

# AALS PROFESSIONAL RESPONSIBILITY SECTION NEWSLETTER



This newsletter is a forum for the exchange of information and ideas. The opinions expressed here do not represent the position of the Professional Responsibility Section of the Association of American Law Schools.

## AALS PROFESSIONAL RESPONSIBILITY SECTION ANNOUNCEMENTS

### AALS ANNUAL MEETING & SECTION PROGRAM



This year's AALS Annual Meeting will be in San Diego from January 6<sup>th</sup> through January 10<sup>th</sup>, 2009. At the Annual Meeting the Professional Responsibility

Section will sponsor a two-session joint program with the Section on Clinical Education. This program is scheduled for Wednesday, January 7, 2009 from 2-5:00. The program is titled *Celebrating and Reflecting on the Council on Legal Education for Professional Responsibility (CLEPR): What Have We Learned about Legal Education and Where Are We Headed?* and commemorates the Fortieth Anniversary of the Council on Legal Education for Professional Responsibility (CLEPR).

The 2009 Professional Responsibility Section Reception has been cancelled because of scheduling conflicts with other AALS events. The Executive Committee hopes to bring the reception back in 2010.

The first session of our section program is titled *Commemorating CLEPR and the Development of Professional Responsibility*

*Education in the Last Forty Years.* The speakers will include

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Professor Irma Russell, University of Tulsa School of Law;  
Professor Deborah Rhode, Stanford University School of Law; and  
Professor Rebecca Sandefur, American Bar Foundation & Stanford University School of Sociology.

Professor Irma Russell is the moderator/commentator for the session. Professor Deborah Rhode will talk both about the development of legal ethics as part of the curriculum since CLEPR and about the use of the pervasive method to teach legal ethics in law school. She will share a problem or some examples that demonstrate how one incorporates ethics by the pervasive method. Professor Rebecca Sandefur will discuss some of the results from the *After the JD Study* that will provide legal educators with insights into variances, based on the types of schools, in graduates' thoughts on how well legal ethics and clinical courses prepared them for practice.

In the second session, *Innovative Curricular Developments: Implementing Best Practices for Educating Lawyers*, the speakers will include:

Professor Antoinette Sedillo Lopez, Associate Dean for Clinical Affairs and Professor of Law, University of New Mexico School of Law;  
Professor Kevin Kerrigan, Director of the Law Centre & Dean Philip Plowden, University of Northumbria School of Law; and Professor Lawrence Grosberg, New York Law School of Law.

Professor Antoinette Sedillo Lopez is the moderator/commentator for the session. Professor Kevin Kerrigan and Dean Philip Plowden will discuss assessment across the law school curriculum in the UK, and they will involve the group in an interactive assessment exercise using the criteria-referenced protocol used at Northumbria. Professor Lawrence Grosberg will discuss the use of multiple assessment methods in clinical and skills courses with a focus on the use of “standardized clients”. He also will involve the group in an interactive assessment exercise.

Professor Peter Joy of Washington University in Saint Louis is the Section’s Program Planning Chair, and Professor Susan Carle of American University and Section Chair Irma Russell have served with him on the Planning Committee.

### CLEPR 40TH ANNIVERSARY CELEBRATION AT AALS ANNUAL MEETING

Some 40 years ago the Council on Legal Education and Professional Responsibility (CLEPR) began making nearly 11 million dollars in grants to law schools across the country to establish live-client clinics, effectively starting modern clinical legal education. A committee composed of delegates from the AALS Clinical Section, CLEA and the ABA Section on Legal Education will host a dinner celebrating CLEPR'S 40th anniversary on Wednesday January 7th during the AALS's Annual Meeting in San Diego. At the Celebration time will be taken to honor William Pincus, CLEPR's President, and early CLEPR pioneer the Honorable Dorothy W. Nelson of the 9th Circuit Court of Appeals. The evening's program also will include a keynote address from Erwin Chemerinsky, founding dean of University of California Irvine School of Law, and a short film on CLEPR by Prof. Sandy Ogilvy, Columbus School of Law. The celebration is made possible by the financial support of over 30 law schools.

The Celebration is being held just a short walk away from the Annual Meeting in the heart of San Diego's Gaslamp District. Admission is a mere \$27.50, which is quite the bargain for a multi-course dinner, a complimentary drink, and dancing in downtown San Diego. Seating is limited and we expect to sell out quickly. For more details on CLEPR, the Celebration, and how to purchase your tickets, please visit:

[www.CSALE.org/CLEPR.html](http://www.CSALE.org/CLEPR.html)

## PROFESSIONAL OPPORTUNITIES

### FOURTH ANNUAL NATIONAL ETHICS TRIAL COMPETITION

*University of the Pacific's McGeorge School of Law* will host the Fourth Annual National Ethics Trial Competition March 19-21, 2009.

### 2009 LAWYERS IN GOVERNMENT CONFERENCE AT HOFSTRA

Hofstra's next major conference on legal ethics will be entitled *Power, Politics, and Public Service: The Ethics of Lawyers in Government* and will be held Sunday, October 18, 2009 through Tuesday, October 20, 2009. Professors with expertise regarding lawyers in government (whether in the legislative, executive, or judicial branches) are welcome to email the Conference Director, Roy Simon, Howard Lichtenstein Distinguished Professor of Legal Ethics, with topic proposals (a short paragraph is sufficient). All Professional Responsibility professors are encouraged to suggest to Roy the names of speakers that they believe would enhance the conference. Roy's email is [roy.simon@hofstra.edu](mailto:roy.simon@hofstra.edu), and his phone number is (516) 463-5289.

### IS THERE A HIGHER LAW? DOES IT MATTER

If you have always wanted to see Malibu in February, this may be your year to experience it! Pepperdine University's Nootbaar Institute on Law, Religion, and Ethics is hosting a conference to ask the questions, "Is there a higher law," and "Does it matter," on February 21-22, 2008,

at the Pepperdine Law School. The conference promises to bring together law professors, judges, theologians, economists, historians, and philosophers with divergent viewpoints to catalyze the discussion of these two thought-provoking and important questions. Six CLE credits are available for the program. To register or receive additional information, visit <http://law.pepperdine.edu/ilre>.

### HOLLORAN CENTER FOR ETHICAL LEADERSHIP IN THE PROFESSIONS

The Holloran Center for Ethical Leadership in the Professions at the University of Saint Thomas Minneapolis School of Law focuses on research about the formation of an ethical professional identity in both students and practicing lawyers. If this is an area of scholarship interest for you, please get in touch with their director, Professor Neil Hamilton, and visit their website, [www.stthomas.edu/ethicalleadership](http://www.stthomas.edu/ethicalleadership).

### NATIONAL INSTITUTE FOR TEACHING ETHICS AND PROFESSIONALISM WORKSHOPS

The National Institute for Teaching Ethics and Professionalism (NIFTEP) was established in 2005 as a consortium of five nationally-recognized university centers on ethics and professionalism, and is also sponsored by the American Bar Association Standing Committee on Professionalism and the Georgia Chief Justice's Commission on Professionalism. NIFTEP conducts workshops that bring together leading academics and practitioners involved in promoting the teaching of ethics and professionalism. Participants in NIFTEP

workshops are designated NIFTEP Fellows. Although fellowships are typically granted either to full-time law professors who teach legal ethics or to practitioners actively involved in ethics CLE education and professionalism programs, any person committed to promoting ethics and professionalism may apply. Fellows are reimbursed for their travel expenses; there is no charge for the workshops.

The next NIFTEP workshops are scheduled for April 24 - 26, 2009 and November 6 - 8, 2009. If you wish to be placed on an electronic mailing list to receive notices about future NIFTEP events, including the call for fellowship applications for each workshop, please send an email to NIFTEP's Director, Professor Clark Cunningham: [cdcunningham@gsu.edu](mailto:cdcunningham@gsu.edu). Put "NIFTEP MAILING LIST" in the subject line and place your contact details in the text of the email message.

#### STANFORD CENTER ON THE LEGAL PROFESSION FELLOWSHIPS

As noted in our November email blast, Stanford Law School's Center on the Legal Profession accepted Fellowship applications for the forthcoming academic year (2009-2010) through December 1, 2008.

The Fellowship is a full-time, one-year residential fellowship designed to offer scholars interested in topics of professional responsibility and the structure of legal practice an opportunity to conduct research and participate in law school events. Fellows are provided with office space, a stipend of \$50,000, and a generous benefits package.

For information about future opportunities, please contact

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The Center is directed by Professor Deborah L. Rhode and supports research, teaching, programs, and public policy initiatives on crucial issues facing the bar. The Center focuses on issues of professional responsibility and the structure of legal practice. Central concerns include how to enhance access to justice, sustain ethical values, improve bar regulatory structures, and effectively respond to the changing dynamics of legal workplaces. Upcoming Center events include The Roadmap to Justice Project, a national effort to draw leaders in the field to develop an agenda for expanding access to legal services for low- and middle-income individuals, and the International Legal Ethics Conference in 2010.

#### MICHAEL FRANCK PROFESSIONAL RESPONSIBILITY AWARD

Professor Geoffrey C. Hazard received the distinguished American Bar Association Michael C. Franck Professional Responsibility Award in spring 2008 in recognition of his out-standing work in the field of professional responsibility and his service to the bar. Nominations for the 2009 Award closed on December 12, 2008, and the 2009 Award will be presented ABA's

35<sup>th</sup> National Conference on Professional responsibility on May 28<sup>th</sup> in Chicago. For more information on this award and the procedures for nominating candidates for it, please go to [www.abanet.org/cpr](http://www.abanet.org/cpr)

## MEMBER NEWS

*Patricia Hatamyer* and *Tory Lucas* are visiting this year at *Stetson University College of Law*.

The *University of Akron School of Law's* Miller-Becker Institute for Professional Responsibility launched its Inaugural Distinguished Lecture Series with a presentation on November 21, 2008 by *Professor Geoffrey Hazard*, the Thomas E. Miller Distinguished Professor of Law of University of California Hastings College of Law. Professor Hazard entitled his lecture, *Not the "City of God": Confronting Multiple Obligations*. In this program, Professor Hazard examined the idea that the standard modern method of thinking is analytic, isolating a specific problem for attention. The reality for clients, however, is that their practical and legal problems usually come in complex clusters, for which Professor Hazard proposed a different and arguably more effective framework for lawyers to follow when counseling clients confronting a cluster of problems. The lecture is also to be published in the *University of Akron Law Review*.

*Professor Jack Sahl* was appointed to the ABA Standing Committee on Professional Discipline. The Chief Justice of the Ohio Supreme Court also appointed him to a three-year term as a Commissioner on the Board on the Unauthorized Practice of Law.

*The Walter F. George School of Law, the Mercer Law Review, and the Mercer Center for Legal Ethics and Professionalism* hosted their Ninth Annual Georgia Symposium on Ethics and Professionalism on November 7, 2008. The topic was *Ethics and Professionalism in a Digital Age*, and speakers included *Hofstra Professor Monroe Freedman, Suffolk Professor Andrew Perlman*, the Honorable John M. Facciola, and *Mercer Professor David Hricik*.

*Professor Peter A. Joy, Washington University Law School*, recently gave keynote lectures in Japan and South Africa.

*Leslie Levin*, Professor of Law at the University of Connecticut School of Law, delivered this year's Howard Lichtenstein Distinguished Professorship of Legal Ethics Lecture at *Hofstra University School of Law* on November 12, 2008. Professor Levin's talk was entitled *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*.

Several professors from Southern Methodist's Dedman School of Law have been engaged recently in ethics programs and projects. In addition to presenting at programs sponsored by the University of Texas School of Law, the Dallas Bar Association, the Higginbotham Inn of Court, and the Fort Worth Women's Bar Association, *Linda S. Eads* was the 2008 recipient of the Don M. Smart Award for Excellence in Teaching. *Henry Lischer, Jr.* spoke on professional responsibility issues arising in tax and estates practices before the ABA's Section of Real Property, Probate & Trust and the University of Montana Law School. Finally, *Fredrick Moss* spoke

before, among other groups, the Dallas Bar Association and Texas Attorney General's Litigation Department.

Several Section members are involved in this year's *Southwestern Law School* Visiting Speaker Series. *Russell Christopher* Associate Professor of Law at the University of Tulsa College of Law kicked off the series on October 16<sup>th</sup>. *Joyce Sterling*, Professor of Law at the University of Denver and currently visiting at Southwestern will present on January 22<sup>nd</sup>, and *Carrie J. Menkel-Meadow*, A.B. Chettle Jr. Professor in Dispute Resolution and Civil procedure at the Georgetown Law Center and also currently visiting at southwestern will follow her on January 29<sup>th</sup>. *Mitu Gulati*, Professor at the Duke university School of Law will speak on March 23<sup>rd</sup>.

Wake Forest Law School has established Citizen Lawyer Awards to recognize alumni "who provide exemplary public service to their communities in a variety of ways."

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### Developments in the Regulation of Lawyers

*By Roy Simon*  
(*Hofstra University School of Law*)

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The ABA, the states, Congress, and other entities keep changing and adding to the rules that regulate or guide lawyers. This column summarizes some of the most significant recent developments and gives a preview of changes that are in the works.

## NATIONAL DEVELOPMENTS

### ABA Developments

The American Bar Association is the largest professional organization in the world, with more than 400,000 members, and it devotes significant resources to the study and improvement of the rules governing lawyers and judges. Several ABA developments have occurred during the past year or are on the agenda for the coming year.

*ABA Model Rules of Professional Conduct:* The ABA Model Rules of Professional Conduct have not been amended since the Spring column, but significant proposals to add a screening provision to ABA Model Rule 1.10 are likely to be debated at the ABA's February 2009 Mid-Year Meeting in Boston (or perhaps at the ABA's Annual Meeting in August). The main proposal, which was drafted by the ABA Standing Committee on Ethics and Professional Responsibility following the ABA's August 2008 Annual Meeting, would permit screening to overcome a former client's objection to a conflict under certain conditions. Specifically, as of early December 2008, the ABA Standing Committee's proposed amendment to Model Rule 1.10 regarding screening provides, in legislative style, as follows:

*Rule 1.10 Imputation of Conflicts of Interest: General Rule*

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a

client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the

screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

These amendments would be accompanied by the following new paragraphs in the Comment to Rule 1.10:

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that

there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation

and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

(Existing paragraphs 7 through 10 of the Comment

to Rule 1.10 would be renumbered upwards.)

At least one competing proposal to amend Rule 1.10 will also be on the ABA's agenda when the screening debate occurs. The proposal, sponsored by the ABA Section of Litigation, was developed by (among others) Ron Minkoff of Frankfurt Kurnit Klein & Selz, PC in New York City. It provides as follows:

- (e) notwithstanding paragraph (a), and in the absence of a waiver under paragraph (c), when a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
  - i. the personally disqualified lawyer was not substantially involved in the matter;
  - ii. the personally disqualified lawyer is timely screened from any participation in the matter and is

apportioned no part of the fee therefrom; and

- iii. written notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, and a statement that review may be available before a tribunal, is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule.

The Litigation Section proposal was originally developed last August as a variation on the prior version of the ABA Standing Committee proposal, which was scheduled to be debated at the ABA's August 2008 Annual Meeting but was put off when Larry Fox's last-minute motion to table won by a sliver, 192-191. The ABA Standing Committee's August 2008 proposal would have engrafted a new paragraph (e) onto Rule 1.10, as follows:

- (e) notwithstanding paragraph (a), and in the absence of a waiver under paragraph (c), when a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

The screening debate in the ABA House of Delegates promises to be vigorous and impassioned, and vote is again likely to be close.

***ABA Model Rule for Registration of In-House Counsel:*** At the ABA's August 2008 Annual Meeting, the ABA House of Delegates adopted (with some modifications) a proposed Model Rule for Registration of In-House Counsel. The rule was drafted and recommended by the Council of the ABA Section of Legal Education and Admission to the Bar. The rule is related to Rule 5.5(d)(1) of the ABA Model Rules of Professional Conduct, which provides that an out-of-state lawyer in good standing may provide legal services to "the lawyer's employer or its organizational affiliates" as long as the services do not require pro hac vice admission. However, Comment 17 to Rule 5.5 qualifies the text by providing that an in-house lawyer "may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education." The new registration rule, which follows up on Comment 17, begins as follows:

A lawyer admitted to the practice of law in another United

States jurisdiction who has a continuous presence in this jurisdiction and is employed as a lawyer by an organization as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, shall register as in-house counsel within [180 days] of the commencement of employment as a lawyer or if currently so employed then within [180 days] of the effective date of this rule ...

The rule continues that a duly registered in-house lawyer is authorized, on a par with fully admitted lawyers, to provide legal services to "the entity client or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer," and to "employees, officers and directors of such entities, but only on matters directly related to their work for the entity" (and only where consistent with Rule 1.7). A registered lawyer shall not (unless permitted by the jurisdiction's rules) (1) offer or provide legal services or advice to anyone else, or (2) "appear before a court or any other tribunal," or (c) "hold himself or herself out as being authorized to practice law in this jurisdiction" beyond the terms of the rule. However, a registered in-house lawyer is authorized to provide pro bono legal services through "an established not-for-profit bar association, pro bono program or legal services program" or through other organizations specifically authorized in the particular jurisdiction. (During the debate over the rule, the House of Delegates

defeated a proposed amendment to prohibit in-house lawyers from handling pro bono cases unless their work was actually supervised by a volunteer lawyer program.)

All of these rights for registered in-house counsel come with some obligations. A registered in-house lawyer must: (1) pay an annual fee (set by each jurisdiction), (2) fulfill the jurisdiction's CLE requirements, and (3) report to the jurisdiction regarding (a) termination of the lawyer's in-house employment, (b) "any change in the lawyer's license status in another jurisdiction, including by the lawyer's resignation," and (c) "any disciplinary charge, finding, or sanction concerning the lawyer by any disciplinary authority, court, or other tribunal in any jurisdiction." Moreover, a registered in-house lawyer must submit to the jurisdiction's Rules of Professional Conduct "and all other laws and rules governing lawyers admitted to the active practice of law in this jurisdiction," and the jurisdiction's disciplinary counsel "has and shall retain jurisdiction over the registered lawyer with respect to the conduct of the lawyer in this or another jurisdiction to the same extent as it has over lawyers generally admitted in this jurisdiction."

In-house registration status automatically terminates when (1) the lawyer's employment terminates, or (2) the lawyer is suspended or disbarred from practice in any jurisdiction or any court or agency before which the lawyer is admitted, or (3) the lawyer fails to maintain active status in at least one jurisdiction. (A separate section sets out procedures for seeking reinstatement.) Finally, to give the rule some teeth, a lawyer who fails to register will be (1) subject to professional discipline, (2) ineligible for admission on motion, (3) referred to the in-house

jurisdiction's bar admission authority, and (4) referred to the disciplinary authority of the jurisdictions where the lawyer is licensed.

The full text of the Model Rule as adopted, and the report submitted by the ABA Section of Legal Education and Admission to the Bar in support of the rule, are available at <http://www.abanet.org/cpr/mjp/home.html> (look under the heading "In-house counsel" on the right-hand menu).

### ***Federal Statutes, Rules, and Regulations***

Although the regulation of lawyers is primarily a matter of state law, Congress and federal rule makers and policy makers also sometimes regulate lawyers. Some significant developments have taken place at the federal level since the Spring 2008 Newsletter.

***Federal Rules of Evidence:*** In late September of 2008, President Bush signed into law a new Rule 502 of the Federal Rules of Evidence, which codifies various doctrines governing waiver of the attorney-client privilege and work product. The new rule provides as follows:

#### ***Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver***

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) *Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver.* — When the disclosure is made in a federal proceeding or to a federal

office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

(b) *Inadvertent disclosure.* — When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

(c) *Disclosure made in a state proceeding.* — When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

- (1) would not be a waiver under this rule if it had been made in a federal proceeding; or
- (2) is not a waiver under the law of the state where the disclosure occurred.

(d) *Controlling effect of a court order.* — A federal court may order that the privilege or protection is not waived by

disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) *Controlling effect of a party agreement.* — An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) *Controlling effect of this rule.* — Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) *Definitions.* — In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The new rule was drafted by the Judicial Conference of the United States, which forwarded its proposal directly to Congress (bypassing the usual path through the United States Supreme Court) because, under 28 U.S.C. §2074(b) of the Rules Enabling Act, any rule “creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.” Therefore, in contrast to most proposals to amend federal rules, inaction by either chamber of Congress for 90 days would not have led to automatic adoption of

the rule. Rather, Rule 502 required affirmative action in both the House and Senate, just like any other law.

For official updates, new proposals, and background information regarding the Federal Rules of Evidence and other federal rules, visit the official web site of the U.S. Courts at [www.uscourts.gov](http://www.uscourts.gov) (click on "Federal Rulemaking") or contact John Rabiej, Chief of the Rules Committee Support Office, at (202) 502-2600.

***United States Department of Justice Principles of Business Prosecution:*** In late August of 2008, the United States Department of Justice announced revised Principles of Federal Prosecution of Business Organizations, which were formerly embodied in documents known as the Thompson Memorandum (adopted in 2003) and the McNulty Memorandum (adopted in 2006). The Thompson Memorandum had announced that in deciding whether to charge a corporation with a crime, the Department of Justice would take into account (among many other factors) "the corporation's willingness...to waive attorney-client and work product protection." The McNulty Memorandum continued that policy with relatively minor changes.

Critics of the Thompson and McNulty Memoranda responded by introducing the Attorney-Client Privilege Protection Act, which would have largely countermanded the DOJ's policies. The Senate held hearings on the Attorney-Client Privilege Protection Act in 2007 and 2008, and during the July 2008 hearings the DOJ promised to revise the waiver policy. In late August of 2008, the DOJ announced significant changes to its policies. The revised policy states: "Eligibility for cooperation credit is

not predicated upon the waiver of attorney-client privilege or work product protection." The story is covered at 24 Law. Man. Prof. Conduct 473.

#### *Securities and Exchange*

***Commission:*** On October 6, 2008, about six weeks after the United States Department of Justice took parallel steps, the SEC's Division of Enforcement published an enforcement manual instructing SEC staff attorneys not to request attorney-client privilege waivers during investigations of potential securities law violations. The manual was prepared by the enforcement division's Office of Chief Counsel and is posted on the SEC's Web site at [www.sec.gov/divisions/enforce/enforcement\\_manual.pdf](http://www.sec.gov/divisions/enforce/enforcement_manual.pdf). The story is covered in more detail at:

24 Law. Man. Prof. Conduct 597 (Nov 12, 2008).

***Federal Deposit Insurance Corporation:*** On November 21, 2008, the Federal Deposit Insurance Corporation (FDIC) clarified the Temporary Liquidity Guarantee Program (TLGP) to include client trust accounts. When a lawyer deposits an individual client's funds into an IOLTA account, the account is now fully insured regardless of the amount. The provision took effect immediately and is valid through June 30, 2009.

### **DEVELOPMENTS IN THE STATES**

#### ***Broad Trends***

***"Ethics 2000" reviews.*** In recent years, many states have reviewed their ethics rules in light of the work of the Ethics 2000 Commission, the ABA Commission on

Multijurisdictional Practice, and the 2003 amendments to ABA Model Rules 1.6 and 1.13. Since the Spring Newsletter, Alabama has comprehensively amended its Rules of Professional Conduct effective June 23, 2008, Louisiana has revised its lawyer advertising rules effective December 1, 2008, and Alaska has comprehensively amended its rules effective April 15, 2009. Looking at the aggregate national picture, since the Ethics 2000 Commission released its final report in 2001, 36 states and the District of Columbia have adopted revised rules (AL, AK, AZ, AR, CO, CT, DE, DC, FL, ID, IN, IA, KS, LA, MD, MN, MS, MO, MT, NE, NV, NH, NJ, NC, ND, OH, OK, OR, PA, RI, SC, SD, UT, VA, WA, WI, WY); 10 states have circulated proposed rules that remain pending (CA, IL, KY, ME, MI, NY, TN, TX, VT, WV); and 4 states have appointed review committees that have not yet issued their reports (GA, HI, MA, NM). For a detailed chart of state-by-state responses and ongoing projects relating to the work of the Ethics 2000 Commission, visit [www.abanet.org/cpr/links.html](http://www.abanet.org/cpr/links.html).

***Malpractice insurance disclosure rules.*** Another broad trend is the adoption of ethics rules or court rules requiring lawyers to disclose whether they carry professional liability insurance. In August 2004, the ABA adopted a Model Court Rule on Insurance Disclosure. At that time, only a few states required lawyers to disclose their malpractice insurance coverage. Today, at least 24 states require some form of malpractice insurance disclosure, either on their bar registration statements (19 states -- AZ, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV) or directly to clients (5 states -- AK, NH, OH, PA and SD). At least 5 additional states (CA, NY, TX, UT & VT) are actively

considering some form of legal malpractice disclosure rule (though the Texas Bar has recommended against it – see below). So far, only Arkansas and Kentucky have expressly declined to adopt the ABA Model Court Rule on Insurance Disclosure. For a state-by-state chart on rules governing disclosure of insurance coverage, see [www.abanet.org/cpr/clientpro/malprac\\_disc\\_chart.pdf](http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf).

For detailed information about developments in particular states, visit the web sites given after each state listed below, or find a link to individual state resources at [www.law.cornell.edu/ethics/listing.html](http://www.law.cornell.edu/ethics/listing.html) or [www.abanet.org/cpr/links.html](http://www.abanet.org/cpr/links.html).

***Alabama ([www.alabar.org](http://www.alabar.org)):*** On June 23, 2008, effective immediately, the Alabama Supreme Court amended the Alabama Rules of Professional Conduct. The amendments were based on recommendations by a state bar subcommittee appointed in 2006 to review the work of the ABA Ethics 2000 Commission. The changes affect the text of Alabama Rules 1.8, 1.10, 1.12, 1.14, 3.6, 3.9, and 4.4, as well as the Comments to Rules 1.14, 3.2, and 3.7. The Alabama Supreme Court rejected a recommendation to adopt ABA Model Rule 6.5 (Nonprofit and Court-Annexed Limited Legal Services Programs). Separately, an October 2007 package of proposed amendments to Alabama's lawyer advertising rules remains pending before the Supreme Court, which rejected similar proposals in 2001.

***Alaska ([www.state.ak.us/courts](http://www.state.ak.us/courts)):*** In October of 2008, the Alaska Supreme Court announced that current the Alaska Rules of Professional Conduct would be rescinded, and new Alaska Rules of Professional Conduct would be adopted, effective April

15, 2009. The full text of the new rules, with commentary explaining the nature of Alaska's changes, is available at [www.state.ak.us/courts/rules.htm#4](http://www.state.ak.us/courts/rules.htm#4).

**Arizona** ([www.azbar.org](http://www.azbar.org)): On September 8, 2008, the Arizona Supreme Court adopted a new rule for admission on motion (effective January 1, 2010), adopted a new rule for registration of in-house lawyers (effective January 1, 2009) and amended Arizona's pro hac vice rule. The new in-house registration rule will allow out-of-state lawyers in good standing to perform legal work other than litigation for an organizational employer, provided the in-house lawyers pay bar dues and file an annual registration statement. The full package of amendments is available online at [www.supreme.state.az.us/rules/Recent\\_rules.htm](http://www.supreme.state.az.us/rules/Recent_rules.htm).

**California** ([www.calbar.ca.gov](http://www.calbar.ca.gov), [www.courtinfo.ca.gov](http://www.courtinfo.ca.gov), and [www.leginfo.ca.gov](http://www.leginfo.ca.gov)): The State Bar of California's Commission for the Revision of the Rules of Professional Conduct has been comprehensively reviewing California's unique rules since 2001 to make them more like the ABA Model Rules. The Commission has issued 45 draft rules so far, in three batches (2006, 2007, and 2008), but none since the Spring 2008 PR Newsletter. The Commission is likely to release a final group of proposed rules for public comment before the Spring 2009 PR Newsletter.

Separately, pursuant to a Fall 2007 law amending California Probate Code §12252, the California Law Revision Commission is studying whether the attorney-client privilege should survive the death of the client and, if so, under what

circumstances. The Law Revision Commission must report its findings to the Legislature by July 1, 2009. Observers speculate that the Law Revision Commission may recommend amendments to California Evidence Code §954 (Lawyer-Client Privilege) and §955 (When Lawyer Required to Claim Privilege). Those sections would have been amended under earlier versions of the bill giving rise to amended §12252 (AB 403 Tran), which passed in the California Assembly but not in the Senate.

**Florida** ([www.flabar.org](http://www.flabar.org)): On September 11, 2008 the Florida Supreme Court issued an opinion amending its MJP rule, Rule 4-5.5, by approving a new subsection (b)(3), which provides that lawyers not admitted in Florida may not "appear in court, before an administrative agency, or before any other tribunal" unless authorized to do so by the applicable rules of those tribunals. The amended rule will take effect on January 1, 2009 and is available online at [www.floridasupremecourt.org/decisions/2008/sc07-1844.pdf](http://www.floridasupremecourt.org/decisions/2008/sc07-1844.pdf). The rule has a long background. In 2005, the Supreme Court of Florida adopted rules regarding the multijurisdictional practice of law and directed the Florida Bar "to monitor the implementation of these amendments and any challenges that arise and report back to the Court within two years from the effective date of these amendments with recommendations for improvements or changes, if any." See *In re: Amendments to the Rules Regulating The Florida Bar and the Florida Rules of Judicial Administration*, 907 So. 2d 1138 (Fla. 2005). The Bar filed a report on MJP on June 1, 2007. The new rule is the Supreme Court's response to that report.

On October 8, 2008, the Florida Bar sent a petition to the Florida Supreme Court proposing various changes to the Florida Rules of Professional Conduct. Most of the proposed changes are minor (*e.g.*, adding headings or clarifying phrases), but the proposals also modify Rule 4-3.3 to conform to the 2002 changes to ABA Model Rule 3.3, and add language to Rule 4-1.5 requiring that nonrefundable fee arrangements be confirmed in writing. A proposed amendment to Rule 4-7.2(c) provides: “*Prohibited Sounds.* A lawyer shall not include in any advertisement or unsolicited written communication any sound that is deceptive, misleading, manipulative, or that is likely to confuse the listener.” (An addition to the Comment explains that this “precludes, for example, the sound of sirens or car crashes.”) This would liberalize Florida’s existing advertising rules – Rule 4-7.5(b) currently prohibits “*any* background sound other than instrumental music.”

Meanwhile, the Florida Supreme Court is still pondering a February 26, 2008 petition by the Florida Bar to amend Rule 4-7.6 (Computer-Accessed Communications), which governs websites, electronic mail, and other computer-accessed advertisements. The proposed amendments were developed by the Special Committee on Website Advertising Rules, the Bar’s Board of Governors, the Advertising Task Force 2004, and the Board’s Rules Committee.

At its May 30, 2008 meeting, the Florida Bar Board of Governors considered an ambitious proposal that *every* new lawyer in Florida must be paired with a mentor as a required element of the transition from law school to practice. The proposal, which is apparently still under discussion, was jointly

developed by the Florida Supreme Court Commission on Professionalism and the Bar’s Standing Committee on Professionalism.

Finally, the lawsuit brought jointly by a personal injury law firm and Public Citizen, Inc. in January of 2008 to challenge the constitutionality of Florida’s lawyer advertising rules remains pending. See *Harrell v. Florida Bar*, 2008 WL 596086 (M.D. Fla.) (refusing to abstain and holding that both plaintiffs have standing).

**Illinois ([www.isba.org](http://www.isba.org)):** The Illinois Supreme Court is still considering comprehensive amendments to the Illinois Rules of Professional Conduct, which were unanimously recommended by the Illinois State Bar Association in June 2004.

Effective July 1, 2008, Illinois added a new Rule 756(j) (Pro Bono Authorization for Inactive and Retired Status Attorneys and House Counsel) that allows retired and inactive attorneys and registered in-house attorneys to provide pro bono legal services if the services are rendered: (a) without charge or an expectation of a fee by the attorney; (b) to persons of limited means or to certain types of organizations; and (c) under the auspices of a sponsoring entity, which must be a not-for-profit legal services organization, governmental entity, law school clinical program, or bar association providing pro bono legal services. A small amendment to the Illinois in-house registration rule, Rule 716, incorporates the pro bono authorization there.

**Louisiana ([www.lsba.org](http://www.lsba.org)):** In July of 2008 the Louisiana Supreme Court announced that it would repeal the existing Louisiana Rules of Professional Conduct governing lawyer advertising and solicitation and replace them with new rules.

The new rules were recommended by the Louisiana State Bar's House of Delegates in June of 2007. The only change the Supreme Court made to the Bar's proposed rules was to add a sentence to new Rule 7.2(c)(5)(B) providing that lawyers who have been certified by an organization that is accredited by the American Bar Association are exempt from the Louisiana State Bar Association's Plan of Legal Specialization. The Louisiana Supreme Court's order adopting the new advertising rules is available online at [www.lsba.org/2007Documents/NewsDocuments/NewsDocument-320.pdf](http://www.lsba.org/2007Documents/NewsDocuments/NewsDocument-320.pdf).

The original effective date of the amended rules was set for December 1, 2008, but on September 23, 2008, before the rules had even taken effect, Public Citizen and two Louisiana personal injury firms filed a lawsuit challenging various provisions of the new rules on First Amendment and Due Process grounds -- see *Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, (E.D. La., No. 2:08-cv-04451-MLCF-JCW) (reported at 24 Law. Man. Prof. Conduct 523). The complaint is on Public Citizen's Web site at [www.citizen.org/documents/louisiana\\_complaint.pdf](http://www.citizen.org/documents/louisiana_complaint.pdf). Some of the challenged Louisiana provisions are identical to New York advertising provisions that a New York federal district court struck down in 2007. On October 31<sup>st</sup>, in response to the suit, the Louisiana Supreme Court issued an order pushing back the effective date by four months to April 1, 2009. The court also issued a press release stating that "to compel compliance with the new rules before the constitutional issues are resolved would be prejudicial to those lawyers attempting to comply with the rules while others are resisting compliance."

On November 24<sup>th</sup> another personal injury lawyer filed a separate federal lawsuit raising First Amendment and Due Process challenges to the new rules -- see *Wolfe v. Louisiana Attorney Disciplinary Bd.*, E.D. La., No. 08-4994. The suit alleges that the new rules will unfairly restrict blog posts and other modern communication tools, and will make it difficult or impossible for law firms to place small Internet text ads with Google and other Internet services.

Finally, effective January 1, 2009, the Louisiana Supreme Court amended Louisiana Supreme Court Rule XVII, Section 3(B) to permit qualified foreign nationals to be admitted to the bar in Louisiana even if they are not permanent residents of the United States. The rule previously required that every applicant to the Louisiana bar be a citizen or resident alien of the United States. The modified rule provides that an applicant must be a citizen of the United States "or an alien lawfully admitted for permanent residence, or an alien otherwise authorized to work lawfully in the United States."

#### **Maine**

[www.mebaroverseers.org/ethicsweb/ethicsmain.html](http://www.mebaroverseers.org/ethicsweb/ethicsmain.html)): On September 21, 2007 (more than a year ago), Maine's Task Force on Ethics 2000 submitted its Recommendations and Report to the Maine Supreme Judicial Court. (The Reporter for the Task Force is Professor Louis Lupica of the University of Maine.) The proposed rules conform to the structure of the ABA Model Rules, and conform to the language of the ABA Model Rules except where established Maine law and practice warrant divergence or variation. The Supreme Judicial Court still has not taken any action. When the court acts, it is likely either to seek additional public comment and conduct a public

hearing on the Recommendations, or to instruct the Task Force to revise the proposals before circulating them for public comment. In the meantime, Maine remains one of only three states (along with California and New York) that have not yet adopted the format and numbering system of the ABA Model Rules.

**Michigan** ([www.michbar.org](http://www.michbar.org)): The Michigan Supreme Court is still considering comprehensive amendments to the Michigan Rules of Professional Conduct that were circulated by the court for public comment in July 2004. (The comment deadline expired in February 2005.) “Clean” and “redlined” versions of the proposed amendments are available at [www.michbar.org](http://www.michbar.org) (click on the home page on “admissions, ethics and regulation,” then click on “Ethics Rules, Opinions and Resources,” then scroll down to “Ethics Rules, Opinions, and Resources”).

Meanwhile, effective September 1, 2008, the Michigan Supreme Court adopted a new Supreme Court Rule 8.126 (Temporary Admission to the Bar) to govern pro hac vice admission for out-of-state lawyers. The rule provides that an out-of-state lawyer may appear in a maximum of five Michigan cases in a 365-day period. In exchange for the privilege of practicing in Michigan, the out-of-state lawyer must pay an annual fee equivalent to the discipline and client protection portions of a Michigan State Bar member’s annual dues, regardless of the number of appearances. Any lawyer admitted pursuant to the new rule is subject to the jurisdiction of Michigan’s attorney disciplinary system. The Supreme Court Order adopting the new rule is available at [www.michbar.org/opinions/ethicsopinions.cfm](http://www.michbar.org/opinions/ethicsopinions.cfm).

**Missouri** ([www.mobar.org](http://www.mobar.org)):

Effective July 1, 2008, the Missouri Supreme Court amended Rules 1.2 and 1.16 to account for unbundled legal services, especially a “limited appearance.” Specifically, the court amended Rule 1.2(c) to provide as follows:

(c) A lawyer may limit the scope of representation if the client gives informed consent in a writing signed by the client to the essential terms of the representation and the lawyer's limited role. *Use of a written notice and consent form substantially similar to that contained in the comment to this Rule 4-1.2* creates the presumptions:

(a) the representation is limited to the lawyer and the services described in the form, and

(b) the lawyer does not represent the client generally or in any matters other than those identified in the form.

An otherwise unrepresented party to whom limited representation is being provided or has been provided is considered to be unrepresented for purposes of communication under Rule 4-4.2 and Rule 4--4.3 except to the extent the lawyer acting within the scope of limited representation provides other counsel with a written notice of a time period within which other counsel shall communicate only with the lawyer of the party who is otherwise self-represented. [Emphasis added.]

The “written notice and consent form” in the referenced comment is about two pages long and is only a model – any form “substantially similar” will suffice. The

form in the comment ends with the following summary paragraph:

I have read this Notice and Consent form and I understand it. I agree that the legal services listed above are the ONLY legal services to be provided by the lawyer. I understand and agree that the lawyer who is helping me with these services is not my lawyer for any other purpose and does not have to give me more legal help. If the lawyer is giving me advice or is helping me with legal or other documents, I understand the lawyer will stop helping me when the services listed above have been completed. ...

As a companion measure, Rule 1.16(c) was amended to provide that a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation “unless the lawyer has filed a notice of termination of limited appearance. Except when such notice is filed, a lawyer shall continue representation when ordered to do so by a tribunal notwithstanding good cause for terminating the representation.”

#### *New Jersey*

[www.judiciary.state.nj.us/rules/appr\\_pc.htm](http://www.judiciary.state.nj.us/rules/appr_pc.htm): In 2004, the New Jersey Supreme Court adopted a rule similar to ABA Model Rule 5.5 but said that in 2007 the Court’s Professional Responsibility Rules Committee (PRRC) would “undertake a comprehensive evaluation of the experience gained in multijurisdictional practice ....” In February 2007, the PRRC issued a report recommending minor amendments and clarifications to Rules 5.5, but the Supreme Court declined, instead asking the PRRC “for an overall review and evaluation of the

provisions of current RPC 5.5.” In January 2008, the PRRC released its review and evaluation, recommending many amendments to Rule 5.5 that would open up New Jersey to more multijurisdictional practice. The PRRC’s report is available online at [www.judiciary.state.nj.us/reports2008/prrc.pdf](http://www.judiciary.state.nj.us/reports2008/prrc.pdf). Effective September 1, 2008, after studying the PRRC recommendations, the New Jersey Supreme Court amended Supreme Court Rule 1:27-2 to allow out-of-state lawyers who work as in-house counsel in New Jersey to represent not only the organizational employer but also the organization’s employees, officers, directors, partners, and shareholders if the representation is “in respect of the same proceeding or claim” involving the employer. The court also adopted new Supreme Court Rule 1:21-10 (likewise effective September 1, 2008), which generally tracks the ABA’s so-called “Katrina Rule” that permits lawyers to provide pro bono legal services in states where they are not licensed following natural or other major disasters.

However, in the same order, the court postponed action on a PRRC recommendation to amend New Jersey Rule 5.5 to allow out-of-state lawyers to practice occasionally in New Jersey in particular matters as long as they “associate” with a New Jersey lawyer who would be responsible (though not necessarily actively participate), and postponed a decision on a recommendation to exempt lawyers engaged in alternative dispute resolution from registering with the state bar and paying assessments. The court did not say when it would revisit those recommendations.

*New York* ([www.nysba.org](http://www.nysba.org) and [www.courts.state.ny.us](http://www.courts.state.ny.us)): On December 16, 2008 New York's Chief Judge Judith Kaye and the four Presiding Justices of the Appellate Division announced that New York will be replacing the existing New York Code of Professional Responsibility with the New York Rules of Professional Conduct effective April 1, 2009. The new rules use the numbering and much of the language of the ABA Model Rules of Professional Conduct, but also retain numerous provisions from the current New York Code of Professional Responsibility (which in turn is based largely on the old ABA Model Code). The new rules are the outgrowth of five years of work by the New York State Bar Association's Committee on Standards of Attorney Conduct (COSAC). The COSAC proposals (as modified and approved by the State Bar's House of Delegates) contained Comments, but the courts issued the new rules without any Comments – so far. The courts have expressly deferred a decision on whether to write the Comments themselves or to leave the Comments to the State Bar. In either case, the proposed Comments will need to be revised to conform to the rules as adopted.

Meanwhile, the federal court decision that struck down various provisions of New York's new (effective February 1, 2007) lawyer advertising rules, *Alexander v. Cahill*, 2007 WL 2120034 (N.D.N.Y., June 23, 2007), remains on appeal in the Second Circuit. Curiously, although the case has been fully briefed for many months, the Second Circuit has not yet set a date for oral argument. Perhaps the Second Circuit was waiting to see whether the New York Rules of Professional Conduct would drop the provisions that were declared

unconstitutional, which would have made the suit moot. Alas, the unconstitutional provisions are part of the new rules, so the suit will now presumably go forward.

*Tennessee* ([www.tba.org](http://www.tba.org)): In June of 2008, the Tennessee Bar Association Board of Governors authorized a proposed set of "refinements" to the Tennessee Rules of Professional Conduct for comment. The proposals, which result from more than two years of effort by the Bar's Standing Committee on Ethics & Professional Responsibility, are the first thorough examination of the rules since their adoption in March 2003. The proposals suggest changes in about twenty significant areas, including client consent, confidentiality, conflicts, client files, and public statements by prosecutors. Comments were due by August 15, 2008. The proposals are available at [www.tba.org/ethics/index.html](http://www.tba.org/ethics/index.html).

Also in June of 2008, the Tennessee Bar Association filed a petition with the Tennessee Supreme Court seeking to expand and encourage pro bono work. The proposals recommend that the court adopt a new Rule 6.5, permit pro bono work by registered in-house counsel, amend Rule 6.1 to set an aspirational standard of fifty pro bono hours per year, and require annual reporting of pro bono hours.

Finally, also in June of 2008, the Tennessee Bar Association filed a petition with the Tennessee Supreme Court recommending that Tennessee adopt ABA Model Rules 5.5 and 8.5 (permitting multijurisdictional practice), thus adding Tennessee to "the broad movement of jurisdictions permitting, but expressly and intelligently regulating, the multijurisdictional practice of law."

**Texas ([www.texasbar.com](http://www.texasbar.com)):** On May 21, 2008, the Texas State Bar's Task Force on Insurance Disclosure voted 6-5 to recommend that Texas should not require Texas lawyers to disclose whether they have malpractice insurance. However, the Task Force also recommended by a 6 to 4 vote that if the court mandates some form of insurance disclosure, the court should do so in the form of an administrative rule (as opposed to a disciplinary rule), and that the information should be posted on the State Bar's web site. On June 26, 2008, the Texas State Bar's Board of Directors June 26 forwarded the Task Force's recommendation to the Texas Supreme Court, where the recommendation remains pending.

**Virginia ([www.vsb.org](http://www.vsb.org)):** At its October 17<sup>th</sup> meeting, the Virginia State Bar Council voted 60 to 11 to reject a proposal that would have required lawyers in private practice to obtain or maintain professional liability insurance with specified minimum policy limits. The proposal, which was developed by the Virginia State Bar's Special Committee on Lawyer Malpractice Insurance, was published for comment last summer. It would have required lawyers who are "regularly engaged in the private practice of law involving representation of clients (individuals or entities) drawn from the public" to obtain coverage of either (a) at least \$100,000 per claim with a minimum \$50,000 claim expense allowance outside the policy limits, or (b) at least \$200,000 per claim where claim expenses are inside the policy limits.

On March 1, 2008, the Virginia State Bar Council approved proposed amendments to Rules 5.5 and 8.5, both patterned on the ABA Model Rules. The proposals remain pending before the

Virginia Supreme Court. The proposed rules are slightly modified versions of proposals that were originally forwarded to the Virginia Supreme Court in 2006 but later withdrawn. (On a related issue, effective January 1, 2009, the Virginia Supreme Court has adopted a new Supreme Court Rule 1A:7 governing certification of foreign legal consultants.)

Also on March 1, 2008, the Virginia State Bar Council approved proposed changes to Rules 1.9 and 1.11 of the Rules of Professional Conduct. Regarding Rule 1.9, the proposals would amend Comment 5 to provide reciprocal guidance regarding lawyers who move from private to public employment. Regarding Rule 1.11, the amendments would move part of Comment 10 into the body of the rule because the Comment addresses a substantive issue. (Comment 10 deals with the disqualification of other lawyers in a government agency when one of the lawyers is disqualified from a matter based on work in private practice.) These proposals also remain pending before the Virginia Supreme Court.

The Virginia Supreme Court is also still considering proposed amendments to the Comment to Rule 8.4 of the Virginia Rules of Professional Conduct. The proposed amendments, which have been pending before the court since October 2006, would provide guidance regarding when a lawyer (or an agent under the lawyer's direction or control) may ethically engage in lawful, undisclosed or non-consensual recording of communications in which the lawyer or agent is a participant.

At its February 28, 2009 meeting, the Virginia State Bar Council is expected to

consider a proposed amendment to Rule 7.4(d). The proposed amendment would allow a lawyer to advertise a specialty certification without the need for a disclaimer if the certification is granted by an organization that is currently accredited by the American Bar Association (ABA). Rule 7.4(d) would continue to require a disclaimer when advertising a certification granted by an organization that is not accredited by the ABA because, the proponents of the amendment reason, such organizations lack the rigorous requirements set forth in the ABA accreditation process.

Finally, at its June 19, 2008 meeting, the Virginia State Bar Council approved for public comment a proposed Supreme Court Rule regarding the Provision of Legal Services Following Determination of Major Disaster (a so-called “Katrina rule”). The proposal generally follows the ABA Model Court Rule on this subject, with a few modifications. Public comments were due on August 21, 2008.

**Wisconsin** ([www.wsb.org](http://www.wsb.org)): Effective January 1, 2009, the Wisconsin Supreme Court has adopted a version of ABA Model Rule 5.5. The Wisconsin version differs from the ABA rule by providing that a Wisconsin attorney will not be disciplined in Wisconsin for engaging in conduct that is prohibited in another jurisdiction but permitted in Wisconsin. The Wisconsin rule substitutes the term “occasional” for the ABA term “temporary,” and the rule does not grant rights to an out-of-state attorney suffering from “medical incapacity.” However, the rule extends MJP rights not only to lawyers from other United States jurisdictions, but also to lawyers licensed in a “foreign jurisdiction.” On a

related issue, Wisconsin has adopted an in-house registration rule (SCR 10.03(4)(f)), and has amended its pro hac vice rule (SCR 10.03(4)(b)), effective January 1, 2009.

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- Comment, *Impervious to Kryptonite: Why Minnesota's "Super Lawyers" Can Continue Advertising*, 30 HAMLINE L. REV. 683 (2007).
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**ABA INVITATION TO COMMENT  
ON PROPOSED CONFLICTS RULE**  
*By Ted Schneyer (University of  
Arizona)*

As the Section's Liaison to the ABA Committee on Ethics and Professional Responsibility, I would like to pass on the following request

from that Committee to our Section's members. The deadline for comment is October 15, 2008. The ABA Committee on Ethics and Professional Responsibility appreciates both your time and input:

Dear Chairs and Staff Liaisons or Directors of ABA Entities and Other Interested Colleagues:

On April 11, 2008, the Standing Committee on Ethics and Professional Responsibility circulated for comment a proposal to amend Rule 1.10 of the ABA Model Rule of Professional Conduct to permit the screening of lawyers as they move from one employment in the private sector to another, so that any conflicts of interest they might carry with them need not be imputed to other lawyers in their new employment.

After consideration of all comments received, the Ethics Committee filed Report 114 with Recommendations for consideration by the ABA House of Delegates at the 2008 Annual Meeting. The Report was co-sponsored by the Standing Committee on Professional Discipline; the Standing Committee on Paralegals; the Government and Public Sector Lawyers Division; the Young Lawyers Division; the Section of Real Property, Trust and Estate Law; the Section of Antitrust Law, the Section of Business Law; the Illinois State Bar Association; the Philadelphia Bar Association; the Ohio State Bar Association; the Oregon State Bar; the Tennessee Bar Association; and supported by the Association of Professional Responsibility Lawyers.

There was insufficient time to deliberate upon several comments and suggested amendments made immediately prior to the scheduled House debate, and a motion to postpone consideration of the Report

passed 192 to 191. Since the August Meeting, the Ethics Committee has conferred regarding these comments and suggestions and has revised Report 114 with the intention of resubmitting it for consideration by the House at the 2009 Midyear Meeting. The attached proposal differs from the proposal presented to the House by adding additional procedural language designed to address the effective policing of screens by former clients and by the law firm that is implementing the screening.

The Ethics Committee invites written comments and suggestions on this proposal, including specific language if changes are recommended.

The Committee seeks to gather information about the experience of lawyers and disciplinary authorities with screening and would therefore particularly appreciate answers to the following questions:

1. To what extent has the inability to screen laterals resulted in firms not hiring lawyers they would otherwise have hired?

2. In states in which provisions permitting screening have been adopted since 2000, has there been an increase in the ability to hire laterals who otherwise would not have been hired because of the conflicts with which they were tainted?

3. In states that have adopted screening for laterals, but have not permitted it for lawyers who had a substantial involvement in the matter or had material, non-public

information relating to the matter, does experience indicate that, after such adoption, lawyer mobility was enhanced? If so, in what situations?

4. Are you aware of instances where, despite the screening of former government lawyers, former judges, law clerks, arbitrators, mediators, or other third party neutrals, confidential information nevertheless passed from the screened lawyer to the lawyer's colleagues in his new firm?

5. Are you aware of instances where, despite the screening of a lawyer for a prospective client who received material, non-public information, confidential information nevertheless passed from the screened lawyer to the lawyer's colleagues in his new firm?

6. Are you aware of instances in those states that have adopted screening provisions generally for lawyers in private practice where, despite the screen, information nevertheless passed from the screened lawyer to the screened lawyer's colleagues in his new firm?

7. Are you aware of instances in which screening was implemented with the consent of the former client, but information nevertheless passed from the screened lawyer to the screened lawyer's colleagues in his new firm?

8. Are you aware of instances in which former clients of a lawyer who has moved to a new firm and been promptly screened complained to a disciplinary authority that the screen was inadequate?

9. Did any of these complaints contend that, for one reason or another, no single screen could be adequately monitored?

10. Did any of these complaints contend that, despite receiving a description of the

screen, the complainant could not determine whether the screen worked effectively and otherwise had no ability to challenge the effective implementation of the screen?

11. Where instances of complaint have come to your attention, were the complaints sustained by the disciplinary authority or court? What were the outcomes?

***NOTE:** In your answers, it is very useful to indicate whether the instances described occurred in the context of a large law firm (more than 50 lawyers) or a smaller law firm and the nature of the practice of the law firm.*

Responses should be received prior to October 15, 2008 so that the Committee can consider them at its next meeting on October 17-18, 2008 in Chicago, Illinois, at the Hotel Allegro, 171 West Randolph Street. Please direct your responses to ABA Ethics Counsel George Kuhlman at [gkuhlman@staff.abanet.org](mailto:gkuhlman@staff.abanet.org). Questions may be directed to Mr. Kuhlman at: 312-988-5300.

Members of the Committee will be available on Friday morning, October 17 to hear from persons who would like to make a personal appearance to elaborate on the written submission made prior to October 15. These oral presentations should focus on experience with screening, particularly including the topics detailed above. If you would like to appear before Committee members on October 17, please notify Mr. Kuhlman by October 7.

A schedule for these appearances will be set on October 10.

Robert H. Mundheim, Chair  
ABA Standing Committee on Ethics and Professional Responsibility

AMERICAN BAR ASSOCIATION  
STANDING COMMITTEE ON ETHICS  
AND PROFESSIONAL RESPONSIBILITY

REPORT TO THE HOUSE OF  
DELEGATES

**RECOMMENDATION**

*RESOLVED*, that the American Bar Association adopts the following amendment to Model Rule of Professional Conduct 1.10:

Imputation of Conflicts of Interest:  
General Rule

\* \* \*

(e) notwithstanding paragraph (a), and in the absence of a waiver under paragraph (c), when a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, and a statement that review may be available before a tribunal, is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule.

\* \* \*

**Comment**

[9] When the conditions of paragraph (e) are met, no imputation of a lawyer's disqualification occurs, and consent to the new representation is therefore not required by these rules. Lawyers should be aware, however, that tribunals may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation, and may disqualify counsel notwithstanding compliance with paragraph (e) if screening will not adequately protect client confidences or otherwise avert the harms against which paragraph (a) protects.

[10] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (e)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[11] Notice generally should be given as soon as practicable after the need for screening becomes apparent.

[12] "Tribunal," defined in Rule 1.0(m), includes any adjudicative body. In matters pending before a tribunal, review of screening procedures may be available before that tribunal. Review may also be available, whether or not the matter is pending before a tribunal, by filing an action in court or by complaint to a disciplinary authority.

### 2009 LAWYERS IN GOVERNMENT CONFERENCE AT HOFSTRA

Hofstra's next major conference on legal ethics will be entitled Lawyers in Government and will be held Sunday, October 18, 2009 through Tuesday, October 20, 2009. Professors with expertise regarding lawyers in government (whether in the legislative, executive, or judicial branches) are welcome to email the Conference Director, Roy Simon, Howard Lichtenstein Distinguished Professor of Legal Ethics, with topic proposals (a short paragraph is sufficient). All Professional Responsibility professors are encouraged to suggest to Roy the names of speakers that they believe would enhance the conference. Roy's email is roy.simon@hofstra.edu, and his phone number is (516) 463-5289.

### 2008 ABA CoLAP CONFERENCE

The ABA Commission on Lawyers Assistance Programs has set their 2008 Conference for Tuesday, October 21 through Friday, October 24 in Little Rock, Arkansas.

### INSTITUTE ON RELIGION, LAW & LAWYER'S WORK ON LIFE BALANCE

The Fall 2008 schedule for Fordham's Institute on Religion, Law & Lawyer's Work includes the program *Beyond Work-Life Balance* on Thursday, October 2, 2008 from 6:00 p.m. - 7:45 p.m. for CLE credit. The program will discuss how practicing attorneys face a number of pressures as they strive to provide excellent service to their clients and also to fulfill their obligations to their families and to the community. In this context, it also will consider how Catholic social teaching on labor, work-life balance, and gender might shed light on these pressures and tensions. Panelists include

Luke Connelly, Esq., Partner,  
Winston & Strawn, LLP (FLS '96)  
Bill Poorten, Esq. (FLS '04)  
Maryanne Stanganelli, Esq.,  
Associate, Baker Hostetler (FLS '04)  
Jessi Tamayo, Esq. Associate  
Director, Louis Stein Center for Law  
& Ethics (FLS '04)  
Amy Uelmen, Esq., Director,  
Institute on Religion, Law &  
Lawyer's Work

All Institute programs are open to the public with the option of CLE credit for a fee. Events are held at Fordham Law School, Room 430 B/C; 140 West 62nd Street, New York, NY. For more information and to register, email [lawreligion@law.fordham.edu](mailto:lawreligion@law.fordham.edu) or call 212/636-7699. For information on other upcoming events, please visit <http://law.fordham.edu/lawreligion> [click "Upcoming Events"]

### IS THERE A HIGHER LAW? DOES IT MATTER

If you have always wanted to see Malibu in February, this may be your year to experience it! Pepperdine University's Nootbaar Institute on Law, Religion, and Ethics is hosting a conference to ask the questions, "Is there a higher law," and "Does it matter," on February 21-22, 2008, at the Pepperdine Law School. The conference promises to bring together law professors, judges, theologians, economists, historians, and philosophers with divergent viewpoints to catalyze the discussion of these two thought-provoking and important questions. Six CLE credits are available for the program. To register or receive additional

information, visit <http://law.pepperdine.edu/ilre>.

### PUBLICATION IN THE JOURNAL OF THE LEGAL PROFESSION

The *Journal of the Legal Profession*, a scholarly journal published by the University of Alabama School of Law, would like to invite submissions to be published in the Spring issue of the 2009 volume. Articles should be submitted to Editor-in-Chief Cole Richins at [jolp@law.ua.edu](mailto:jolp@law.ua.edu). The managing board will thoroughly review all submissions and reply as promptly as possible.

Since its inception, the *Journal* has provided insightful research regarding legal ethics while also supporting cutting-edge scholarship concerning the practice of law and professional responsibility. Publication in the *Journal* provides a wonderful opportunity for you to make your research and expertise available to the professional and academic communities through a highly regarded publication.

### HOLLORAN CENTER FOR ETHICAL LEADERSHIP IN THE PROFESSIONS

The Holloran Center for Ethical Leadership in the Professions at the University of Saint Thomas Minneapolis School of Law focuses on research about the formation of an ethical professional identity in both students and practicing lawyers. If this is an area of scholarship interest for you, please get in touch with their director, Professor Neil Hamilton, and visit their website, [www.stthomas.edu/ethicaleadership](http://www.stthomas.edu/ethicaleadership)

## LEGAL MALPRACTICE LAW UPDATE

Brian T. McDonough prepares the bi-weekly *Legal Malpractice Law Update*, a review of legal malpractice decisions throughout the country, as part of his legal malpractice defense practice with Morrison Mahoney LLP, a 160 attorney Boston based law firm with offices in New York, New Jersey, New Hampshire, Connecticut, and Rhode Island. Mr. McDonough's research method is an all federal - all states LEXIS search of the phrases "legal malpractice" or "attorney malpractice," which results in an average of 22 decisions a week. He reads each decision and summarizes those decisions that are relevant to legal malpractice law. Each bi-weekly *Legal Malpractice Law Update* has an average of 10 case reviews.

If you or anyone you know may be interested in receiving the *Legal Malpractice Law Update*, please contact Mr. McDonough at [bmcdonough@morrisonmahoney.com](mailto:bmcdonough@morrisonmahoney.com)

## FUNDING OPPORTUNITY FOR SCHOLARSHIP RELATING TO LITIGATION

The ABA Section of Litigation invites applications to The Litigation Research Fund, which makes individual awards of between \$5,000 and \$20,000 to support original and practical scholarly work that significantly advances the understanding of civil litigation in the United States. The Fund was established in 2007 to support research and writing projects relevant to litigation policy and practice, with preference given to works with an empirical foundation. The first round of funding in early

2008 resulted in seven grants totaling approximately \$70,000. Priority will be given to applications received by August 31, 2008. For additional information, see <http://www.abanet.org/litigation/researchfund>.

(Section member and former Section Chair Bruce Green has been chairing this project)

## WILLIAMSBURG IN THE FALL

Melody S. Nichols, Assistant Director of Institute of Bill of Rights Law at William & Mary School of Law was so impressed by those of us who attended last spring's program on *The Citizen Lawyer* that she wanted us to know that we would be more than welcome to come to the Institute's Fall Supreme Court Preview scheduled for September 26-27, 2008. For additional information, please visit their web site.

## CHRISTIAN VOCATION OF THE LEGAL SCHOLAR

Pepperdine University's Nootbaar Institute and Regent University School of Law are among the co-sponsors of the Sixth Annual Christian Legal Scholars' Symposium. At this program, legal scholars from around the globe will meet to discuss what it means to be a Christian legal scholar and to examine the implications that a Christian worldview has on the teaching and practice of law. The Symposium will begin Friday, October 10 at noon with a luncheon address on "The Christian Vocation of the Legal Scholar" and continue with a panel of international law professors who will share stories about the intersection of their faith and their academic and legal careers. The remainder of Friday afternoon and a full session Saturday morning will be devoted to Christian jurisprudence, beginning with an address by renowned political

philosopher J. Budziszewski, followed by panels on the implications of jurisprudence for religious freedom issues and the culture of life.

The Christian Scholars' Symposium is a part of the Christian Legal Society Global Convocation (October 9-12). For those attending the full CLS Global Convocation, the only additional fee for the Scholars' Symposium is \$40 for the Scholars' luncheon and keynote. However, if one is unable to attend the CLS Global Convocation, one still can register for the Christian Scholars' Symposium only for \$200. For registration materials or additional information, please visit <http://www.globalconvocation.org/legalScholarsSymposium.html>

#### NATIONAL INSTITUTE FOR TEACHING ETHICS AND PROFESSIONALISM WORKSHOPS

The National Institute for Teaching Ethics and Professionalism (NIFTEP) was established in 2005 as a consortium of five nationally-recognized university centers on ethics and professionalism, and is also sponsored by the American Bar Association Standing Committee on Professionalism and the Georgia Chief Justice's Commission on Professionalism. NIFTEP conducts workshops that bring together leading academics and practitioners involved in promoting the teaching of ethics and professionalism. Participants in NIFTEP workshops are designated NIFTEP Fellows. Although fellowships are typically granted either to full-time law professors who teach legal ethics or to practitioners actively involved in ethics CLE education and

professionalism programs, any person committed to promoting ethics and professionalism may apply. Fellows are reimbursed for their travel expenses; there is no charge for the workshops.

Webcasts of the first two workshops are available on the NIFTEP web site: <http://law.gsu.edu/ccunningham/Professionalism/NIFTEP/> The webcast of the November 2007 workshop will be available by September 15, 2008. The next NIFTEP workshops are scheduled for April 24 – 26, 2009 and November 6 – 8, 2009. If you wish to be placed on an electronic mailing list to receive notices about future NIFTEP events, including the call for fellowship applications for each workshop, please send an email to NIFTEP's Director, Professor Clark Cunningham: [cdcunningham@gsu.edu](mailto:cdcunningham@gsu.edu). Put "NIFTEP MAILING LIST" in the subject line and place your contact details in the text of the email message.

#### WEBCAST OF THE INTERNATIONAL CONFERENCE ON THE FUTURE OF LEGAL EDUCATION

The International Conference on the Future of Legal Education, held in Atlanta from February 20 to 23, 2008, included over 200 speakers and participants drawn from the USA, Russia, Kenya, England, Scotland, South Africa, Argentina, Nigeria, Spain, India, Canada and Australia. The complete program, speaker biographies, abstracts and papers are currently available on the conference web site: <http://law.gsu.edu/FutureOfLegalEducationConference/> This web site also includes copies of PowerPoint presentations made at the conference and a webcast of all the plenary sessions (held on February 21 and 22). Of particular interest to members of

this Section might be the following presentations:

Focus on Law Schools: A New Approach to Preventing Unprofessional Behavior by John T. Berry, Legal Division Director, The Florida Bar, and former chair, ABA Standing Committee on Professionalism  
 Reflections on the Anniversary of the Carnegie Report by William Sullivan, Senior Scholar, Carnegie Foundation for the Advancement of Teaching and lead author of *Educating Lawyers*  
 The New ABA Initiative to Measure Law School Outcomes by Hulett H. Askew, Consultant on Legal Education, American Bar Association  
 Panel on the Role of the Bench and Bar in Transforming Legal Education: Jim O. Stuckey II, Chair, American Bar Association Standing Committee on Professionalism; Melvin F. Wright, Jr., Chair, Consortium of Professionalism Initiatives, and Hulett H. Askew, Consultant on Legal Education, American Bar Association

### INNOVATIVE METHODS FOR TEACHING LEGAL ETHICS

Clark Cunningham at Georgia State recently made a presentation on innovative methods for teaching legal ethics to a delegation of Mexican law professors at the annual meeting of the Southeastern Association of Law Schools. He is also currently working on a related article, *A Practice-Based Approach to Teaching Legal Ethics*, to appear in a special international issue of the *Law Teacher* on *The Role of Values in Common Law Legal Education*. (The *Law Teacher* is the UK equivalent of the *Journal of Legal Education*.) He would be glad to

send the powerpoint slides from his conference presentation and the discussion draft of the article for comments and suggestions. Contact him at [cdcunningham@gsu.edu](mailto:cdcunningham@gsu.edu).

### BOOKS OF INTEREST

**Richard Abel**, Connell Professor of Law Emeritus at UCLA Law School, has a new book coming out this fall: *Lawyers in the Dock: Learning from New York Disciplinary Proceedings* (Oxford University Press 2008). In it, he tells in depth the stories of six New York lawyers disciplined for neglecting clients, overcharging, or excessive zeal (three of the most common, or most disturbing, ethical violations). The case files, including lengthy statements in mitigation, allow Professor Abel to detail what the lawyers did and how they understood and justified their actions. He relates their stories to the basic problem of trust and betrayal and proposes reforms that might make such deviance less common.

Associate Dean **Kelly Lynn Anders** of Washburn University School of Law has a new book due out, *The Organized Lawyer* (Carolina Academic Press). The book should be of great interest to members of the Professional Responsibility Section because on a regular basis, attorneys are sanctioned for many misdeeds that can be traced back to disorganization. Often, the sanctions are for actions that are inexcusable, but not malicious. Rather they are examples of how bad things can get when one is disorganized.

*The Organized Lawyer* is designed to help all types of lawyers--corporate, nonprofit, government, private, academic, and solo practitioners--develop and maintain a more organized space, and it does so while recognizing that we all have a particular organization style that impacts how we view

our things, live with them, and keep them organized — or disorganized and that what works for some does not work for others. Additional details are available at [www.theorganizedlawyer.com](http://www.theorganizedlawyer.com).

West announces the forthcoming publication of the second edition of *Lawyers, Clients, and Moral Responsibility* by Professors **Thomas L. Shaffer** (Notre Dame Law School) and **Robert F. Cochran, Jr.** (Pepperdine Law School). This second edition of the authors' influential book explores the place of moral and social values in the law office. Following its critique of the now familiar lawyering models: godfather, hired gun, and guru, the authors present their model, the lawyer as friend (based on Aristotle's notion of friendship), a lawyer who raises and discusses moral issues with the client without imposing the lawyer's values on the client. The book presents a practical way for lawyers to raise and discuss moral issues with clients. It will serve as an engaging supplement to professional responsibility, client-counseling, and legal clinic courses. This second edition adds substantial discussion of three topics in particular:

- 1) the place of moral discourse within law firms and corporations,
- 2) ways to engage the powerless client in moral discourse without overpowering the client, and
- 3) the place of social justice in client counseling and the practice of law.

**Walter Effross**, Professor of Law at American University's Washington College of Law, will be posting his new work *Professional ethics of Lawyers in the Digital World* online.

Professor **Michael B. Lang** of Chapman University School of Law

is writing a casebook on Tax Practice Ethics with **Linda Galler** of Hofstra School of Law.

Professor **Lisa G. Lerman**, The Catholic University of America, Columbus School of Law, and Professor **Philip G. Schrag**, Georgetown University Law Center, have completed the second edition of *Ethical Problems in the Practice of Law*. Thoroughly updated, the second edition now features a more flexible organization and coverage of important recent developments in the law, rules, and code.

**Paul Rice**, Professor of Law at American University's Washington College of Law and attorney/client privilege expert, has written a collection of poems about his childhood experiences on his grandmother's farm. The book is called *Walking among the Shadows: Searching for the Red Sunfish*.

Foundation Press has published the 10th ed. of its very popular text *Professional Responsibility* (10th ed. 2008) by **Thomas Morgan**, Oppenheim Professor of Antitrust and Trade Regulation Law at the George Washington University School of Law, and Professor **Ronald Rotunda** of Chapman University School of Law.

The second edition of *Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility* by **Susan R. Martyn**, University of Toledo and **Lawrence J. Fox**, *Drinker Biddle & Reath* is now available. For the second edition, a new chapter on Control and Communication has been added as well as a new chapter on Judicial Ethics and an additional series of notes on ethical challenges unique to specialized areas of practice, including pro bono representation, criminal defense, insurance defense, representing organizations, and representing governments.

Professor **Kyndra Rotunda**, Chapman University School of Law, has now published *Honor Bound: Inside the Guantanamo Trials* (Carolina Academic Press 2008). As noted by Morris Davis, former Chief Prosecutor for the Military Commissions at Guantanamo Bay, then Major Rotunda was the only one who saw events at Guantanamo Bay unfold from three distinct vantage points, legal advisor in Guantanamo Bay, a member of the Criminal investigations Task Force, and war crimes prosecutor.

An esteemed and diverse group of critics have been enthusiastic in their reviews of the book. Former U.S. Attorney General Edwin Meese called *Honor Bound* "an engrossing, first-hand account of military justice in an age of terrorism and what it takes to defend liberty as a JAG officer today." **Alan M. Dershowitz**, Harvard Law School Professor, said of the book, "This eye-opening inside account must be read by everyone who cares about balancing national security and human dignity," and Theodore B. Olson, former Solicitor General of the United States called *Honor Bound* a "page-turning eye-opener for me. No American should miss the opportunity--and responsibility--to read it. Bravo!"

Thomas M. Cooley Law School has recently completed the book *Reflections of a Lawyer's Soul: The Institutional Experience of Professionalism at Thomas M. Cooley Law School*, and evaluation and description of Cooley's professionalism efforts. The work was edited by Professors **Amy Timmer** and **Nelson Miller**.

**Marc I. Steinberg**, Radford Professor of Law at Southern Methodist University school of Law, has had a new book published--*Lawyering and Ethics for the Business Attorney* (West 2d edition 2007) and has also recently updated his work *Attorney Liability After Sarbanes-Oxley* (Law Journal Press 2007, 2008).

For those interested in legal ethics and legal heroes, Stuart Streichler's new book might be worth checking out. *Justice Curtis in the Civil War Era* is a biography of Benjamin R. Curtis, one of the nation's most brilliant Supreme Court justices and one of the two dissenters in the Dred Scott case. In fact, Justice Curtis not only dissented in the Dred Scott opinion, but he is said to have resigned from the Supreme Court over the majority's opinion. After leaving the Court, Curtis also publicly challenged Lincoln's conception of executive power and his presidential military tribunal system during the Civil War. During Reconstruction, Justice Curtis served as President Andrew Johnson's attorney in the President's impeachment trial. Professor **Tony A. Freyer**, University of Alabama School of Law, called Streichler's biography of Curtis "a model study of the American legal mind at work," and **Mark Graber**, professor at the University of Maryland School of Law noted, "Curtis was an extremely important political and legal figure during the nineteenth century; yet, he remarkably lacks a serious biography.... Professor Streichler does a first-rate job. No need exists for a further biography."

**Michael Tigar**, Research Professor of Law at American University's Washington College of Law, has authored *Thinking About Terrorism: The Threat to Civil Liberties in Times of National Terrorism*. In this book, Professor Tigar examines government responses to terrorist threats throughout history and the impact these

responses have had on civil rights. Professor Tigar has also edited *Trial Stories* with his colleague at American Professor **Angela J. Davis**.

Professors **Bernard Wolfman**, Harvard Law School, **Deborah H. Schenk**, New York University Law School, and **Diane Ring**, Boston College Law School, have completed the fourth edition of their text *Ethical Problems in Federal Tax Practice*. This long-time standard organizes the materials according to the various functions a lawyer serves, including litigator, advisor, and counselor, and has been updated to reflect the issues tax lawyers face today. The new edition features a significant update of the changes made to Circular 230, which applies to all tax lawyers and a complete revision of Chapter 4, "Tax Planning and Advice," to reflect the increased role that lawyers play, particularly with respect to tax shelters.

## NEWS FROM SCHOOLS

**University of Alabama School of Law** alumnus **Harper Lee** received the Presidential Medal of Freedom last November from President Bush, who said of Ms. Lee and her classic book, "One reason *To Kill a Mockingbird* succeeded is the wise and kind heart of the author, which comes through on every page." Ms. Lee attended the law school from 1946-49.

**Arthur N. Read**, General Counsel of Friends of Farmworkers, Inc., a legal services provider in Philadelphia, received the 2007 Morris Dees Justice Award. The **University of Alabama School of**

**Law** partners with Skadden, Arps, Slate, Meagher & Flom, LLP to present this annual award named in honor of Mr. Dees, the famed civil rights lawyer and University of Alabama School of Law graduate. Nominations for the award are typically accepted through the end of July for the year the award is to be given.

**Harvard Law School** has just started a new program that will give students their final year of tuition for free if they commit to work in public service for five years after graduation. The program is called the Public Service Initiative and will operate in addition to the law school's current loan repayment program. In addition five HLS students and one alumnus received Skadden Fellowships, a public interest grant funded by Skadden, Arps, Slate, Meagher & Flom. More than sixteen students and alumni won awards this year to encourage public service work.

The **University of Maryland School of Law** is partnering with the Fetzer Institute of Kalamazoo, Michigan, to develop LEAD, a new initiative that emphasizes leadership, ethics, and democracy in legal education. The Fetzer Institute is supporting the Initiative with a \$1.6 million investment. **Michael Millemann**, Jacob A. France Professor of Public Interest Law, will serve as LEAD's director, and Marbury Research Professor of Law **Paula Monopoli** will head the leadership component of the Initiative.

**Pennsylvania's law schools** this summer held their second annual conference-meeting between their deans of students and Pennsylvania Lawyers Concerned for Lawyers and the directors of character and fitness for the Pennsylvania Board of Law Examiners. Once more it was a productive and fruitful event!

The **University of Virginia School of Law's** Pro Bono Project resulted in students volunteering more than 13,600 hours to indigent clients and nonprofit organizations last year. The project encourages students to perform at least 75 hours of free legal work during their time in law school. A record three UVA law students received Skadden Public Service Fellowships for 2008.

**Washington University in Saint Louis School of Law** alumnus Errin Braddock donated a kidney to his law school classmate Tony Jackson, a father of two who was suffering from lupus and kidney failure. Both are doing well, and not only is Mr. Jackson's new kidney functioning well, but he is testing free of lupus. Mr. Braddock noted, "My kidney was my gift to Tony. Seeing how it changed the quality of life for him and his family was his gift back to me, and I am forever thankful."

## SECTION MEMBER NEWS

**Professor Carol Rice Andrews**, University of Alabama School of Law, was a panelist on the Alabama Chief Justice's Professional Consortium, an invitation event for leaders of the Alabama Bar and Judiciary and organized by the Chief Justice's Commission on Professionalism and the Alabama State Bar. She also served as Co-Chair of the University of Alabama United Way campaign, which set a record for University giving.

**Debra Bassett**, Professor of Law and Judge Frank M. Johnson Jr. Scholar at the University of Alabama Law School, has recently spoken at

the University of Florida and Valparaiso Law Schools and at the Annual Judicial Symposium sponsored by the National Foundation for Judicial Excellence.

**Anita Bernstein** has been appointed the Anita and Stuart Subotnick professor of Law at Brooklyn Law School.

**Pamela Bucy**, Fran M. Bainbridge Professor of Law at the University of Alabama Law School, serves as an at-large Bar Commissioner and chair of the Mentoring Task Force for the Alabama State Bar.

**Alan Childress** of Tulane Law School has been named the Conrad Meyer III Professor of Civil Procedure.

**Susan Carle**, Professor of Law and Associate dean for Scholarship at American University's Washington College of Law, received the National Equal Justice Library Award for Distinguished Scholarship on the subject of equal access to justice. Dean Carle was also reappointed a member of the D.C. Bar Rules of Professional Responsibility Review Committee.

American University's Washington College of Law Professor **Mary Clark** spoke on *Women Judges Speaking Out* at the University of Akron Law School's New Women's Legal History Symposium.

**George Cohen** of the University of Virginia Law School was the inaugural Edgar M. Snyder Distinguished Visiting Scholar at the University of Pittsburgh Law School last April. The Snyder Scholar program each year brings a distinguished scholar in the field of legal ethics to Pitt for two days.

An increasingly important ethical issue is when a law firm that has served as a

corporation's general counsel can also provide legal representation for an internal investigation of potential wrongdoing without violating conflict of interest rules. One federal court has recently addressed this issue in a lawsuit by the trustee of a creditor's trust against such a law firm for malpractice. The court denied the law firm's motion to dismiss, relying in part on expert affidavits provided by **Clark D. Cunningham**, W. Lee Burge Professor of Law & Ethics at Georgia State, and Merritt B. Fox, Michael E. Patterson Professor of Law at Columbia. For more information, see *In re Friedman's Inc.*, 385 B.R. 381, 2008 WestLaw 131163 (S.D.Ga. 2008).

Professor **Maureen Eggert** of Wake Forest Law School recently conducted two CLE programs, a CLE webinar for West LegalEd Center entitled *Avoiding Ethical Dilemmas and Malpractice in North Carolina* and a program for the North Carolina Bar Association entitled *Internet Research Tools Without the Expense*.

**Barbara Glesner Fines**, Ruby M. Hulen Professor of Law at the University of Missouri - Kansas City School of Law has assumed the duties of Associate Dean for Faculty.

Harvard Law School Professor **Mary Ann Glendon** has become the U.S. Ambassador to the Holy See (Vatican). Professor Glendon also recently received the National Medal for the Humanities.

Tom Bevill Chairholder of Law at the University of Alabama Law School **Steven Hobbs** spoke at the

Association of Family and Conciliation Courts' conference on "Ethics in Family Law" and also presented "When the Hero Gets the Blues" at the Alabama Bar Leadership program. Professor Hobbs was also the featured speaker at Widener—Harrisburg's annual Martin Luther King Day Celebration, and his talk for Widener, *Martin and Me: Lessons for the Social Activist*, was an especially popular program for the Pennsylvania Cable Network and was aired repeatedly. Professor Hobbs is also serving on the Committee to Review Scholarly Papers for the 2009 AALS Annual Meeting and continues to be active as a nationally-recognized quilter and speaker on quiltmaking.

This year **Randy Lee** of Widener Law School's Harrisburg Campus has done nine live ethics CLE programs for the Pennsylvania Bar Institute on *A Man for All Seasons* and *a Lawyer's Search for Integrity*. The program, which intertwines Robert Bolt's play about Saint Thomas More with the experiences of present day lawyers, has also been shown as a video CLE program in over twenty Pennsylvania counties and is available for CLE credit on the websites of four state bar associations. In an unrelated twist of fate, Professor Lee received the Fidelis Award this summer from the Saint Thomas More Society of Central Pennsylvania.

**William Wesley Patton**, Professor, Associate Dean of Clinical Programs, and J. Allan Cook and Mary Schalling Cook Children's Law Scholar at the Whittier Law School, has been working on a very important and interesting professional responsibility case that has been published in California, *In re Kristen B.*, 163 Cal. App. 4th 1535 (4th Dist. Div. 1, June 18, 2008). A Petition for Review has been filed in the California Supreme Court, and Professor Patton just filed a Petition in Support of Review and a Request for

Depublication in the California Supreme Court for the Whittier Law School Legal Policy Clinic.

In *Kristen B.* the court of appeal found that it was not error for a child's attorney in a child abuse dependency case to impeach his child client on the witness stand and to argue in closing argument against his child client's stated legal goal.

The opinion was based, in large part on a California statute, Welfare & Institutions Code Section 317 (e) that defines a child's counsel as both a zealous advocate and a federal CAPTA guardian ad litem.

Professor Patton's brief raises a separation of powers question because the California Supreme Court for more than 100 years has stated that it has plenary and inherent power to regulate the attorney/client relationship, and the Court in case law and in its approval of the California Rules of Profession Conduct has not mandated a different form of lawyering for child clients. Therefore, there is a serious separation of powers problem since the Legislature in section 317(e) has redefined the attorney/client relationship in a manner that often will result in a violation of client loyalty and confidentiality since the statute permits the child's attorney to make recommendations to the court that are both against the child's stated preference and may rely sub silentio on the child's confidential statements to the attorney.

Professor Patton also argues that these fragile abused children will be re-abused by the jurogenic effects of the legal system since they will, once again, have their expectation of loyalty violated and it will exacerbate their psychopathology

and make treatment more difficult. (Professor Patton teaches a course in forensic child and adolescent psychiatry at the UCLA Medical School Neuropsychiatric Institute)

**Ronald and Kyndra Rotunda** are pleased to report that they are now law professors at Chapman University Law School.

Section Chair **Irma Russell**, NELPI Professor of Law, University of Tulsa College of Law and National Energy-Environment Law & Policy Institute, has been busy with presentations over the last few months. Professor Russell was recently a panelist at the Southeast Association of American Law Schools Annual Meeting; a co-presenter at the Silver Anniversary Presentation of ALI-ABA's Annual Advanced Course of Study, Hazardous Substances, Site Remediation, and Enforcement in Washington, D.C.; a panelist on the CLE Panel on Ethics Issues in Environmental Law at the Pace National Environmental Moot Court Competition; and a presenter at the Fourth International Conference on Contracts at the University of the Pacific, McGeorge School of Law. Professor Russell also just presented on The Lawyer's Role in Representing Corporate Clients at the ABA Section on Environment, Energy & Resources Fall Meeting. Professor Russell will be visiting at the University of Kansas School of Law this spring.

Professor **Jack Sahl** of the University of Akron School of Law is back home having just completed (for the 18th year) his six-week teaching assignment at Yale for international lawyers. Professor Sahl's return this year is especially nice because, as of July 14th, he and his wife Joann adopted two siblings from India: Anish (a 6-year-old boy) and Mandakini (a 10-year-old girl). His experience at Yale teaching lawyers with different levels of English is

proving helpful since the two are just beginning with their English but most ingenious. Anish and Mandakini are a real joy - and very active!

Professor Sahl has also been appointed Faculty Director of the Miller-Becker Institute for Professional Responsibility. The Miller-Becker Institute's First Distinguished Lecturer is Professor **Geoffrey C. Hazard, Jr.** of the University of Pennsylvania Law School. His lecture, "*Not the City of God*": *Confronting Multiple Obligations* will be held at the Akron Law School of Law on November 21, 2008.

Professor **Linda F. Smith** of the University of Utah's S.J. Quinney College of Law is serving as a member of the Utah Judicial Standing Committee on Resources for Self-Represented Parties and recently organized and participated in a CLE entitled *The Access to Justice Crisis: The Challenge of Unrepresented Litigants.*"

Newsday reports that **Roy Simon**, the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra Law School and Professional Responsibility Newsletter Recent Developments columnist, is running for the New York State Senate. Professor Simon is challenging the Senate Majority Leader, a twelve-term incumbent. **Nelson Tebbe** has joined the faculty at Brooklyn Law School as an associate professor of law.

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