

Spring 2010 Edition

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.



MESSAGE FROM THE CHAIR

Professional Responsibility in a Changing World

By Susan Carle

(American University Washington College of Law)

In my first column as section chair, I thought I'd take note of the tremendous energy I sense among legal ethicists confronting both the opportunities and the challenges facing the legal profession in the current economic and political climate. The work of our section members, including our outgoing chair and continuing technology czar Laurel Terry—who organized our section program last year on international financial reporting requirements and their implications for lawyers—has gotten us all thinking more about globalization and what it means for the future of the legal profession. Along with that, I think we need to be thinking about the future of our roles in educating students to take their places within the profession. All kinds of activity are taking place to explore these themes, including work by our section as I'll describe below.

A huge international legal ethics conference cosponsored by Stanford Law School and the ABA Center on Professional Responsibility, titled “The Legal Profession in Times of Turbulence,” and scheduled for July 15 to 17, promises to be the most impressive such international gathering of legal ethicists to date. Another important upcoming conference is the National Conference on Professional Responsibility organized by the ABA Center for Professional Responsibility from June 2 to 5 in Seattle, Washington, which will explore the work of the ABA Ethics 2020 Commission, among other topics, and at which our section will have a dinner gathering organized by Andy Perlman of Suffolk Law School; hope to see many of you there. And many law schools have held exciting gatherings to explore related issues, not only with respect to “big law” but also in the provision of legal services to ordinary people. Please send in future conference announcements for publication in our next newsletter.

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One recent conference I attended, organized by Mitt Regan and Carol Silver at Georgetown University Law Center, was entitled “Law Firm Evolution: Brave New World or Business As Usual?” This terrific conference brought together leaders of the legal profession, primarily from the U.K., Canada, and the U.S., to compare the changes they are experiencing in their own domestic contexts as well as to discuss how changes in the global context are affecting and can be projected to continue to affect the way our students will practice law. Topics included the transition in billing practices away from hourly rates to project-based billing schemes, how clients are demanding more transparency and value from legal services, how future assessments of lawyers’ productivity are likely to change from hours spent to the very different metric of value extracted per lawyer hour, and the future importance to lawyers’ skill sets of such capacities as project management, managing e-discovery, and the like. Participants offered questions such as: Will fewer lawyers be needed at the “top” of the profession to handle traditional tasks involving legal judgment and analysis, and will law schools begin to specialize in teaching specific kinds of lawyers to play more specialized roles in law practice? How much of the increasing need for post-graduate legal skills training will law schools fill (as some now do in countries such as England), and how much of this important market for ongoing legal education will law firms meet through internal programs or other service providers instead?

As we know, our current graduates are facing increased challenges in fitting into a bruised labor market for junior lawyers. At the same time, the broad prognosis for the profession is far from bleak. In a world of increasingly complex and thorough regulation, involving overlapping and sometimes conflicting sets of national and super-national legal rules, a strong demand for lawyers will surely continue. The legal profession is thus far from in decline—as compared to print journalism, for example, as one conference participant noted. The question thus becomes not whether new generations of law school graduates

will find jobs in the legal field, but how those lawyers will practice and what kind of skills, support, and values clarification they will need in preparation for the practice world they will encounter. In short, the rapid change the profession is currently undergoing promises to place huge new demands on law schools to adequately prepare students for changing practice environments.

I’m sure many of us are thinking about these issues as we engage in teaching, service and scholarship. It is in many ways the best of times to be a professional responsibility teacher, because so much is in almost dizzying motion. It is easy to excite students about these issues involving change in the profession and thus show them the relevance of professional responsibility questions to their future practice lives. Even professors who teach in other areas of the law must be thinking about these questions, a situation that poses excellent opportunities for dialogue across professional sub-fields. As the Chinese adage notes, “in crisis there is opportunity,” and I am sure many of us are thinking about the opportunities posed by the challenges lawyers face in the world today.

We as a section are focusing on these questions too, in a variety of ways. First, our section is working on a proposal for a one-day workshop on the future of the legal profession and law teaching to be held in conjunction with the 2012 Annual Meeting. A committee made up of volunteers from our Executive Board is currently working on drafting the proposal, and welcomes input from section members on themes, topics, and potential speakers. The list of committee members, along with a bit more information about the proposal planning process, can be found later in the newsletter. All of us would welcome email or other contacts from interested section members.

Another committee is hard at work recruiting speakers and otherwise organizing our 2011 AALS Annual Meeting program, to be held on the theme of “Lawyers’ Special Responsibilities as Public Citizens in a Rapidly Changing World.” Further

information about this program also appears later in this newsletter.

In other work related to the 2011 Annual Meeting, we are reaching out to work with other sections by cosponsoring and playing a role in planning other programs also of particular interest to our members. These include the Section on Litigation, with which we are planning a program entitled “Current Issues in Judicial Disqualification” (Andy Perlman is the liaison), and the Section on Law and Mental Disability, with which we are co-sponsoring a program on “Alternatives to Traditional Guardianship” (with Peter Margulies as liaison). Our section is one of the largest in the AALS, weighing in with almost 900 members at last count, and our interests span a wide variety of cross-sectional topics, so the Executive Committee is pleased to play a role in co-sponsoring programs of particular appeal to our members.

Indeed, we must have the hardest working executive committee of any AALS Section, because still other executive committee members are working hard on a host of other outreach, mentoring, resource development, and prize committees. Barbara Glesner-Fines is chairing our Mentoring Committee, Ben Cooper is organizing our PR Exam Bank Project, Laurel Terry is updating our Casebook Summaries project, and Sam Levine is chairing our Fred Zacharias Prize committee, on which Ted Schneyer is also serving. Chair-elect Peter Joy is heading a committee to plan our section dinner at 2011 Annual Meeting, and Barbara Gillers is our section liaison to the ABA (please find reports below). A full list of executive committee members and email addresses can be found later in this newsletter.

Most important of all to this newsletter’s continued existence is our new newsletter editor, Margaret Tarkington of the J. Reuben Clark Law School of Brigham Young University, who is filling big shoes left by outgoing editor and former section chair Randy Lee. Thank you, Margaret, for stepping up to take on this important job. Margaret is

pioneering a new feature showcasing short essays by section members on topics of common interest, which I am sure you will find engaging. In addition, Renee Knake from Michigan State University (who also organized a wonderful “hot topics” panel on “The Supreme Court’s Increased Attention to the Law of Lawyering” at the 2010 Annual Meeting), has volunteered to prepare our traditional “Recent Scholarship” column for the fall newsletter. In doing so, Renee is helping to patch the enormous hole created by the untimely loss of the irreplaceable Fred Zacharias, who did such a fine job on this column for many years. Happily, Roy Simon has volunteered to continue his wonderful column, “Recent Developments in the Law of Lawyering.”

We still need a volunteer to take over the vacant position of “Case Developments” columnist, which was how I got my start in the section some years ago when Carol Needham walked up to me, then a perfect stranger to her (who must have looked somewhat like a sucker), and recruited me to take over this column for several years. If you have an interest in carrying out this column assignment or know a colleague who might be interested, please let Margaret or me know. I found writing the case developments column tremendously rewarding, both as a way to get involved in the section and as a painless way of keeping up to date for my professional responsibility teaching.

Last but not least, thanks to Laurel Terry’s continuing work for the section, we now have our opt-out list serv up and running. Several intriguing conference announcements and other messages of general interest to the section have appeared on it thus far. It can be accessed via our section website, which Laurel created and continues to maintain, at <https://connect.aals.org/p/co/in/gid=145>. You can also find there a wealth of other information about the section, including information for new law teachers, an “in-progress” exam bank, case book summaries, lists of subcommittee members, past section chairs, and links to relevant blogs and other electronic resources. Until next time, I hope you

will visit our section's home on the web, and stay in touch with our activities in this and other ways.
-Susan

AALS PROFESSIONAL RESPONSIBILITY SECTION ANNOUNCEMENTS

2010 AALS PR SECTION ANNUAL MEETING PROGRAM

This year our section's annual meeting program will take place at the AALS meeting in San Francisco on **Friday, Jan. 7, 2011**, from **10:30 a.m.** until 12:15 p.m. The title for the program is *Lawyers' Special Responsibilities as Public Citizens in a Rapidly Changing World*.

Program Description:

Recent world events have led to enormous new pressures on, and potential transformations in, conventional understandings of lawyers' professional responsibilities. The worldwide economic crisis and its causal link to financial practices in which some lawyers were complicit, coupled with lawyers' roles in a host of recent corporate scandals, have shifted attention back to lawyers' professional responsibilities to safeguard the public purposes of regulatory law. The challenges of combating terrorism while preserving treasured lawyering traditions that protect individual civil liberties against state encroachment have raised difficult new dilemmas. Persisting economic and social inequalities pose a host of questions about lawyers' special responsibilities, if any, to work for social justice.

At the same time, globalization has led to increased linkages among lawyers in sharing best practices on professional responsibility and other matters. Lawyers from different parts of the world are sharing experiences in thinking through the roles of lawyers and the regulation of lawyers in enhancing corporate social responsibility. Lawyers are

likewise sharing ideas about access to justice and other social responsibility concerns. These efforts suggest new possibilities for lawyer collaboration in their roles as public citizens throughout the world.

All of these new issues confronting lawyers in a rapidly changing world raise important questions about how we should teach new generations of lawyers to assume their places in the legal profession as special citizens with potentially unique duties as guardians of justice. A diverse panel of distinguished experts will discuss these issues at the 2011 Professional Responsibility Section's Annual Meeting Program. The Section will conduct a call for papers to fill some panelist slots.

Confirmed Speakers:

William Simon, Columbia Law School, "Tax Practice and the Frontiers of the Gatekeeper Role"

Lt. Colonel Yvonne R. Bradley, (discussing reflections on professional responsibility issues as a JAG Lawyer at Guantanamo Bay – info. provided for general topic identification purposes only)

Scott Cummings, UCLA, "New Global Developments in Public Interest Law"

Nora Freeman Engstrom, Stanford, "Domestic Access to Justice"

Other panelists to be filled through **call for papers** (announced below).

Papers to be published in the AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY, AND LAW.

**ACTIVITIES IN CONJUNCTION WITH THE
36TH ABA NATIONAL CONFERENCE ON
PROFESSIONAL RESPONSIBILITY AND THE
26TH NATIONAL FORUM ON CLIENT
PROTECTION**

The ABA Center for Professional Responsibility invites you to join us for the 36th National Conference on Professional Responsibility at the Westin Seattle on June 2-5, 2010. The Conference will be held in conjunction with the 26th National Forum on Client Protection.

Legal scholars, jurists and specialists in the professional responsibility field will gather for three days of intensive seminars covering a wide range of topics, including: ethical preparation of witnesses; conflicts; confidentiality and attorney-client privilege; the ethics of investigations; sanctions for trial conduct; SEC prosecutions of lawyers; disaggregated legal work; prosecutors' special responsibilities under amended Rule 3.8; virtual law practice; cross border practice; and restrictions on the right to practice. Attendees also are invited to participate in optional roundtable discussions including the work of the ABA Commission on Ethics 20/20, academic research projects and ideas, and ethics/risk management functions at a law firm or corporate law department, sponsored by the ABA Business Law Section Firm Counsel Project. See <http://www.abanet.org/cpr/events/prconf.html> for conference schedule and registration information.

Moreover, our Section has taken a leadership role in two events held in conjunction with the conference:

SCHOLARSHIP ROUNDTABLE

The Scholarship Roundtable will be held on Friday June 4th from 12:30 to 3:30 in the Whidbey Room, on the "San Juan" level of the ABA Center for Professional Responsibility Conference hotel. The starting time for the Roundtable has been moved up to 12:30 so that people who would like to also attend the 2020 Commission program starting at 2:00 will be able to do so. Carol Needham is

looking into getting box lunches; send her an e-mail with "Roundtable Box Lunch" in the subject line if you want further info on how to order.

This year's roundtable will focus initially on the works of two scholars:

Renee Newman Knake, Asst. Prof. Michigan State, will discuss "The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?"

Prof. Knake can be reached at knakeree@law.msu.edu or 517-802-8188.

Robert K. Vischer, Assoc. Prof. Univ. St. Thomas (Minn.) will discuss "Trust and the Global Law Firm: Are Relationships of Trust Still Central to the 21st Century Legal Profession?"

He can be reached at Rkvischer@stthomas.edu or 651-962-4838

Members of the AALS Section on Professional Responsibility can participate in the Scholarship Roundtable without paying a registration fee; academics who will be in the Seattle area on June 4th are invited to attend.

For more information on the Roundtable, please contact **Carol Needham** at needhamc@slu.edu and include "Roundtable" in the subject line.

JOIN US FOR DINNER!

The Professional Responsibility Section is organizing a dinner for Friday, June 4th in Seattle during the ABA's National Conference on Professional Responsibility. We are reserving a private room at a restaurant near the conference, and we need to estimate how many people are likely to attend the dinner in order to reserve the proper room. If you are interested in attending, please email **Andy Perlman** at aperlman@suffolk.edu. (Total cost will be approximately \$60 per person.)

**PLANNING COMMITTEE FOR
2012 WORKSHOP PROPOSAL
SOLICITS SECTION MEMBER INPUT**

The members of the planning committee to develop a proposal from the AALS Professional Responsibility Section for a one-day workshop on the general theme of “Changes to the Legal Profession and What They Mean for Law Schools,” are as follows: Susan Carle (chair), Barbara Glesner-Fines, Peter Joy, Peter Margulies, and Ted Schneyer. We welcome input from all section members. (Contact info. can be found below.) The proposal is due on May 22, 2010, at which time it will be evaluated by the Executive Committee of the AALS. If the proposal is accepted, a separate committee will be appointed by the AALS to continue with the planning for the workshop.

**THE PROFESSIONAL RESPONSIBILITY
EXAM DATABASE**

Ben Cooper is putting together a database of professional responsibility exams as a resource for section members. This database will be available on the section’s website later this year. Ben will be reaching out to section members this summer via the listserv to solicit exams from willing donors and then to provide updates on the progress and availability of the database.

**PROFESSIONAL RESPONSIBILITY
MENTORING OPPORTUNITIES**

New to teaching and writing in professional responsibility? Wish you had someone to call to ask questions, share ideas, and get advice?

Have some experience in the field? Willing to share your experience and perspective?

Join the AALS-PR Section Mentoring Network. You will be matched with another faculty member to share ideas and resources on teaching and researching Professional Responsibility. Contact

Barbara Glesner Fines, Associate Dean for Faculty, UMKC Law at glesnerb@umkc.edu with your contact information, years taught, and your particular interest in having/being a mentor.

**COMMITTEES OF THE 2010–11
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(Updated April 14, 2010)

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NEWSLETTER

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JAN. 2010- JAN. 2011**

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**FROM OUR LIAISON TO THE ABA
STANDING COMMITTEE ON ETHICS AND
PROFESSIONAL RESPONSIBILITY**

By Barbara S. Gillers

(Adjunct Professor of Law New York University
School of Law and Fordham Law School)

Greetings!

This is my second report as the Section's Liaison to the ABA Standing Committee on Ethics and Professional Responsibility. It has been a busy few months. While the Committee hasn't published any

opinions since my report in the Fall, it has considered a variety of important issues, including whether amendments to the Model Code of Judicial Conduct should be adopted in light of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ---, 129 S.Ct. 2252 (2009) and *Citizens United v. Federal Election Commission*, --- U.S. ---, 130 S.Ct. 876 (2010).

Here's my take on current topics. Send me your thoughts, comments, suggestions, research leads, citations, and any other resources you think would be helpful, and, most importantly, stay tuned!

- *Lawyer Websites*: Lawyers use websites to communicate with the public. What ethical obligations apply? What rules govern descriptions of the lawyers, their firms, their practices, their matters? What creates a prospective client-lawyer relationship under Rule 1.18? Do some interactive features themselves create a client-lawyer relationship? What disclaimers might avoid that result? What disclaimers are required in any event?
- *Client Confidences and Ineffective Assistance of Counsel Claims*: When a former client claims that a lawyer provided constitutionally ineffective assistance of counsel, does the self-defense exception contained in Model Rule 1.6(b)(5) permit the lawyer to disclose client confidences without consent?
- *Conflicts Issue in Estate Planning*: Which family members may a lawyer represent in connection with estate planning matters? Husband and wife? Entire family? What should the engagement letters say? What should the waivers explain? When is the multiple representation not (or no longer) appropriate?
- *Conflicts Related to Inside Counsel Representing Corporate Affiliates*: How should inside counsel handle conflicts issues when representing corporate affiliates? How do the rules governing joint representations and common interest arrangements apply? When should affiliates be separately represented?

• *Other Possible Topics:* Reasonableness of Limited Scope Representations; Conflicts in Representing Several Individuals Forming a Partnership or Incorporating a Business; and, Ethics Issues in the Use of Litigation Funding Companies.

So, if you're working on a paper, giving a talk, or just have some ideas on any of these topics, let me know. If these topics are not on your radar screen but you have another idea for an opinion, send it along. I'm just a click away, at barbara.gillers@nyu.edu.

See you in Seattle. Best.
-Barbara

OTHER PROFESSIONAL ANNOUNCEMENTS AND OPPORTUNITIES

CALL FOR PAPERS ANNOUNCEMENT AALS SECTION ON PROFESSIONAL RESPONSIBILITY

Lawyers' Special Responsibilities as Public Citizens in a Rapidly Changing World

Friday, Jan. 7, 10:30 a.m. – 12:15 p.m.
2011 AALS Annual Meeting
San Francisco, California

The AALS Section on Professional Responsibility will hold a program during the AALS 2011 Annual Meeting in San Francisco, California on "Lawyer's Special Responsibilities as Public Citizens in a Rapidly Changing World," and invites the submission of papers on this topic for presentation and/or publication consideration. (Please see above for program description.)

Eligibility:

Faculty members of AALS member and fee-paid law schools are eligible to submit papers. Foreign, visiting and adjunct faculty members, graduate students, and fellows are not eligible to submit.

Registration Fee and Expenses:

Call for Paper participants will be responsible for paying their annual meeting registration fee and travel expenses.

How will papers be reviewed?

Papers will be selected after anonymous review by the members of the 2011 Annual Meeting Program Committee listed below. In order to facilitate anonymous review, please identify yourself and your institutional affiliation only in the cover letter to your manuscript and not in the manuscript itself.

Members of the 2011 PR Section Program Committee:

Susan Carle (chair), American University
Washington College of Law
Sande Buhai, Loyola Law School in Los Angeles
Margaret Raymond, The University of Iowa
College of Law
Jack Sahl, The University of Akron School of Law

Will program be published in journal?

Papers will be eligible for publication by the AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & LAW by mutual agreement of the author and journal editors.

Deadline date for submission:

Wednesday, Sept. 1, 2010
Authors of accepted papers will be notified by Friday, Oct. 1, 2010.

Contact for submission and inquiries:

Susan D. Carle
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**CALL FOR PAPERS:
AALS SECTION ON LITIGATION**

Current Issues in Judicial Disqualification

Friday, Jan. 6, 4:00 pm – 5:45 pm
2011 AALS Annual Meeting
San Francisco, California

The legal landscape for judicial disqualification has received a few recent jolts. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ___, 129 S. Ct. 2252 (June 2009), the United States Supreme Court ruled that due process required disqualification of a West Virginia supreme court justice whose campaign received \$3 million in campaign support (via independent expenditures, not direct campaign contributions, which were limited to \$1,000 under state law) from Massey's CEO. In *Citizens United v. Federal Election Commission*, 558 U.S. ___, 130 S. Ct. 876 (January 2010), the Supreme Court invalidated restrictions on direct corporate expenditures concerning political issues, raising the stakes with regard to potential appearances of partiality resulting from judicial electoral processes (the scope of the decision remains a matter of debate, as reflected in the famous dust-up between President Obama and Justice Alito during the 2010 State of the Union address). These Supreme Court decisions came in the wake of the ABA's 2007 Model Code of Judicial Conduct, which recommended that states require disqualification in cases of substantial campaign contributions, as well as the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which invalidated many restrictions on judicial campaign speech. With interest groups' asserting themselves into judicial elections with zeal, and scholars' noting the risk of judges' unconscious bias, issues of judicial disqualification are more prominent than ever in litigation.

The Program will explore the current shape of judicial recusal, including efforts to limit the influence of money in judicial elections and the degree to which the introduction of expanded due

process considerations has altered the disqualification equation. The Program will include a speaker selected from this Call for Papers.

Eligible papers may address any topic related to judicial disqualification, including regulation of campaign spending, or the degree to which "independent expenditures" on behalf of a candidate or other support for or relationships with a candidate require disqualification. Assessments of *Caperton*, *Citizens United*, or other key judicial decisions are within the scope of the Program topic. These are only examples; papers may be submitted on any topic relevant to the Program's theme. Both essay- and article-length papers are welcome. The selected author will be invited to participate in the Program, at the expense of the author's institution.

The REVIEW OF LITIGATION AT THE UNIVERSITY OF TEXAS has agreed to publish the winning paper and other articles submitted by panel members (subject to the REVIEW'S final approval of the articles). THE REVIEW is well known for its publication of scholarship related to litigation, civil procedure, and dispute resolution.

The deadline to submit a draft paper is September 1, 2010. Please e-mail the draft paper to **Professor Michael W. Martin**, Chair of the Section on Litigation, at mwmartin@law.fordham.edu. Decisions will be communicated no later than October 1, 2010.

**CALL FOR PAPERS
2011 ST. MARY'S LAW JOURNAL
SYMPOSIUM ON LEGAL MALPRACTICE AND
PROFESSIONAL RESPONSIBILITY**

The St. Mary's Law Journal, ranked among the ten law reviews most frequently cited by state and federal courts (<http://lawlib.wlu.edu/LJ/index.aspx>), invites interested authors to submit articles on the topic of legal malpractice and professional responsibility for its 2011 annual symposium issue. Past participants in the symposium have included:

Thomas D. Morgan, Nathan Crystal, Susan Saab Fortney, John P. Sahl, and John S. Dzienkowski.

Authors selected for publication will be invited for an expense-paid two-night trip to San Antonio, Texas, to speak at the Tenth Annual Symposium on Legal Malpractice and Professional Responsibility in February 2011.

Authors should contact **Laura Cauley**, Volume 42 Symposium Editor, at laura.cauley@mail.stmarytx.edu or call (817) 980-5145.

CALL FOR PAPERS
JOINT SPECIAL ISSUE CONFERENCE ON
LAW, ETHICS, AND FINANCE
 September 16–18, 2010
 Toronto, Canada

Organized by the Birmingham Business School, and the Schulich School of Business, York University

Sponsored by business schools, the SSRN announcement states: “As the world economy struggles out of the financially induced recession, the concept of ethical or socially responsible investment, along with corresponding calls for regulation, will play an increasingly important role in the study of finance for both privately held and publicly traded companies. . . . The search for improved ethics, corporate governance, transparency and regulation of business and finance is certain to increase.”

**UPCOMING CONFERENCES &
 WORKSHOPS**

**NATIONAL CONFERENCE ON
 PROFESSIONAL RESPONSIBILITY AND
 NATIONAL FORUM FOR CLIENT
 PROTECTION**
 Seattle, Washington
 June 2–5, 2010

Sponsored by the ABA’s
 Center for Professional Responsibility

Legal scholars, jurists and specialists in the professional responsibility field will gather for three days of intensive seminars covering a wide range of topics, as outlined above.

**REGULATING AND DEREGULATING
 LAWYERS IN THE 21ST CENTURY**
 London, England
 June 3 & 4, 2010

Sponsored by the University of London’s
 Institute of Advanced Legal Studies,
 the University of Westminster School of Law, and
 the Cleveland State University College of Law

The conference is aimed at “concrete discussions of strategies for effective regulation and deregulation in the numerous and distinct economic and client-varied modes of law practice. Issues include the failure of self-regulation, controlling the numbers of lawyers, revising rules on the unauthorized practice of law, consumer protections aimed at creating incentives for lawyers to provide improved service to their clients through the potential for liability, and removal of inappropriate entry barriers.” (Quoted from SSRN Announcement)

Contact: Belinda Crothers,
Belinda.Crothers@sas.ac.uk

**INTERNATIONAL LEGAL ETHICS
CONFERENCE IV:
THE LEGAL PROFESSION IN
TIMES OF TURBULENCE**

Palo Alto, California
July 15–17, 2010

Sponsored by the Stanford Center on
the Legal Profession

The conference “will focus on a broad range of issues, including the conditions of legal practice, bar regulatory structures, law firm culture, access to justice, diversity cause lawyering, client relationships, conflicts of interest, globalization, and legal ethics education.”

(Quoted from Legal Scholarship Blog)

**UPCOMING WORKSHOPS OF THE NATIONAL
INSTITUTE FOR TEACHING ETHICS AND
PROFESSIONALISM (NIFTEP)**

November 12-14, 2010

April 8-10, 2011

November 11-13, 2011

NIFTEP, a consortium of law school ethics centers, conducts two workshops a year that bring together leading academics and practitioners involved teaching legal ethics and promoting professionalism. Workshops are held at the Red Top Mountain Lodge, 40 miles north of Atlanta, and are co-sponsored by the American Bar Association Standing Committee on Professionalism and the Georgia Chief Justice's Commission on Professionalism. Workshop participants are designated as NIFTEP Fellows and attend the workshop at no charge.

More information, including the programs, webcasts, and materials for all previous workshops, is available on the NIFTEP website at: <http://law.gsu.edu/niftep/>

To be placed on an email list to receive notice when the application for each workshop is available, please email NIFTEP Deputy Director **Charlotte Alexander** at calexander@gsu.edu with “NIFTEP MAILING LIST” in the subject line.

**IBA ANNUAL MEETING TO ADDRESS
TRAINING LAWYERS FOR
ETHICAL DECISIONMAKING**

Vancouver, Canada
October 7, 2010

The 2010 meeting of the International Bar Association, taking place in Vancouver, will include a session on Thursday, October 7 entitled “Ethical Competence: Preparing Lawyers for Substantial Client Responsibility.” This 3 hour program, co-sponsored by the Professional Ethics Committee and the Academic and Professional Development Committee, will explore how law schools, professional education providers, professional development programs, law firm managers, and lawyers with special responsibility for promoting ethical compliance, can learn to collaborate in producing ethically competent lawyers who are ready to assume major client responsibility. When lawyers begin to have substantial client responsibility, it is critical that they have proven competence in ethical decision-making (such as identifying and properly resolving ethical issues) and professional judgment (for example, recognizing where discretion needs to be exercised in advising and representing clients). What are current best practices from around the world for training lawyers for such responsibility and assessing their competence? What innovative approaches are possible?

To register for the 2010 IBA meeting, go to: www.int-bar.org/conferences/Vancouver2010/

For more information about this session, contact **Clark Cunningham**, W. Lee Burge Professor of Law & Ethics, GSU College of Law: cdcunningham@gsu.edu

RECENT CONFERENCES

**ASSOCIATION OF PROFESSIONAL
RESPONSIBILITY LAWYERS
20TH ANNIVERSARY PROGRAM**
New Orleans, Louisiana
April 15–17, 2010

Noted professors and practitioners addressed a wide range of important practical ethics issues, including the nationalization and globalization of legal ethics and lawyer regulation, trends in lawyer discipline, conflicts of interest, lawyer opinion letters, and the rise and role of law firm ethics counsel.

**ABA NATIONAL CONFERENCE ON
LEGAL MALPRACTICE**
Washington, D.C.
April 14–16, 2010

Conference sessions addressed the following: an opening plenary on legal writing presented by Justice Antonin Scalia and Bryan Garner; an examination of the interface between emerging social media and law firm culture and practice; an examination of whether emergent legal technology is transforming legal standards of care; an entertaining look at how the best poker strategies and current psychological research can give you a negotiating edge; how intentional tort and fraud claims can transform a garden-variety malpractice claim into a complex litigation puzzle; legal malpractice trends and developments in the real estate realm; the potential for malpractice liability in international practice settings, and a roundtable discussion on the teaching of legal liability in law schools.

Mitchell M. Simon (Franklin Pierce Law Center) discussed innovative approaches to “Teaching Tomorrow’s Lawyers to Avoid Legal Malpractice.”

[Taken from ABA brochure—quotations omitted]

**MENTORING II: BEST PRACTICES IN
BUILDING SUSTAINABLE MENTORING
PROGRAMS AND THE FUTURE ROLE OF
MENTORING IN THE LEGAL PROFESSION**
Columbia, South Carolina
April 8–10, 2010

Sponsored by the Nelson Mullins Riley & Scarborough Center on Professionalism, and the University of South Carolina School of Law

The conference “address[ed] the recruiting and training of mentors, what can be learned from law firm mentoring programs, assessment, working with the millennial generation, and integrating mentoring into the lawyer professional development continuum.”
(Quote from University of South Carolina website)

**JUDICIAL ETHICS AND ACCOUNTABILITY:
AT HOME AND ABROAD**
Sacramento, California
April 9–10, 2010

Hosted by Professor Paul Paton & the Ethics Across the Professions Initiative at Pacific McGeorge

The Symposium’s six panels and roundtables—featuring domestic experts and members of the judiciary and international tribunals—reflected on recent events and issues on the theme: “What does it mean to be an ethical judge?” Panels considered issues of implicit bias, judicial training and codes of conduct; judicial elections, financing and the independence of the bench; the 71 recommendations of the California Commission for Impartial Courts; judges, (in)civility and the media; and ethics for judges serving on international tribunals.

Featured speakers included Judge Fausto Pocar of the International Criminal Tribunal for the Former Yugoslavia; Justice John Hedigan of the High Court of Ireland (formerly of the European Court of

Human Rights); California Justices Ronald Robie and Richard Fybel; Professors Brad Wendel (Cornell), James Moliterno (Washington & Lee), Richard Devlin (Dalhousie), Charles Geyh (Indiana), Ronald Rotunda (Chapman), Eli Wald (Denver), Sarah Cravens (Akron), Meryl Chertoff (Sandra Day O'Connor Project, Georgetown); and Dr. Leigh Swigart (International Center for Ethics, Justice and Public Life, Brandeis).

Further conference information and papers are available at:

http://www.mcgeorge.edu/Research_Centers_and_Institutes/Capital_Center_for_Public_Law_and_Policy_Home/Ethics_Across_the_Professions_Initiative/Judicial_Ethics_and_Accountability_At_Home_and_Abroad.htm

Papers and Comments will be published in a Symposium Edition of the MCGEORGE LAW REVIEW this fall.

**NEW PROFESSIONALISM OPPORTUNITIES
IN A TIME OF CRISIS
(NIFTEP WORKSHOP)**

Georgia
March 19–21, 2010

Featuring keynote speakers Bill Henderson from the Indiana University Maurer School of Law and Fred Rooney of the City University of New York Law School's Community Legal Resources Network, the workshop focused on how both law schools and the profession can respond to dramatic changes in the profession caused by the current economic crisis. Workshop presentations focused on, among other topics, the training of pro bono lawyers "on loan" from private practice to public interest organizations; support of practitioners providing low bono legal services to those ineligible for legal aid but unable to afford conventionally priced legal services; and guidance to graduating law students and lawyers who wish to begin solo or small firm practices, including professionalism challenges and ethical pitfalls likely to arise in such settings. The NIFTEP website includes not only webcasts of each

session but also in-depth information about a number of the sessions including PowerPoint presentations and links to other internet resources.

**RIGHTS, EQUALITY, AND JUSTICE:
A CONFERENCE INSPIRED BY THE MORAL
AND LEGAL THEORY OF DAVID LYONS**

Boston, Massachusetts
March 12–13, 2010

Sponsored by the Boston University School of Law and Department of Philosophy

"BU Law honored Professor David Lyons with a conference featuring many outstanding scholars in law and philosophy giving papers and commentaries on important topics about which he has written. Professor Lyons has published a number of significant books in moral, political and legal theory, including *Forms and Limits of Utilitarianism* (Clarendon Press, 1965); *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Clarendon Press, 1973); *Ethics and the Rule of Law* (Cambridge University Press, 1984); *Moral Aspects of Legal Theory* (Cambridge University Press, 1993); and *Rights, Welfare, and Mill's Moral Theory* (Oxford University Press, 1994)."

"Professor Lyons gave a response. Boston University Law Review will publish the papers and proceedings."

(Quoted from Boston University Law School website)

**LAW FIRM EVOLUTION: BRAVE NEW
WORLD OR BUSINESS AS USUAL?**

Washington, D.C.
March 21–23, 2010

Sponsored by the Center for the Study of the Legal Profession, Georgetown University Law Center

Noting that "[l]aw firms have been affected to an unprecedented degree by the current economic

downturn,” the conference brought “together scholars, practitioners, and legal professionals from around the world to discuss the future of the market for legal services, and the implications of change for the organization of law practice, legal career paths, law schools, and lawyers’ sense of professional identity.”

(Quote from Georgetown Law website)

THE ECONOMIC DOWNTURN AND THE LEGAL PROFESSION

October 16, 2009

Published in the FORDHAM LAW REVIEW

Sponsored by the Louis Stein Center for Law and Ethics, the University of Denver Sturm College of Law and the Fordham Law Review

The format of the symposium was informal: short presentations of the essays were followed by open, moderated discussions among the authors and invited commentators. The purpose of the symposium was to investigate the impact of the recent economic meltdown on the legal profession and its role in society. Lines of inquiry included the consequences of the crisis for members of the bar as economic, social and political actors, their roles as service providers, lawyer-statesmen and public citizens and their responsibilities to paying and non-paying clients as well as to non-clients and the public interest.

DEVELOPMENTS IN THE REGULATION OF LAWYERS

By Roy Simon

(Howard Lichtenstein Distinguished Professor of Legal Ethics, Hofstra University School of Law)

I have taught my last class. After twenty-seven years as a law professor, I have decided to embark on a second career (to be announced). However, I plan to continue writing this column twice a year and to continue writing about professional

responsibility in books and articles elsewhere. I will keep writing because the world of professional responsibility keeps evolving, in fascinating ways. The ABA, the states, Congress, and other entities keep studying, changing, and adding to the rules that regulate or guide lawyers. This column summarizes some of the most significant recent developments and previews some changes that are in the works.

NATIONAL DEVELOPMENTS

American Bar Association Developments

This section reports on significant ABA developments that have occurred since the last issue of the PR Section Newsletter, or that are on the agenda for the relatively near future.

ABA Model Rules of Professional Conduct:

The ABA Standing Committee on Ethics and Professional Responsibility, which generally writes proposed amendments to the ABA Model Rules of Professional Conduct, will not be proposing any changes at the ABA’s Annual Meeting this August in San Francisco. All quiet on the western front ... But within the ABA’s Criminal Justice Section this Spring, some members unsuccessfully sought to amend Comment 6 to ABA Model Rule 1.6 by adding the underscored language:

[6] ... Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Similarly, if a lawyer knows

that an individual was sentenced to death for a crime that he did not commit, the lawyer may disclose confidential information to the extent reasonably necessary to prevent the individual's otherwise certain execution. Although substantial bodily harm may include the consequences of a wrongly convicted defendant's imprisonment for a substantial period, disclosures should be made sparingly despite the risk of harm. The interests underlying the confidentiality obligation are ordinarily paramount, because clients may not be forthcoming if there is a risk that their confidences will be disclosed. In deciding whether to disclose client confidences in exceptional cases involving a substantial period of incarceration, a lawyer should weigh, among other things, the likelihood that the incarcerated individual's wrongful conviction can be rectified by disclosure, the remaining length of the incarcerated individual's imprisonment, and the extent to which disclosure will implicate the client or otherwise prejudice interests important to the client. [Emphasis added.]

The proposal had its origins in the debate over Rule 3.8(g)-(h), which imposes new duties on prosecutors who receive credible material evidence of a wrongful conviction. When the ABA's Criminal Justice Section ("CJS") was discussing proposed versions of Rule 3.8(g)-(h), some members asked whether private lawyers should likewise have duties upon learning evidence of a wrongful conviction. The CJS ethics committee agreed to study the issue after the Section finished with Rule 3.8(g)-(h). When the ethics committee began developing proposals, it first offered an amendment to Rule 1.6 to apply only when the client was deceased (as in the Alton Logan situation). But the ethics committee itself was divided on the proposal, and the proposal gained little support in the CJS Council. Several members of the CJS ethics committee then drafted the version quoted above (plus an accompanying report), but the CJS Council resoundingly rejected it at its April 2010 meeting. The issue is now at rest and the CJS is unlikely to develop any further proposals in the

foreseeable future. (I am indebted to Bruce Green of Fordham, the current Chair of the CJS, for all of this information.)

ABA 20/20 Commission: The ABA 20/20 Commission was created in August of 2009 to comprehensively review the ABA Model Rules of Professional Conduct and to examine larger issue of how state and federal authorities should regulate the U.S. legal profession in the context of globalization and rapid advances in information technology. The 20/20 Commission held a public hearing on February 5, 2010 at the ABA's Mid-Year Meeting in Orlando. More recently, the Commission circulated a list of questions about outsourcing legal services, both domestically and internationally. The Commission hopes to gather information from lawyers and clients who have outsourced legal services and from outsourcing providers. The questions are posted on the Commission's web site, and the Commission asked for responses by May 7, 2010.

ABA/COLAP National Judges' Assistance Helpline: In February of 2010, the ABA/COLAP Judicial Assistance Initiative announced a National Judges' Assistance Helpline (800-219-6474) that will be staffed by judges throughout the United States and Canada who are willing to share their recovery experiences with their peers on the bench. (COLAP is the ABA's Commission on Lawyer Assistance Programs.)

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. This section reports on federal developments relevant to the regulation of lawyers.

Proposed Legislation to Overturn Stoneridge: The Fall 2009 issue of this Newsletter reported that in July of 2009 Senator Arlen Specter (D-Pa.) had introduced a bill known as the Liability for Aiding and Abetting Securities Violations Act of 2009 ([S. 1551](#)). The purpose of the bill was to override *Stoneridge Investment Partners v. Scientific-Atlanta*, 552 U.S. 148 (2008), which held

that §10(b) of the Securities Exchange Act of 1934 does not create a right of private action against aiders and abettors of securities law violations (including lawyers). That bill appears to be dead – nothing has happened in Congress since the Senate Judiciary Subcommittee on Crime and Drugs held a hearing on the bill on September 17, 2009.

Proposed Legislation to Restrict Sealing of Court Files: A proposed “Sunshine in Litigation Act” (S. 537, H.R. 1508) would prohibit sealed settlements in civil cases and impose substantial restrictions on a court issuing protective orders under Rule 26(c). Specifically, under the legislation, a judge could issue a protective order only if the judge first found that the information to be protected by the order would not affect public health or safety. That provision has been introduced in every Congress since 1991. The Judicial Conference of the United States (responsible for amending the Federal Rules of Civil Procedure and other court rules) has opposed the legislation. The Hon. Mark Kravitz, Chair of the Committee on Rules of Practice and Procedure, said at a January 2010 meeting that his committee opposed the Sunshine bill because (1) it would amend Rule 26 without following the Rules Enabling Act process; (2) it lacks empirical support; (3) it would disrupt the civil litigation process; and (4) it is unworkable because it would require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case. Judge Kravitz said Congressional staff members now appear to understand the serious problems that the bill would create – but members of Congress may find it hard to oppose any bill that carries the label “sunshine.” (If that’s true, why has Congress rejected the bill ten sessions in a row? Just asking.)

Proposed Attorney-Client Privilege Protection Act of 2009: On December 16, 2009, Rep. Bobby Scott (D-Va.), House Judiciary Committee Chairman John Conyers (D-Mich.), ranking Republican member Lamar Smith (R-Tex.), and others introduced a bill called the Attorney-Client Privilege Protection Act of 2009 (H.R. 4326). The bill would prohibit all federal agents from demanding that corporations waive the attorney-

client privilege or work product protection in return for more lenient treatment in charging decisions and other enforcement matters. A similar bill passed in the House of Representatives in 2007, but the Senate abandoned consideration of the bill after the Department of Justice announced revisions to its policy on corporate privilege waivers in 2008. Under the revised DOJ guidelines, prosecutors are already prohibited from demanding waivers in exchange for more lenient treatment, but the new bill would go further by imposing the same guidelines on the entire executive branch.

Federal Rules of Civil Procedure: Significant amendments to Rule 26(a)(2) and Rule 26(b)(4) will take effect on December 1, 2010 unless both houses of Congress reject them. The amendments would protect draft reports by experts and various attorney-expert communications from discovery. The amended version of Rule 26(b)(4)(B) and (C), which is almost all new, will provide as follows (with emphasis added):

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) *protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.*

(C) *Trial-Preparation Protection for Communications Between a Party’s Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) *protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:*

- (i) relate to compensation for the expert’s study or testimony;
- (ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party’s attorney provided and that the expert relied upon in forming the opinions to be expressed.

The Advisory Committee Note neatly summarizes the import of the new language: “Rule 26(b)(4) is

amended to provide work-product protection against discovery regarding draft expert disclosures or reports and –with three specific exceptions – communications between expert witnesses and counsel.”

In other civil procedure news related to legal ethics, the Committee on Practice and Procedure, which met on January 7-8, 2010, is reexamining Rule 26(c) (which addresses protective orders in discovery) because Congress continues to express concerns over the role of protective orders, as reflected in the Sunshine in Litigation Act bills (S. 537, 111th Cong.; H.R. 1508, 111th Cong.) that were introduced in 2009.” (See above for more on the Sunshine bills.)

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

Federal Rules of Criminal Procedure: Regarding criminal rules, the summary report on the January 7-8, 2010 meeting of the Committee on Practice and Procedure says that the advisory committee “continues to consider proposals to codify and expand the government’s obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963).” A small group of practitioners, academics, and judges met in Houston, Texas, on February 1, 2010 to discuss Rule 16 discovery practices, and the advisory committee continues to review materials submitted in connection with earlier proposals to amend Rule 16. That review has been augmented by materials from the Department of Justice, which “has recently adopted a multi-faceted approach to address Brady issues, including mandatory training, internal enforcement and leadership, and more consistency in discovery practices across the districts.” For more information, visit the official web site of the U.S. Courts at www.uscourts.gov.

FTC “Red Flags Rule” Litigation: In 2007, the Federal Trade Commission (FTC) and various federal financial institution regulatory agencies adopted final rules on identity theft “red

flags” and address discrepancies. These rules implement §§ 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003 by requiring businesses that act as “creditors” to establish a program to prevent identity theft. The program must identify potential areas of vulnerability within a business and include policies for detecting and responding to various “red flags.” The ABA sued to enjoin application of the Red Flags Rule to lawyers, and on October 29, 2009, Judge Reggie Walton (D.D.C.) granted the ABA’s motion for summary judgment for declaratory and injunctive relief. On December 1, 2009, issued his full opinion in support of the ABA’s motion. In late February of 2010, the FTC filed an appeal of Judge Walton’s decision. Meanwhile, the FTC has delayed enforcement of the Rule regarding entities under its jurisdiction until June 1, 2010. More information is available on the FTC’s site at www.ftc.gov/redflagsrule and on the ABA’s site at www.abanet.org/poladv/priorities/redflagrule.

Federal Deposit Insurance Corporation: Way back in 2008, the Federal Deposit Insurance Corporation (FDIC) clarified the Temporary Liquidity Guarantee Program (TLGP) to include IOLTA accounts, which thus became fully insured for an unlimited amount. After the latest extension (announced April 12, 2010), the provision will remain in effect at least through December 31, 2010, and if the FDIC determines that economic conditions warrant yet another extension, the FDIC has an option to extend the program for another year without further rule making. As long as the provision remains in effect, IOLTA accounts will continue to be fully guaranteed, without limit, at participating financial institutions.

DEVELOPMENTS IN THE STATES

Broad Trends in the States

Nirvana for Chart Lovers -- ABA Center for Professional Responsibility Policy Implementation Committee Web Page: The ABA Center for Professional Responsibility Policy Implementation Committee focuses on implementing recent changes to the ABA Model Rules of Professional Conduct (including Ethics

2000 and the Corporate Responsibility Task Force), the policies of the Multijurisdictional Practice Commission, and the Model Code of Judicial Conduct. It also keeps track of state implementation of the ABA Model Court Rule on Insurance Disclosure, the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (the “Katrina Rule”), and the ABA Model Rule for Registration of In-House Counsel. I mention the Policy Implementation Committee here because its staff (notably John Holtaway) compiles and updates wonderful, detailed charts containing state-by-state responses to all of those ABA ventures. (Some of these charts used to be in a different location.) The web site of the Policy Implementation Committee is www.abanet.org/cpr/pic/

“Ethics 2000” reviews. Nationally, since the Ethics 2000 Commission released its final report in 2001, forty-three (43) U.S. jurisdictions have significantly revised their rules (AK, AL, AR, AZ, CO, CT, DE, DC, FL, IA, ID, IL, IN, KS, KY, LA, MD, ME, MN, MO, MS, MT, NE, NC, ND, NH, NJ, NM, NY, NV, OH, OK, OR, PA, RI, SC, SD, UT, VA, VT, WA, WI, WY); 5 states have circulated proposed rules that remain pending (CA, MI, TN, TX, WV); and 3 states have appointed review committees that have not yet issued their reports (GA, HI, MA). Since the Fall 2009 Newsletter, only Illinois has comprehensively amended its Rules of Professional Conduct (effective January 1, 2010).

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 25 states require some form of malpractice insurance disclosure, either on their bar registration statements (18 states -- AZ, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA, and WV) or directly to clients (6 states -- AK, CA, NH, OH, PA, and SD). At least 4 additional states (NY, TX, UT, and VT)

are actively considering some form of legal malpractice disclosure rule. So far, only four states (AR, CT, FL, and KY) have rejected 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.

Multijurisdictional practice rules. An amazing forty-three (43) U.S. jurisdictions have adopted a multijurisdictional practice rule identical to or substantially similar to ABA Model Rule 5.5. For a state-by-state chart, see www.abanet.org/cpr/mjp/home.html.

In-House counsel registration rules. Thirty-four (34) states have adopted an in-house registration rule that authorizes in-house lawyers who are in good standing in at least one U.S. jurisdiction to engage in the practice of law without being fully admitted to the bar of the state where they work as in-house counsel. (The ABA adopted the ABA Model Rule for Registration of In-House Counsel in August of 2008, but a number of states had in-house registration rules before the ABA acted.) A state-by-state chart is at www.abanet.org/cpr/mjp/home.html.

Katrina Rule. Since the ABA recommended it in 2007, eight (8) U.S. jurisdictions have adopted the so-called “Katrina Rule” (formally known as the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster), which authorizes out-of-state lawyers to provide pro bono services in a stricken state and allows lawyers from the stricken state to carry on their home state practices in jurisdictions that have adopted the Katrina Rule.

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 or www.abanet.org/cpr/links.html.

Now I will discuss some of the more interesting developments in particular states since the Fall 2009 PR Section Newsletter. (Some of the

entries below largely repeat items in the Fall Newsletter. When the previous Newsletter says that a new or amended rule is scheduled to take effect in the future, I cover the same item after it takes effect to confirm that things actually happened as planned.)

Arizona (www.azbar.org): A new rule for admission on motion, which is part of a package of related amendments, took effect on January 1, 2010. The package is available online at www.supreme.state.az.us/rules/Recent_rules.htm.

California (www.calbar.ca.gov, www.courtinfo.ca.gov, and www.leginfo.ca.gov): The eyes of the nation are on California, the only state in the country that has not yet adopted some form of the ABA Model Rules. But things are moving. Eight years ago, California's Commission for the Revision of the Rules of Professional Conduct embarked on the herculean task of revising and updating the rules, a project that hadn't been undertaken for two decades. The Commission was charged with trying to eliminate unnecessary and potentially confusing differences between California and other states and to foster the evolution of a national standard with respect to professional responsibility issues.

The Commission has been releasing clusters of draft proposed rules for several years, and recently circulated a full set of sixty-nine proposed new and amended rules for public comment. The format, numbering system and much of the substance follows the ABA Model Rules of Professional Conduct, but California will retain many unique provisions. (The Bar's web site has an interesting Top Ten List of proposed rules.) The deadline for comments is June 15, 2010. By September, the California Bar's Board of Governors is expected to review the public comments, finalize the proposed rules, and forward the complete package of rules to the California Supreme Court, which has the final word.

Florida (www.flabar.org or www.floridasupremecourt.org): Effective February 1, 2010, the Florida Supreme Court modified Rule 4-3.3 to conform to the 2002 changes to ABA Model Rule 3.3, and added language to Rule 4-1.5

requiring that nonrefundable fee arrangements be confirmed in writing. An amended Rule 4-7.2(c) prohibits lawyer advertisements from using sounds that are "manipulative" or "likely to confuse the listener."

The Next Big Thing in Florida will be rules for lawyer websites. The Florida Supreme Court has asked The Florida Bar to submit [guidelines for lawyer websites](#) because an amendment to Rule 4-7.6 ("Computer Accessed Communications"), which governs websites, takes effect on July 1, 2010. The Bar has responded with a fast-track process to prepare the rule amendment. (This isn't the Bar's first try – the effort began back in 2004 as an outgrowth of the Bar's extensive study of advertising rules.) Guidelines for web sites have become urgent because in November of 2009, the Florida Supreme Court decided that websites are subject to the general advertising rules contained in Rule 4-7.2, which bans lawyers from using testimonials, referring to past results, or characterizing the quality of their legal services. These things are commonly done on law firm websites, so under the court's opinion almost nearly every lawyer web site and law firm website was potentially in violation of the rules governing lawyer advertising.

The original effective date of amended Rule 4-7.6 was January 1, 2010, but the Bar's Board of Governors asked the court to delay the effective date until July 1, 2010, and the court agreed. The Bar then asked the Standing Committee on Advertising to provide guidance for Bar members on complying with the rules. The committee responded by suggesting a bifurcation of attorney websites. Sections that contain testimonials, or refer to past results, or characterize the quality of legal services, or otherwise don't comply with Rule 4-7.2, would not be generally accessible to web surfers. Rather, access would require the viewer to click a button or take another affirmative step after viewing a disclaimer.

In a letter to the Supreme Court explaining the Bar's actions, Bar Executive Director John F. Harkness, Jr., wrote:

The Standing Committee on Advertising determined that an appropriate disclaimer, before giving a user access to website pages that do not comply with the lawyer advertising rules, must include what type of information will be viewed, that the information is not reviewed or approved by The Florida Bar, and if past results or testimonials are provided, that a prospective client's facts and circumstances may differ from the matter in which results or testimonials are provided, whether all results or testimonials of all clients are provided, that the results or experience of the client giving the testimonial are not necessarily representative, and that every case is different and each client's case must be evaluated and handled on its own merits.

Under the guidelines, therefore, a person viewing a website will have two choices – either (1) acknowledge viewing the disclaimer, or (2) give the sponsoring lawyer or law firm contact information and a request to receive additional information about the lawyer or law firm. The court responded to the Harkness letter by issuing a March 31, 2010, order saying that the Court liked the procedure but wanted it in the text of the advertising rules rather than just in a freestanding policy. According to Bar Ethics Counsel Elizabeth Tarbert, the Bar hopes to file a proposed rule with the court around June 1, 2010. These will be the most detailed rules in the country governing lawyer websites.

Finally, on March 30, 2009, the district court granted summary judgment in favor of The Florida Bar in *Harrell v. The Florida Bar*, No. 3:08-cv-00015-MMH-TEM, a lawsuit challenging the constitutionality of Florida's lawyer advertising rules. (Westlaw never posted this decision, so I missed it last year, but this time I visited the web site of Public Citizen and found updates and court documents at www.citizen.org/litigation/forms/cases/getlinkforcas.e.cfm?cID=447.) The entire suit turned on the phrase "Don't settle for less than you deserve" in a lawyer's advertisement. A staff attorney at the Bar notified the attorney that the phrase improperly characterized the quality of the lawyer's legal

services, so the plaintiffs filed suit, but the Florida Bar Board of Governors later reversed that decision and approved the phrase, so the district court dismissed for lack of a case or controversy. Nevertheless, the plaintiffs have appealed to the Fifth Circuit, where the case remains pending.

Illinois (www.isba.org): Effective January 1, 2010, the Illinois Rules of Professional Conduct have been comprehensively amended.

Indiana (www.inbar.org): Effective January 1, 2010, Indiana has amended the Comment to Rule 6.1 to define a number of terms (e.g., "poverty law," "civil rights," "charitable organization"). An especially interesting addition is a new Comment 5 stating that the following typically would not fulfill the aspirational goals in Rule 6.1: "(a) Legal services written off as bad debts. (b) Legal services performed for family members. (c) Legal services performed for political organizations for election purposes. (d) Activities that do not involve the provision of legal services, such as serving on the board of a charitable organization."

Louisiana (www.lsba.org): At its December 2009 meeting, the Louisiana State Bar's Committee on the Louisiana Rules of Professional Conduct discussed public comments on whether Louisiana should adopt ABA Model Rule 3.8(g)-(h), which impose obligations on prosecutors who have evidence that a person was wrongfully convicted. In light of negative comments from Louisiana prosecutors, the Committee unanimously decided to defer consideration of these provisions for four to six months. In the meantime, the Committee will continue to study the provisions.

Proposed changes to the Louisiana bar exam are circulating for public comment. The current system requires a bar candidate to score 70% or higher on 7 of 9 subject areas, and to pass 4 of 5 Louisiana Code topics. The proposed "compensatory" scoring system will require an *average* score of 70%, allowing better performance in one subject to compensate for poorer performance in another subject. An impressive raft of charts and graphs indicates that the compensatory system will increase the pass rate on the exam.

Also under consideration is adding an alternate pathway to admission – the Uniform Bar Exam (plus a Louisiana essay exam). Adopting the Uniform Bar Exam would allow for reciprocity/transferability of scores with other states, offering flexibility to Louisiana law students enrolled in a common law curriculum.

Maine

(www.courts.state.me.us/court_info/rules/rules.html): Effective March 1, 2010, Maine has amended two Rules of Professional Conduct. A new Rule 1.10(e), which I believe is unique in the country, provides as follows:

(e) If a lawyer or law student affiliated both with a law school legal clinic and with one or more lawyers outside the clinic is required to decline representation of any client solely by virtue of this Rule 1.10, *this rule imposes no disqualification on any other lawyer or law student who would otherwise be disqualified solely by reason of an affiliation with that individual, provided that the originally disqualified individual is screened from all participation in the matter at and outside the clinic.* [Emphasis added.]

At the same time, Maine amended Rule 8.4 to remind lawyers that they can be disciplined not only for violating the Rules of Professional Conduct but also for violating the Bar Rules. For example, amended Rule 8.4(a) says that it is professional misconduct for a lawyer to “violate or attempt to violate any provision of *either* the Maine Rules of Professional Conduct *or the Maine Bar Rules*” (Emphasis added.) Each amendment is accompanied by an explanatory Advisory Note that was apparently written by the Maine Supreme Court itself. These amendments are pretty quick work for Maine, given that Maine’s comprehensively amended Rules of Professional Conduct just took effect on August 1, 2009, less than nine months ago.

Michigan (www.michbar.org): On September 15, 2010, a new Rule 1.15A, known as the Trust Account Overdraft Notification rule (with the charming acronym “TAON”), will take effect. But much bigger changes are ahead in Michigan. On March 1, 2010, the comment period ended for

the Michigan Supreme Court’s proposed changes to the Michigan Rules of Professional Conduct. The proposed changes would amend existing Rules 1.5, 1.7, 1.8, 3.1, 3.3, 3.4, 3.5, 3.6, 5.4, 5.5, and 8.5, and would add Rules 2.4 (“Lawyer Serving as Third-Party Neutral”), 5.7 (“Responsibilities Regarding Law-Related Services”), and 6.6 (“Nonprofit and Court-Annexed Limited Legal Services Programs”). To view the comments that the Court has posted, go to: www.courts.mi.gov/supremecourt/resources/administrative/index.htm (scroll to 2009-06 under “other”).

In large part, the proposed changes were recommended by the State Bar of Michigan way back in 2004, but (apart from a public hearing in 2005) the Michigan Supreme Court sat on the proposals without any action for more than five years. Finally, on November 24, 2009, the Court decided to circulate some of the proposed rules for public comment. An interesting feature is that the Attorney Grievance Commission has written a proposed Alternative B for amending Rule 1.5. The thoughtful proposal includes a number of provisions that would be unique to Michigan. For example, a proposed Rule 1.5(d)(3) provides: “A lawyer and client may agree as to the timing, manner, and proportion of fees the lawyer may withdraw from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client’s right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees. ...” The proposed Rule 1.5 is accompanied by a detailed Comment explaining the Grievance Commission’s reason for each proposed provision.

Missouri (www.mobar.org): Effective July 1, 2010, amended versions of the Missouri versions of Rules 7.1, 7.2, and 7.3 will take effect, along with an amended Supplemental Missouri Comment for each rule. The amendments are based on proposals made by the Missouri Bar’s Special Committee on Lawyer Advertising in January of 2009, but the Missouri Bar Board of Governors stripped out many of the proposed changes before forwarding them to the court. The court did not

issue a legislative-style version of the amended rules, so figuring out what changed will require a word-by-word comparison of the old and new rules.

Effective July 1, 2010, Missouri will become the first state in the nation to adopt the Uniform Bar Examination (UBE), which will test general law rather than state-specific law. The first administration of the UBE in Missouri will be the February 2011 examination. The UBE will consist of six Multistate Essay Exam (MEE) questions (some covering more than one area of law), plus two Multistate Performance Test (MPT) items, and the Multistate Bar Exam (MBE). The UBE questions will be graded according to the law of general application and not the law of any specific state. What about Missouri law? Not to worry -- applicants for admission by examination (UBE) must complete an educational course on Missouri law prescribed by the Board of Bar Examiners and approved by the Supreme Court of Missouri.

New Jersey (www.judiciary.state.nj.us/rules/apprpc.htm): In a joint decision by the New Jersey Supreme Court's Advisory Committee on Professional Ethics (Op. 718) and the Advisory Committee on Attorney Advertising (Op. 41), the committees held that a so-called "virtual office" does not qualify as a bona fide office for purposes of N.J. Court Rule 1:21-1(a). (A "virtual office," the opinion said, refers to "a type of time-share arrangement whereby one leases the right to reserve space in an office building on an hourly or daily basis ... by appointment only." In my view, the reasoning in the decision is specious, resting mainly on the myth of the walk-in client. The real motive, I think, is New Jersey's desire to protect New Jersey attorneys against competition from lawyers from other states by making it much more expensive for out-of-state lawyers to satisfy the "bona fide office" requirement.

The New Jersey Supreme Court is still apparently still mulling over a recommendation by the Court's Professional Responsibility Rules Committee (PRRC) to amend New Jersey Rule 5.5. The proposed amendment would allow out-of-state lawyers to practice occasionally in New Jersey in

particular matters if they "associate" with a New Jersey lawyer who would be responsible (though would not necessarily actively participate). The Court has also postponed decision on a PRRC recommendation to exempt lawyers engaged in ADR from registering with the state bar and paying assessments.

Also still pending is a proposed new Advertising Guideline that would prohibit an attorney or law firm from including, on a website or other advertisement, "a quotation from a judge or court opinion (oral or written) regarding the attorney's abilities or legal services." The New Jersey Supreme Court's Committee on Attorney Advertising proposed the new Guideline after reviewing an attorney's website that included two quotations from unpublished opinions on fee petitions in which judges praised the attorney's legal abilities.

New York (www.nysba.org and www.courts.state.ny.us): On May 4, 2010, effective immediately, the New York Courts amended Rule 6.4 ("Law Reform Activities Affecting Client Interests"). The first two sentences of New York Rule 6.4 are identical to ABA Model Rule 6.4, but when the Courts adopted the New York Rules of Professional Conduct last year, the Courts on their own (without any recommendation by the New York State Bar Association) added a final sentence that said: "When the lawyer knows that the interests of a client may be adversely affected by a decision [of a law reform organization] in which the lawyer actively participates, the lawyer shall disclose that fact to the client." The State Bar Association, worried about a chilling effect, immediately began lobbying to have that sentence removed. The Courts have now taken out that sentence, replacing it with the following: "In determining the nature and scope of participation in such [law reform] activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7."

Meanwhile, New York's rules on lawyer advertising are in limbo. In *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. March 12, 2010) (Guido Calabresi, J.), the Second Circuit affirmed almost

all of the district court's decision striking down various New York lawyer advertising provisions that took effect in 2007 (and upholding a 30-day blackout period barring targeted advertising by any means, including newspapers or broadcast media, after a "specific incident" involving personal injury or wrongful death). However, the story is not over yet because the Administrative Board of the Courts has decided to seek certiorari. An interesting issue is whether Justice Sotomayor will recuse herself because she was one of the three judges on the Second Circuit panel that heard oral argument on the case in January of 2009. Perhaps her recusal won't affect the result, because even if the Supreme Court deadlocks 4-4 then the Second Circuit will be affirmed by an equally divided Court. But if the Supreme Court reverses by a 5-3 (or 5-4) vote, then I think the Court could go so far as to overrule or severely limit *Bates v. State Bar of Arizona*, rolling back the First Amendment clock to the pre-*Bates* era for lawyer advertising.

Oregon (www.osbar.org): Effective January 1, 2010, the Oregon Supreme Court amended its admission by motion rule. The amended rule expands the number of jurisdictions from which lawyers may seek admission to the Oregon Bar without having to take and pass the Oregon bar exam. Reciprocally, Oregon lawyers will now be eligible to become licensed in those additional jurisdictions without an exam. According to the Bar's website, "This new portability means that it will be easier for Oregon lawyers to help clients whose legal matters and business crosses state lines. It may also mean an increase in the OSB membership." For general information about the amended rule (including a list of all states with which Oregon has reciprocity), see www.osbar.org/admissions/admissiononmotion.html. The amended rule itself is online at www.osbar.org/docs/admissions/15.05FINAL.pdf.

Tennessee (www.tba.org): Effective January 1, 2010, the Tennessee Supreme Court made a number of important rule changes. First, the Court adopted versions of ABA Model Rules 5.5 and 8.5 (permitting and regulating multijurisdictional practice). The Tennessee

versions generally track the ABA Models but add four new paragraphs. Second, the Court amended Rule 6.1 ("Pro Bono Publico Service") to set an aspirational standard of fifty pro bono hours per attorney per year, and it adopted a new Rule 6.5 ("Nonprofit and Court-Annexed Limited Legal Service Programs"). Both rules closely track the ABA Model Rule equivalents. Third, the court approved a new court rule to permit pro bono work by registered in-house counsel. Fourth, the Court adopted a new court rule, § 10.01, entitled "Registration of In-House Counsel" based on the ABA Model Rule for Registration of In-House Counsel. Fifth, the Supreme Court adopted verbatim the ABA's Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (the so-called "Katrina Rule").

However, the court did not adopt the Tennessee Bar Association's proposal to require annual reporting of pro bono hours. Instead, the court took the reporting issue "under advisement" and referred the proposal to the Access to Justice Commission for its consideration and recommendation.

More sweeping changes lie ahead. The Tennessee Bar Association Board of Governors is still studying comments to an extensive set of proposed "refinements" to the Tennessee Rules of Professional Conduct. The comment deadline was back on August 15, 2008. The proposals are available at www.tba.org/ethics/index.html.

Texas (www.texasbar.com): With an October 20, 2009, order, the Supreme Court of Texas began the public comment process for proposed changes to the Texas Disciplinary Rules of Professional Conduct. A redlined version of the proposed changes is available at www.texasbar.com/Template.cfm?Section=Home&CONTENTID=25654&TEMPLATE=/Content and the court's Order is at www.supreme.courts.state.tx.us/MiscDocket/09/09917500.pdf.

The Texas Supreme Court has (at least temporarily) written an epitaph to efforts to compel Texas lawyers to disclose to clients whether they carry legal malpractice insurance. A letter dated April 14, 2010, from Chief Justice Wallace B.

Jefferson to Texas State Bar President Roland Johnson recounted the three-year debate and announced that “the Court will retain the status quo,” meaning no mandatory insurance disclosure. But the epitaph may be short-lived. You may recall that in 2009, while the Bar and the Supreme Court were wrestling with the issue, a bill (H.B. 2825) was introduced in the Texas legislature that would have required the Texas Supreme Court to adopt a mandatory insurance disclosure rule by December 1, 2009. Proponents of mandatory insurance disclosure now plan to return to the legislature to carry on their fight.

Finally, in *McKinley v. Abbott*, No. A-09-CA-643-LY (W.D. Tex., March 25, 2010) (Lee Yeakel, J.), the court struck down Texas Penal Code § 38.12(d)(2)(C) (which just took effect on September 1, 2009) on First Amendment grounds, and permanently enjoined the statute’s enforcement. The statute prohibited attorneys (among others) from soliciting employment from arrested or summoned individuals or their relatives within 30 days after the arrest or summons. The court said that the privacy concerns animating 30-day anti-solicitation provisions in personal injury or wrongful death situations do not apply in the context of criminal offenses.

Virginia (www.vsb.org): Since the Fall 2009 issue of this Newsletter, the Virginia Supreme Court has approved a number of new or amended rules. (Virginia is among the most active jurisdictions in improving and updating its rules governing lawyers.) Some amendments concern bar or disciplinary procedures, which do not interest most of us, but two others are notable. Effective March 19, 2010, Virginia has amended Paragraph 10, Section IV, of the Rules for Integration of the Virginia State Bar, now entitled “Promulgation of Legal Ethics, Unauthorized Practice of Law Opinions, and Rules of Court; Informal Staff Opinions of Ethics Counsel; and Complaints of Unauthorized Practice of Law.” Separately, effective November 1, 2010 Virginia’s MCLE rules provide that “[n]o more than eight (8) credit hours may be earned in any twelve hour period attending pre-recorded courses.”

Three proposed amendments to the Virginia Rules of Professional Conduct are pending before the Virginia Supreme Court. At its October 16, 2009 meeting, the Virginia State Bar Council approved a proposed amendment to Comment 5 to Rule 4.2 to address the situation in which a law enforcement officer seeks legal advice from a Commonwealth’s Attorney regarding whether the officer may obtain a statement from a defendant who is in custody, formally charged, and represented by counsel, but who has waived his Miranda rights and wants to give a statement to a law enforcement officer without his counsel present. At the same meeting, the Council also approved a proposed new Rule 1.18 regarding prospective clients, virtually identical to ABA Model Rule 1.18.

The Supreme Court is also apparently still considering whether to adopt the Katrina Rule to govern Provision of Legal Services Following Determination of Major Disaster, which the Bar recommended nearly two years ago, on July 11, 2008. The Virginia proposal generally follows the ABA Model Court Rule on this subject, with a few modifications. Also, the Supreme Court is apparently still considering a proposed amendment to Rule 1.17(a) that would permit lawyer who sold only part of a law practice to continue to practice law in the geographic area in areas of the practice that were not sold. When it sent that proposal, the Virginia State Bar Council also asked the Supreme Court to support a bill pending in the Virginia Legislature to increase the penalty for certain types of UPL (*e.g.*, a disbarred lawyer profiting from continued practice) from a misdemeanor to a felony (keeping the current language and misdemeanor penalty for lesser UPL offenses).

However, on January 22, 2010, the Virginia Supreme Court rejected a proposed amendment to Rule 7.4(d) that would have allowed a lawyer to advertise a specialty certification without a disclaimer if the certification was granted by an organization accredited by the American Bar Association.

Finally, the Standing Committee on Legal Ethics has circulated two proposed amendments to

the Virginia Rules of Professional Conduct for public comment. A proposed amendment to Rule 1.15 (“Safekeeping Property”) would eliminate some redundancy in the rule and clarify the rule’s record-keeping requirements. Proposed amendments to Rules 7.1 through 7.5 (which regulate lawyer advertising and solicitation) would make these rules more general in their application by moving specific examples of lawyer advertising statements or claims from the body of the rules to the Comments. The deadline for commenting on all of these proposals is June 4, 2010.

ITEMS OF INTEREST

INTERNATIONAL, INTERACTIVE WEBSITE ON TEACHING LEGAL ETHICS WILL LAUNCH SOON

By **Clark Cunningham and Charlotte Alexander**
(Georgia State University College of Law)

The National Institute for Teaching Ethics and Professionalism (NIFTEP), a consortium of law school ethics centers, is collaborating with the United Kingdom Centre for Legal Education (UKCLE), to develop a highly innovative international website: the International Forum on Teaching Legal Ethics and Professionalism (www.teachinglegalethics.org). This website is being designed as an online gathering place, resource repository, and clearinghouse for an international community of ethics teachers, scholars, and practitioners, with the hope that the website will act as an organizing tool for efforts to change the culture of legal education and to increase the emphasis on ethics and professionalism education across jurisdictions and throughout law schools’ curricula.

When complete, the Forum website will catalyze innovative teaching, especially by increasing the flow of information across national boundaries, and will empower law teachers (particularly those in

institutions with limited resources) to participate in a global dialog among persons dedicated to the effective teaching of legal ethics and professionalism. Specifically, the website will:

- Consolidate and make easily available a wide range of materials, in both text and multi-media formats, on the teaching of legal ethics and professionalism, and organize these materials into a comprehensive, fully searchable bibliography
- Allow registered users to create their own web pages, upload both scholarship and teaching materials to the bibliography, download a wide variety of materials created by others (including podcasts, webcasts, and other audio-visual material), and post comments on their use of such material, and
- Provide a forum for original commentary and exchange of ideas for both teachers and practitioners on teaching ethics and promoting professionalism.

A pilot version of the website was demonstrated at the January 2010 Learning in Law Annual Conference at the University of Warwick in the United Kingdom. Current plans are to go live in September 2010 with an English-language version of the website that includes contributions from as many common-law jurisdictions as possible. The project has an interim advisory board that currently includes representatives from Australia, Canada, the UK and the United States. Expansion into other languages and civil-law jurisdictions is a long-term goal.

Although the website is in a very early stage of development, members of the PR section are invited to browse the site. Interactive features are currently limited to a small group of teachers who have agreed to “test drive” the site, but if you would like to be placed on a list to become a registered user when the site becomes fully active, please navigate to www.teachinglegalethics.org — click on “Login/ Register” and fill out the “Create new account” form.

THE LAW OF LAWYERING AND THE SUPREME COURT'S 2009 TERM

By Renee Newman Knake

(Michigan State University College of Law)

The Supreme Court considered over a dozen cases involving lawyering issues during the 2009 term. This is a significant departure from standard practice, where typically the Court takes up only a few matters related to the role of attorneys or the practice of law. Broadly speaking, the cases fall into two categories: (1) access to lawyers and legal advice, and (2) concerns about bad lawyering. Of the six cases in the access category, two involved First Amendment challenges to federal statutory constraints on legal advice, three addressed fee-shifting statutes, and one questioned the availability of an immediate appeal for a discovery order involving materials covered by the attorney-client privilege. Cases in the bad lawyering category included one prosecutorial misconduct matter and seven ineffective assistance of counsel claims raising concerns about a missed federal habeas filing deadline, a damaging closing argument, misadvice on deportation consequences of a guilty plea, and insufficient mitigation evidence at sentencing.

I summarize the outcomes of the cases and offer some preliminary observations about them in an article that will be published this fall, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. __ (2010). A list of the cases by category follows below.

Access to Lawyers and Legal Advice:

- Milavetz, Gallop & Milavetz, P.A., et al. v. United States, 130 S.Ct. 1324 (2010) (advice ban and advertising disclosure)
- Humanitarian Law Project v. Mukasey, 522 F.3d 916 (9th Cir. 2009), *cert. granted*, Holder v. Humanitarian Law Project, 130 S. Ct. 48 (argued 2/23/10) (advice ban)

- *Perdue v. Kenny A. ex rel. Winn*, 532 F.3d 1209 (11th Cir. 2008), *reversed*, 130 S.Ct. __ (2010) (fee-shifting statute)
- *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008) (2008), *cert. granted*, *Astrue v. Ratliff*, 130 S. Ct. 48 (2009) (argued 2/22/10) (fee-shifting statute)
- *Hardt v. Reliance Standard Life Ins. Co.*, 336 Fed. Appx. 332 (4th Cir. 2009), *cert. granted*, 130 S.Ct. 1133 (2010) (argued 4/26/10) (fee-shifting statute)
- *Mohawk Indus., Inc. v. Carpenter*, 130 S.Ct. 599 (2009) (attorney-client privilege)

Concerns About Bad Lawyering:

- *Pottawattamie County, Iowa v. McGhee*, 130 S.Ct. 1047 (2010) (prosecutorial misconduct)
- *Holland v. Florida*, 539 F.3d 1334 (11th Cir. 2008), *cert. granted*, 130 S. Ct.398 (argued 3/23/10) (ineffective assistance of counsel – missed filing deadline)
- *Smith v. Spisak*, 130 S. Ct. 676 (2010) (ineffective assistance of counsel – damaging closing argument)
- *Padilla v. Kentucky*, 253 S.W.3d 482 (Ky. 2008), *reversed*, 130 S.Ct. __ (2010) (ineffective assistance of counsel – misadvice on deportation consequences of guilty plea)
- *Wood v. Allen*, 130 S.Ct. 841 (2010) (ineffective assistance of counsel – attorney inexperience and insufficient mitigation evidence at sentencing)
- *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) (per curiam) (ineffective assistance of counsel – insufficient mitigation evidence at sentencing)
- *Wong v. Belmontes*, 130 S.Ct. 383 (2009) (per curiam) (ineffective assistance of counsel – insufficient mitigation evidence at sentencing)
- *Porter v. McCollum*, 130 S.Ct.447 (per curiam) (ineffective assistance of counsel – insufficient mitigation evidence at sentencing)

CAN JUDGES AND LAWYERS BE FACEBOOK FRIENDS?

By Lisa Penland

(Drake University School of Law)

Social networking has opened a can of ethical worms for lawyers and judges. One issue of recent interest is whether judges can participate in social networking sites, such as Facebook, and to what extent judges can “friend” lawyers on those social networking websites. A November 2009 advisory opinion from the Florida Judicial Ethics Advisory Committee strictly limits a judge’s Facebook friendships.¹ In contrast, the South Carolina Advisory Committee on Standards of Judicial Conduct seems to take a more lenient approach.² The question is: which is the better approach to deciding whether judges and lawyers can be Facebook friends?

The use of websites like Facebook is prevalent.³ On Facebook, a person sets up a profile that provides information about that person, including her “interests, activities and anything else [she] want[s] to include with people [she] connect[s] to on Facebook.”⁴ The person can choose to incorporate as much or as little information as she would like, even a picture if she so chooses.⁵ Once the profile is

set up, the person is ready to make contacts.⁶ That is, the person can search for acquaintances and request that an acquaintance be her “friend.”⁷ Similarly, other Facebook users can request that this new Facebook participant be their friend as well.⁸ Any Facebook user can ignore or deny friend requests.⁹ The extent to which your Facebook profile and interactions with your Facebook friends are open to viewing by others is determined by your privacy settings.¹⁰ For example, I’ve set my privacy settings so that only friends can see the information I supply in my profile; only friends can write on my wall (that is, send messages that actually appear on my profile page); only friends can see who my other friends are; and so forth. Before the phrase “social networking” was coined, we would probably have called the interaction on Facebook “socializing.”

In Florida, a judge asked the Advisory Committee for a decision to determine “whether a judge may add lawyers who may appear before the judge as ‘friends’ on a social networking site, and permit such lawyers to add the judge as their ‘friend.’”¹¹ The decision of the Advisory Committee prohibiting such friending was based on Canon 2B of the Florida Code of Judicial Conduct, which prohibits a judge from “convey[ing] or permit[ting] others to convey, the impression that they are in a special position to influence the judge.”¹² The Advisory Committee held that because others would be able to see that the judge was a friend with a particular lawyer, the friendship would create the impression that the lawyer-friend was in a special position to influence the judge.¹³

¹ Fla. Judicial Ethics Advisory Committee Op. 09-20, <http://www.jud6org/LegalCommunity/LegalCommunity/LegalPractice/opinions/jecopinions/2009/2009-20> (accessed Feb. 22, 2010) [hereinafter Fla. JEAC Op. 09-20].

² S.C. Advisory Committee on Standards of Judicial Conduct Op. 17-2009, <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpiniNo=17-2009> (accessed on April 15, 2010) [hereinafter S.C. ACSJC Op. 17- 2009].

³ Facebook is now the most popular social networking website. See Daniel Nations, About.com: Web Trends, *The Top Social Networking Sites*, http://webtrends.about.com/od/socialnetworking/a/social_network.htm (accessed April 19, 2010). Other popular social networking websites include MySpace, Twitter and Linked-In. See *id.*

⁴ Facebook, *Set Up a Profile*, http://www.facebook.com/help/?guide=set_up_profile (accessed April 19, 2010).

⁵ See *id.*

⁶ Facebook, *Find Your Friends*, http://www.facebook.com/help/?guide=set_up_profile#!/help/?guide=find_friends.

⁷ *Id.*

⁸ Facebook, Help Center, *Friends > Friends: Adding friends*, http://www.facebook.com/help/?guide=set_up_profile#!/help/?page=767 (accessed April 19, 2010).

⁹ *Id.*

¹⁰ Facebook, Help Center, *Privacy > Privacy: Privacy settings and fundamentals*, <http://www.facebook.com/help/?search=Privacy%20#!/help/?page=839> (accessed April 19, 2010).

¹¹ Fla. JEAC Op. 09-20, *supra* n. 1.

¹² *Id.*

¹³ *Id.*

In South Carolina, the Advisory Committee held that judges may use Facebook and may “be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge’s position as magistrate.”¹⁴ The decision of the South Carolina Advisory Committee was based on Canon 2(A) of the Judicial Code of Conduct which provides that “[a] judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹⁵

So what’s the difference between the two decisions and does one of them take a better approach to judges’ social networking activities? First, it’s clear that the two decisions are quite different in two respects: the questions examined are quite different and the Canons applied are also dissimilar. The South Carolina decision is limited to a judge’s interactions with law enforcement officers and judicial employees and doesn’t directly address a judge’s interactions with lawyers.¹⁶ In addition, the South Carolina Canon leaves a greater discretion to the judge’s own determination of whether her actions are appropriate.¹⁷ The Florida opinion is specific to a judge’s interactions with lawyers practicing before that judge and is limited by the language of the Canon which focuses on the “impression” given by the judge.¹⁸ While the two opinions are based on different rules and circumstances, of particular note is the stark difference in approach taken by the two jurisdictions. It is likely that the South Carolina Committee would allow a judge to friend lawyers practicing before that judge because that Committee specifically noted that “complete separation of a judge from extra-judicial activities is neither possible nor wise.”¹⁹ Further, the Committee opined that judges should be a part of the

community in which they live and that includes being a part of social networking sites.²⁰

There are several reasons why the South Carolina approach is the better approach. First, being a Facebook friend does not violate Florida Canon 2B because Facebook friendships do not create an impression of special influence. It is commonly understood by Facebook users that being a friend on Facebook does not in itself signify a special relationship.²¹ Most often it signifies only that the person is an acquaintance. To the extent that a more intimate relationship exists, it is not the friending on Facebook that creates the intimacy or an appearance of intimacy. Thus, when a lawyer and judge are friends on Facebook, that friendship does not commonly result in the impression that the friend now will have some special influence over the judge. In fact, because social networking occurs in such a public forum, it may allow for more transparent relationships. If, indeed, there is a relationship of special influence, it may be more likely to be revealed in the realm of Facebook postings.

Second, there are other mechanisms to safeguard against real judicial impartiality. While it is key to our judicial system that judges be *viewed* as impartial and not subject to special influence, it is equally important and central to the rules of judicial ethics that judges avoid *actual* impartiality and special influence. Thus, rules of judicial conduct require a judge to reveal special relationships that may affect her ability to pronounce an impartial result.²² Rules of recusal require the judge to withdraw from participating where special relationships are identified by the lawyers or disclosed by the judge.²³ Thus, the rules provide

²⁰ *Id.*

²¹ See e.g., David Derbyshire, *Most Facebook Friends are False Friends*, Mail Online, <http://www.dailymail.co.uk/sciencetech/article-481050/Most-Facebook-friends-false-friends.html#> (accessed April 19, 2010).

²² See e.g. Model Code of Judicial Conduct, Rule 2.11 (ABA 2007).

²³ *See id.*

¹⁴ S.C. ACSJC Op. 17-229, *supra* n. 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ Fla. JEAC Op. 09-20, *supra* n. 1.

¹⁹ S.C. ACSJC Op. 17-229, *supra* n. 2.

mechanisms for safeguarding against undue influence.

Finally, as a profession, we recognize the tradition and value of creating strong ties between the bench and bar, and that includes social interaction between bench and bar.²⁴ We see this as beneficial interaction that strengthens the legal community and, as stated by the South Carolina Advisory Committee, “allows the community to see how the judge communicates and gives the community a better understanding of the judge.”²⁵ Interaction between bench and bar has not been viewed in the past as creating an impression of special influence and it should be of no significance whether that interaction occurs face-to-face or on the internet.

In sum, while we are concerned with the appearance of special influence, friending on Facebook does not suggest a relationship of special influence, but only a social interaction among acquaintances. The ethical rules applicable to judges create mechanisms for guarding against actual undue influence. And, finally, we value the legal community created by social interaction between bench and bar. South Carolina is going in the right direction – it’s o.k. for judges to socialize on Facebook. We need to trust judges and lawyers to exercise discretion and caution in internet socializing in the same way we have always trusted them to do so in their “real world” socializing.

UNIVERSITY OF MARYLAND ENVIRONMENTAL CLINIC COMES UNDER ATTACK

By **Elizabeth McCormick**
(University of Tulsa College of Law)

In late March, the Environmental Law Clinic of the University of Maryland School of Law was threatened with a loss of funding by the Maryland state legislature in connection with a lawsuit filed by the clinic against a poultry company charged with polluting the Chesapeake Bay. In response to the lawsuit and pressure from powerful poultry interests, a bill was proposed in the legislature that would require the legal clinic to turn over information about the clinic operation, including confidential client information, or risk a substantial loss of funding.²⁶

The bill was immediately and widely criticized as an attack on both the professional responsibility and academic freedom of the clinical faculty and their students. Phoebe Haddon, Dean of Maryland Law School, warned that the legislature’s request “to disclose information about specific cases currently being litigated, and tying that request to the withholding of substantial amounts from the University budget, can be easily perceived as an attempt to intimidate faculty, students, clients — perhaps even the judges before whom the case is set.”²⁷ She urged the General Assembly to “consider carefully how that kind of reporting implicates the professional responsibility requirements of the lawyers, the rights of the clients, and the necessary independence of the courts as they resolve disputes.”

²⁴ See e.g. Keith B. Norman, *Good Bench and Bar Relations Strengthen Our Judicial System*, 60 Ala. Law. 82 (March 1999).

²⁵ S.C. ACSJC Op. 17-229, *supra* n. 2.

²⁶ See Ian Urbina, *School Law Clinics Face a Backlash*, NYT, April 3, 2010, <http://www.nytimes.com/2010/04/04/us/04lawschool.html?fta=y>

²⁷ Statement from Dean Haddon about General Assembly's Proposed Budget Amendments, <http://www.law.umaryland.edu/about/features/enviroclinic/haddon.html>

AALS Executive Director Susan Westerberg Prager, in a March 31, 2010 letter to the Chancellor and Board of Regents of the University of Maryland, reiterated the AALS's opposition to legislative interference with clinical programs in state law schools.²⁸ “[P]ublic law school clinical law professors and their students practicing in a clinical setting will not be able to competently or ethically represent clients if they must reveal confidences that other members of the bar would be required to keep.”²⁹ ABA President Carolyn B. Lamm also came out against the lawmakers' actions, calling the proposed legislation an intolerable intrusion on the attorney-client relationship.³⁰ Urging lawmakers to back away from the proposal, Lamm reminded them that “the rule of law cannot survive if pressure prevents lawyers from fulfilling their responsibilities to their clients.”³¹

The Clinical Legal Education Association (CLEA), the nation's largest association of law teachers, issued a statement decrying the legislature's actions as “a failure to understand the professional responsibilities of lawyers and the structure of contemporary legal education”:

To effectively teach students and represent clients, these law clinics must be allowed to operate as other law offices, and law school clinics throughout the country, do -- zealously representing their client's interests and following the commitment in the Maryland Rules of Professional Conduct to “ensure access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.” But, some legislators are

*trying to impose restrictions and burdens unknown to other clinics or law offices, invading the sanctity of the lawyer-client relationship and harming both legal education and legal services for the needy in Maryland.*³²

Similarly, a letter to the Maryland General Assembly, signed by 479 law professors, also urged the legislature to consider the impact that the measure would have on the poor and others with limited access to justice who would be left without representation if law school legal clinics could not operate without political interference with their choice of clients or cases.³³

State law school clinics have for a long time been subjected to efforts by state legislatures to cut funding to law schools and clinical programs where the clinics have undertaken representation of an unpopular client or in an unpopular case. Recently, law school clinics in New Jersey, Michigan and Louisiana have faced similar threats to their funding, but such challenges have been around for as long as clinical legal education has existed. Professors Peter Joy and Robert Kuehn, both of Washington University Law School, have been long-time champions in the effort to protect law schools from similar threats to academic freedom and professional responsibility, and their efforts, together with the many individuals and organizations who offered support in this effort, were instrumental in convincing the Maryland legislature to back away from its threat to withhold funding from the Environmental Law Clinic at the University of Maryland.

On April 6, the amendments that would terminate funding to the environmental law clinic unless the

²⁸ Susan Prager letter to Maryland Chancellor and Regents, <http://www.law.umaryland.edu/about/features/enviroclinic/documents/AALS.pdf>

²⁹ Id.

³⁰ Statement of ABA President Lamm Re: Proposed Legislation Affecting Funding for University of Maryland School of Law, <http://www.abanow.org/2010/04/statement-of-aba-president-lamm-re-proposed-legislation-affecting-funding-for-university-of-maryland-school-of-law/>

³¹ Id.

³² CLEA, The Attack on the University of Maryland Law School Clinics, March 27, 2010, <http://www.law.umaryland.edu/about/features/enviroclinic/documents/CLEA.pdf>

³³ Law Faculty and Deans Letter to Maryland Assembly, http://www.law.umaryland.edu/about/features/enviroclinic/documents/Faculty_deans.pdf

law school complied with requests for reports on the clinic's activities were stricken from the bill.

TEACHING ETHICS ON-LINE

By Patricia E. Salkin
(Albany Law School)

The spring 2010 semester turned out to be a successful experiment with on-line teaching for a three-credit course in government ethics. Other than a one-hour meeting in-person to review technology issues and instructions, I did not physically see my 20 students all semester (except for the few who came by the office to chat).

Using TWEN as the technology platform for the course, each week was organized thematically. For example, weekly topics included: identifying the client of the government lawyer, attorney-client privilege in the government context, state and legislative branch ethics, post-employment restrictions, gifts, disclosures, honoraria, royalties and travel reimbursement, theft of honest services, enforcement, municipal ethics, campaign finance and lobbying. In addition to weekly reading from a soft cover book on government ethics published by the ABA as well as supplemental materials posted to TWEN, each student signed-up to be responsible for one state (limited to states with an ethics commission – 40 of the states have these). We then used the new wiki feature on TWEN to have the students collect and organize statutes and regulations (as well as links) to topical information related to the reading that week, and to answer a series of questions about how certain issues would be handled in their state. This provided a 20 state comparison of ethics laws (and a comparison of 20 local ethics laws when we got to that topic).

Using an ethics course to test “on-line” teaching was a wonderful experience. Each week, I would post two to three broad discussion questions, answers to which required the students to demonstrate that they had read and considered the assigned materials. To generate a sense of a

“virtual classroom” I typically asked each student to respond to one or two questions and then to post a reply to one or two postings made by their colleagues. Reading the postings revealed that the students spent a lot more time on articulating their responses (since they were in writing) than if we had been together physically in the classroom and they simply gave a one or two sentence verbal answer to a question posed. It also challenged me to come up with questions that would be “broadly focused” to enable 20 or more different responses/reactions, but keep students on task. I also had to consider my typical teaching style, which is not usually Socratic. Through the on-line experience, I was actually more Socratic and less lecture-style than I had been in the past since I wanted to give all students an opportunity to freely respond to the questions posted and to agree or disagree with the postings of their colleagues. Written responses (on-line) taught the students, among other things, to be careful with choice of words, to edit their work, and to be mindful of collegiality in terms of tone of response to each others’ ideas.

In lieu of a course paper, which is typically what I have done for this seminar class, I organized the students into small groups and they studied and built wikis around the theft of honest services statute. Each group was assigned a former public official who had been indicted and/or convicted of theft of honest services. They were given an organizational rubric for the project which included an introduction of their person, background on their public service, a description of the acts committed that [allegedly] violated the statute, consideration of whether any other local, state or federal ethics laws may have been violated, a discussion of the three cases currently before the U.S. Supreme Court revolving around the interpretation/constitutionality of this statutory provision, consideration of whether the possible Court decisions could have an impact on their person (e.g., might they get out of prison if

they are currently serving a sentence), and ideas for potential Congressional reform of the statute if they deemed it appropriate. I think this part of the experiment also proved very successful (however, I will confirm this when student course evaluations are submitted and reviewed).

I started to chronicle some of the on-line experiences on the Albany Law School Best Practices Blog (www.bestpracticeslegaled.albanylawblogs.org) maintained by Professor Mary Lynch, director of our Center for Excellence in Law Teaching, and my colleague, Darlene Cardillo, an instructional technologist at Albany Law School has posted information about the technology aspects of this course on her blog (www.albanylawtech.wordpress.com). This summer I will be working on a longer article that discusses best practices and reflects on other aspects of the course from curriculum development to teaching, including outcomes and evaluation. Although I used government ethics as the substantive subject matter, it seems to me that the opportunity exists to test this out with other professional responsibility courses. I would be happy to share more information with anyone interested. Please feel free to email me at psalk@albanylaw.edu.

MEMBER ANNOUNCEMENTS & PUBLICATIONS

THE CARNEGIE REPORT AND RECENT LAW SCHOOL INNOVATIONS IN TEACHING PROFESSIONAL JUDGMENT

Clark Cunningham and **Charlotte Alexander** at the Georgia State University College of Law have recently completed a book chapter entitled “Developing Professional Judgment: Law School Innovations in Response to the Carnegie Foundation’s Critique of American Legal Education.” The chapter provides a concise

summary of *EDUCATING LAWYERS* (William Sullivan et al.) published by the Carnegie Foundation in 2007 and then explicates its critiques and recommendations for legal education by applying concepts from the field of moral psychology that have been used in other professional schools to assess how schools teach and students learn professional judgment. The chapter concludes by highlighting innovative approaches to teaching ethics and professionalism that three American law schools (Stanford, Washington & Lee, and Indiana) have implemented since the Carnegie Report and analyzes them using these concepts from moral psychology. The chapter will appear later this year in *The Ethics Project in Legal Education*, edited by Michael Robertson, Lillian Corbin, Francesca Bartlett and Kieran Tranter and published in London by Routledge-Cavendish. The chapter is available in draft form at www.teachinglegalethics.org/content/developing-professional-judgment

ETHICS FILM FOR CLASSROOM OR CLE: *RED STATE/BLUE STATE: LAWYERS, POLITICS & MORAL COUNSELING*

Russell G. Pearce (Fordham Law School) has produced an ethics film, *Red State/Blue State: Lawyers, Politics, and Moral Counseling*, along with a viewer’s manual that provides a lesson plan for the classroom or CLE.

The Viewers Manual and film use the question of why lawyers are more politically liberal than non-lawyers as a way to explore the foundation in political philosophy for the dominant conception of lawyers as amoral partisans and to consider whether engaging in moral conversation with clients is permitted or preferable.

The film attempts to make this inquiry both fun and accessible. It features an entertaining narrative, musical selections from R.E.M., and comments

from law students, lawyers, clients, and scholars from diverse political backgrounds, including **Doug Ammar, Robin Barnes, Erwin Chemerinsky, Lawrence Fox, Heather MacDonald, John McGinnis, Russell Pearce, Deborah Rhode, William Simon, Ken Starr, and David Wilkins.**

The Viewer's Manual is available at:
<http://ssrn.com/abstract=1574458>

The Viewers Manual and film build on Pearce's paper, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, available at
<http://ssrn.com/abstract=988196>

**ONLINE ETHICS CLE THEATRE PROGRAM:
 JUSTICE MARSHALL IS COMING!**

Daisy Hurst Floyd (Mercer University, Walter F. George School of Law), is featured as a post-production panelist in a new online CLE theater program, *Justice Marshall is Coming!*, which recently debuted by Periaktos Productions (<https://periaktos.bizvision.com/>). The programs feature a recorded play, a post-play panel discussing ethical issues raised in the play, and a chat room for viewers; they are certified for ethics credits in about 18 states. **Marie A. Failing** (Hamline University School of Law) moderated the chat room for the March 24 showing.

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