may ultimately be successful, until they are, the ***status quo of the current rule*** puts U.S. lawyers in a problematic situation. We think it is unacceptable to ask U.S. lawyers to wait years and perhaps decades for a resolution of this untenable situation. (The current situation dates from 2003, when the MJP Commission modified Comment 7 to Rule 8.5 to make it applicable to U.S. lawyers engaged in transnational practice. Prior to 2003, Rule 8.5(b)(1) did not apply to such lawyers.) ITILS urges the Commission to reconsider this issue and the undersigned urge the Commission to revise the fallback provision in Rule 8.5(b)(1) as applied to international tribunals. This action does not preclude the Commission from encouraging other ABA entities to work with international partners to ensure that international tribunals adopt rules for lawyers appearing before them.

The undersigned believe that a limited change to Rule 8.5(b)(1)'s fallback provision would bring the rule in line with the expectations of U.S. lawyers who practice before international and foreign tribunals. In our experience, most U.S. lawyers who appear before international tribunals do not routinely research and attempt to comply with the ethics rules of the foreign jurisdiction in which the international tribunal sits. In many cases, the foreign ethics rules and law of lawyering may not be available in English and may not have anything at all to do with the dispute. Indeed the tribunal's location might have been selected precisely because it has *no connection* to the dispute. (The international situation is different than the domestic situation in which venue rules require some connection between the dispute and the jurisdiction in which the tribunal sits.)

In addition to bringing the rule in line with the expectations of U.S. lawyers, we believe that changing the fallback provision would be fair and appropriate. We are unaware of any other foreign jurisdiction that has a choice of law rule that is comparable to Rule 8.5(b)(1). Thus, having the current fallback rule does not ensure that all advocates appearing before an international tribunal use the same rules. Nor is such a rule necessary in order to protect the interests of the foreign or international tribunal or the foreign jurisdiction in which it sits. The change we recommend would still require a U.S. lawyer to follow rules of conduct explicitly set forth by a tribunal, the entity creating that tribunal, or the foreign jurisdiction in which the tribunal sits. These entities have the power to exercise control over U.S. licensed lawyers. We simply ask that where these entities have chosen ***not*** to exercise that power – which is a common situation – the fallback provision in the ABA Model Rules of Conduct should specify that U.S. lawyers are subject to U.S. rules of conduct not foreign rules.

Some may suggest that the status quo in Rule 8.5(b)(1) is acceptable because lawyers practicing before international tribunals have not been subject to discipline for failure to comply with foreign ethics rules. We suggest that the lack of discipline cases is not an appropriate measure of whether the status quo is acceptable. The mere existence of the rule means that responsible and conscientious lawyers will undertake efforts to comply with it. If the rule is burdensome and expensive to comply with, then some or all of these costs may be passed on to clients. Thus, if the Commission agrees that the current fallback rule is unnecessary and inappropriate in the international tribunal setting, the lack of discipline cases is not a sufficient justification for

leaving the status quo as is.

We understand that the Commission may be hesitant to adopt the Terry-Rogers' request to change the black letter of Rule 8.5(b)(1). The undersigned write in support of the ***concept*** of changing the current fallback provision and are not wedded to any particular language. We recognize that the Commission might find it sufficient to change Comment [7] to Rule 8.5 along the lines indicated on the enclosed document.

Sincerely yours,

Glenn Hendrix
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