



PROFESSIONAL RESPONSIBILITY SECTION SPRING 2006 NEWSLETTER

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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 American Association of Law Schools.



MESSAGE FROM THE CHAIR

By Carol A. Needham (Saint Louis)

This is a great time to be an academic interested in professional responsibility issues. One of my primary interests as the 2006 Section Chair is to highlight opportunities for scholarly dialogue and involvement. This year's section activities include:

(1) Award for Best Paper by a (relatively) Junior Scholar

At the Section's business meeting at the AALS annual meeting in San Francisco, we will recognize the best paper in the field of professional responsibility written by a scholar who has completed fewer than ten years of full-time teaching at an AALS-member law school as of June 30, 2006. Each scholar can submit one paper for consideration. Papers published during 2006 and unpublished manuscripts will be eligible, and must be submitted to the review

committee chair, Marie Failing at Hamline. Note to more senior section members: If you would be interested in serving as a reader for this or future competitions, contact Marie Failing. See the summer newsletter for deadlines and further details.

(2) Call for Papers

At the 2007 AALS Annual Meeting in San Francisco, the solo program sponsored by our Section will be "Protecting Lawyers' Independent Professional Judgment." A peer-reviewed call for papers will be used to

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select one of the speakers. In addition to the public acclaim that comes with the opportunity to speak at the conference, the winner's contribution will get additional notice as a result of the posting of the abstract on the AALS website where the Section on PR's program is listed. And, the AALS will call the attention of those attending the Annual Meeting to the speakers who were selected through the "Call for Papers" process by listing the section program at which they will speak.

To participate, you must submit a detailed abstract or paper that has not been previously published. The peer review process will be chaired by Irma Russell, University of Memphis School of Law; 3715 Central Avenue, Memphis, TN 38152; 901/678-3222; irussell@memphis.edu. For additional information, please contact Irma.

Shorter papers (under 35 pages) are particularly encouraged. The Saint Louis University Law Journal will be publishing papers from the Section on PR annual meeting program, subject to the usual discussion between editors and authors regarding length and timing. The working description of the program reads:

A central concern for lawyers advising entities is navigating the margin between representing the entity and dealing with the constituents, the persons working for the entity. Simply requiring lawyers to go "up the ladder" does not address an important part of the problem: the human dimension. In the confusion of a developing situation, it can take an extended period of time to establish actionable levels of factual knowledge. Even when there are no intentional efforts to mislead counsel for the company, there are situations in which the executives' actions indicate that the unwelcome news the lawyer is trying to

bring to the executives' attention has not been heard. Cognitive psychology and other social sciences may illuminate ways to navigate these difficulties. Law firms emphasize to their associates and their clients that "we are not deal-killers" and "we find a way to get done what our clients need done" and in-house counsel experience pressure from management to "be a team player." Academics are perhaps uniquely positioned to publicly question some of the key assumptions undergirding the current system. Are the current PR regulations drawing the lines in the right place? What happens to the human beings during the interval in which they are sorting out the next action they are required/permitted to take? In what ways can we support lawyers' exercise of their professional judgment so that they will have less incentive to "close their eyes to the obvious" and avoid investigating problematic situations?

(3) Additional Annual Meeting Programs

We are also co-sponsoring four additional programs:

- "Legal Ethics CLE in the Law School Setting" with the Section on CLE,
- "Prosecution and Racial Justice" with the Sections on Criminal Justice and Minority Groups,
- "Ethics Issues in Class Action Litigation" with the Section on Civil Procedure, and
- a program with the Section on Student Services related to Impaired Students and LAP.

(4) Our Fourth Poster Session at the 2007 AALS Annual Meeting

Hopefully you've noticed the great posters members of our section have displayed at the last three annual meetings. Building on our example, the AALS will again this year expand the poster sessions at the Annual Meeting. While we will provide more information on this session in the summer newsletter, here's some background information for anyone interested in preparing a poster.

Posters are displayed in the hallways of the main hotel for the annual meeting and grouped and identified as a Section poster (e.g. AALS Section on Professional Responsibility posters). AALS provides the easels and schedules a date and time for a Section's posters to be presented during the Annual Meeting.

Posters should be able to be read from 2-3 feet away. The posters should not exceed 3ft x 4ft (36 x 48 inches). Experienced poster presenters suggest 3-6 graphics to mix in with your text (if available) to make the posters more engaging. The text should be succinct. Many universities offer assistance in poster design and printing. Research assistants are also a good resource for figuring out how to put the poster together. Some good tips and examples of posters can be found at:

<http://staff.science.uva.nl/~bcate/essli03/posters.html>

<http://www.lcsc.edu/ss150/poster.htm>

<http://www.cis.udel.edu/~pollock/fse04/posterauthorinst.html>

The posters should be mounted on a hard backing such as foam core that can be

placed on an easel. Foam core is available at print shops, art supply stores, Staples, etc. Staples sells a 30'x40" foam core poster board for approximately \$16.

Poster presenter are responsible for getting their poster to the annual meeting, but the AALS does a good job of developing shipping options for the conference. Shipping options will be discussed in the next newsletter,

For additional information on this program, contact AALS.

(5) Searchable Website.

The Special Projects Task Force is exploring which law schools (or blogs?) might be interested in hosting a website, searchable by city and date, where ethics profs can post notices of up-coming conferences and workshops. If you have computer expertise or have ideas regarding this project, please let us know.

(6) ABA Liaison Sub-Committee

The Section has formed an ABA liaison sub-committee this year. As part of its responsibilities, the sub-committee is developing a list of Section members who play some role in the ABA's various ethics-related activities. The goal is to have a contact list for Section members who need to access PR information or services from the ABA or want to provide input into the ABA's groups and initiatives. If you have some ethics-related role in the ABA, please contact one of the sub-committee chairs, Irma Russell (irussell@memphis.edu) or Andrew Perlman (aperlman@suffolk.edu). Once Irma and Andrew have developed a contact list, they will distribute it through this newsletter.

(6) Scholars' Discussion Groups in Vancouver.

For the first time, a new forum for interaction between scholars and others involved in professional responsibility will be available at the ABA Center for Professional Responsibility 32nd National Conference on Professional Responsibility. On the afternoon of Friday June 2, 1:30 to 5:00 has been set aside for small group discussions and roundtable discussion on legal ethics scholarship. This can be a chance informally to test ideas and to investigate what data sets relevant to your research may already be available.

The Section has a lot going on this year, and we sincerely hope you will be a part of the action.



Call for Announcements for the Summer Edition of the Newsletter

The summer edition of the newsletter is exclusively announcements so we you're your news. Please send us any personal or professional highlights that you want to share with your colleagues in the section. Let us know if you've recently won an award, served the Bar in a unique way, added to your family, or moved to a new school. Let us know if you are setting up a conference, panel, or symposium. Since law review publications are already recognized in Fred Zacharias's column, please do not submit these to the column. Please email submissions to Randy Lee at glee@widener.edu, indicate "Summer News" in the subject heading and try to keep submissions under fifty words. The Section Newsletter Editor reserves the right to edit submissions.



MEMBER ANNOUNCEMENTS

Third International Conference on Therapeutic Jurisprudence in Perth, Australia

Professors Marjorie Silver (Touro), Ed Dauer (Denver), and Tom Barton (Cal. Western) are organizing a panel on Ethical Issues & Therapeutic Jurisprudence for the Third International Conference on Therapeutic Jurisprudence in Perth, Australia, this June (7th-9th). They welcome ideas on topics for discussion.

Blogging



A group of Professional Responsibility Section colleagues invite you to check out their blog at legalethicsforum.com. In addition, they are always looking for interesting legal ethics related posts. If people want to share their recent scholarship or have anything else about which they'd like to post, they can feel free to contact Professor Andrew Perlman at aperlman@suffolk.edu.

Award



Deborah L. Rhode, Director, Stanford Center on Ethics and Ernest W. McFarland Professor of Law, is getting the Michael Franke Professionalism Award at the ABA Center on Professional Responsibility

Conference this June. This is an honor not normally given to an academic, and our congratulations go out to Deborah.

Call for Papers

The UMKC Law Review invites articles for inclusion in its 2007-08 symposium issue on Ethics and the Representation of Families. This symposium issue will focus on selected ethical issues in the representation of families (including representation in estate planning, divorce, custody, abuse & neglect and juvenile cases). There are a number of signs that attorneys are not doing very well in rising to the challenges of practice in the unique world of representing families. Complaints to disciplinary agencies, malpractice rates, and a public increasingly looking to other professionals to assist them in adjusting family relationships are all signs of a profession that could do a better job serving its clients. Guidance for ethical practice in these critical and challenging fields of law is thin. The rules of professional conduct regulating attorneys conceive of legal practice in a balanced adversarial or corporate setting. Family representation is rarely central in debates over professional regulation standards. It is no wonder that the most prominent examples of "supplemental ethics codes" are developed in fields relating to family law practice. This symposium issue will address some of the most difficult ethical dilemmas in representing families in an effort to provide guidance for practitioners and policy makers in developing ethical standards.

The publication schedule for the symposium anticipates a September 29th deadline for article submissions. Inquiries may be directed to the faculty symposium sponsor Professor Barbara Glesner Fines at glesnerb@umkc.edu or 816.235.2380.

Articles should be submitted to

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ABA Opportunities

The Professionalism Committee of the ABA Section of Legal Education and Admissions to the Bar is developing a program for the 2007 ABA midyear meeting on law school pro bono programs. The Committee also is studying the feasibility of investigating a correlation between unprofessional conduct by law students and subsequent disciplinary problems when those students become lawyers (similar to a study recently conducted in the medical profession, which found a correlation between unprofessional conduct by medical residents and subsequent disciplinary problems in practice). Persons interested in assisting with these projects are invited to contact Dean Donald Burnett, Committee Chair, University of Idaho College of Law, P.O. Box 442321, Moscow, Idaho 83843-2321 (dburnett@uidaho.edu).

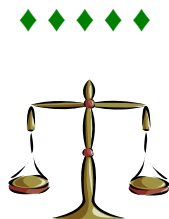
The Professional Lawyer, the quarterly magazine of the ABA Center for Professional Responsibility is seeking submissions. If you have an article you would like to submit or if you would like further information about the publication,

please contact the editor, Art Garwin, at agarwin@staff.abanet.org or 312-988-5294.

Recent Program

Congratulations to Section member Ellen Yaroshefsky and the Jacob Burns Ethics Center for their successful symposium “Secret Evidence and the Courts in the Age of National Security” on Dec 5-6. The Cardozo Public Policy Law and Ethics Journal will publish the proceedings.

A number of Section members have reported that Hofstra had a great conference late last fall on “Lawyer Ethics in an Adversary System.” Included in the program was a dinner honoring the work of Monroe Freedman.



DEVELOPMENTS IN THE REGULATION OF LAWYERS *by Roy Simon (Hofstra)*

Below are some significant state and national developments since the Fall 2005 Newsletter, plus some anticipated future developments. As always, the *Current Reports* from the ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT have been invaluable. If you know of developments that I missed, or if you learn of new developments that I should mention in the next column (or if you have corrections to this column), please contact me at roy.simon@hofstra.edu.

NATIONAL DEVELOPMENTS

American Bar Association Developments

For extensive information on everything going on at the ABA relating to professional responsibility and regulation, visit the web site of the ABA Center for Professional Responsibility at www.abanet.org/cpr. Here are some highlights:

ABA Model Rules of Professional Conduct: The ABA Model Rules of Professional Conduct have not been amended since August of 2003, and no proposed amendments are under serious consideration. This marks the longest period since 1987 in which ABA Model Rules of Professional Conduct have not been amended. (They were not amended at all during the first four years after their adoption in 1983, but since 1987 they have been amended in some way every year or two.)

ABA Model Rules for Lawyers' Funds for Client Protection: In February 2006, the ABA Standing Committee on Client Protection proposed amendment to Rules 1 and 10 of the ABA Model Rules for Lawyers' Funds for Client Protection. (The Standing Committee on Client Protection is charged with providing support to client protection funds, which reimburse clients whose lawyers steal their funds or engage in other dishonest conduct relating to client funds. Every state has such a fund.) In their current form, the ABA Model Rules for Lawyers' Funds for Client Protection (and many state rules based on the ABA Model), allow compensation only for losses suffered by clients if (a) the lawyer causing the loss is licensed to practice law in the jurisdiction where the Fund is located, and (b) the lawyer's dishonest conduct have occurred in the jurisdiction where the Fund is located.

The 2002 amendments to ABA Model Rule 5.5 have made these restrictions problematic because, if a lawyer misappropriates client funds while representing that client pursuant to Model Rule 5.5 in a “host” jurisdiction, the claim will fall between the cracks – the Fund in the lawyer’s “home” jurisdiction may not entertain the client’s claim for reimbursement because the misconduct did not occur there, but the Fund in the “host” jurisdiction might not entertain the claim because the lawyer is not licensed there. The proposed amendments would address this anomaly.

Among other things, the amendments allow the “host” Fund to reimburse clients whose lawyers are authorized to practice law in the jurisdiction as a foreign legal consultant, in-house counsel or under the ABA Model Rule for Temporary Practice by Foreign Lawyers. (Most jurisdictions that license foreign legal consultants and in-house counsel require those lawyers to contribute financially to the “host” Fund through the payment of an annual assessment.) The amendments to Rule 10 provide the Fund’s Trustees with an equitable balancing test to determine whether their own Fund, another jurisdiction’s Fund, or both Funds jointly should pay a particular claim for reimbursement. The Standing Committee expects to submit a final report and recommendation to the ABA House of Delegates in time for debate at the ABA’s 2006 Annual Meeting in August. For more information, visit www.abanet.org/cpr/client.html.

ABA Model Code of Judicial Conduct: In December of 2005, after holding ten public hearings over the past several years, the ABA Joint Commission to Evaluate the Code of Judicial Conduct issued a “Final Draft Report” containing proposed revisions to the entire ABA Code of Judicial Conduct.

Comments on the draft were due by March 15, 2006.

The Commission had hoped to present the final draft to the ABA House of Delegates in time for debate at the ABA’s August 2006 Annual Meeting, but in April of 2006 the Commission Chair, attorney Mark Harrison of Phoenix, issued a statement saying that the Commissioners had agreed that “a short extension of our work will allow us to present the best possible product to the ABA House of Delegates, both to provide clear and appropriate guidance to the judiciary in the years ahead, and to assure the public that its trust in the judiciary is well-founded.” The statement added that the Commission had made “substantial progress” toward completing work on the first three Canons and addressing the “unusually difficult and complex questions” presented by Canons 4 and 5. The Commission “committed to finishing its work this fall, which will allow “full consideration of all the proposed changes in the Code before the House convenes for the ABA Midyear Meeting in Miami in February 2007.” The Commission’s proposals, as well as written comments, transcripts of public hearings, and other information about the Joint Commission’s work and the Code of Judicial Conduct are available on the Commission’s home page at www.abanet.org/judicialethics.

Federal Developments

The regulation of lawyers is primarily a matter of state law, but federal rules and statutes also play a role.

Fed. R. Civ. P. 26 – proposed rule on inadvertent production of privileged information: The Federal Rules of Civil Procedure do not currently address the inadvertent production of privileged information during discovery, but on April

12, 2006 the United States Supreme Court forwarded to Congress the following proposed amendment to Rule 26:

(B) *Information Produced.* If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

The amendments will take effect on December 1, 2006 unless they are or rejected, deferred, or modified by both houses of Congress. For additional information about proposed or pending changes to the Federal Rules of Civil Procedure (as well as other federal rules), visit the official web site of the U.S. Courts at www.uscourts.gov or contact the Rules Committee Support Office at (202) 273-1820.

Gramm-Leach-Bliley litigation: On March 6, 2006, the filing deadline passed for the FTC to seek a writ of certiorari to the United States Supreme Court regarding a December 2005 ruling by the United States Court of Appeals for the D.C. Circuit, which affirmed a district court ruling in favor of the ABA and the New York State Bar Association. The district court and the court

of appeals held that the FTC exceeded its authority when it interpreted the privacy provisions of the Gramm-Leach-Bliley Act to cover lawyers. The D.C. Circuit (whose panel included now-Chief Justice John Roberts) reasoned that if Congress had intended to cover lawyers in the G-L-B Act, it would have said so explicitly. “The states have regulated the practice of law throughout the history of the country; the federal government has not,” the court said. Whether the federal government could regulate lawyers in this way was not at issue. The panel simply concluded that “it is not reasonable for an agency to decide that Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous.” The panel added (quoting Justice Scalia) that “Congress does not hide elephants in mouseholes.”

BROAD TRENDS IN THE STATES

The ABA provides model rules, but the states govern the actual regulation of lawyers. Before I discuss developments in particular states, I’ll mention some broad trends.

Increasing national uniformity of ethics rules: Even since the ABA adopted the Canons of Professional Ethics in 1908, the ABA’s goal has been to foster national uniformity in state ethics rules. That goal was largely achieved under the old ABA Model Code of Professional Responsibility. Within a decade after the ABA House of Delegates approved the Code of Professional Responsibility in 1969, nearly every state had adopted the Code with few or no changes. But that national uniformity quickly disappeared after the ABA adopted the Model Rules of Professional Conduct in 1983, because many states clung to the old Code of Professional Responsibility and because states that “adopted” the ABA Model Rules of Professional Conduct invariably changed some of the language to

reflect local values or address local conditions.

Today, however, the states are moving back toward the national uniformity that existed under the old Model Code. All but four states (CA, ME, NY, and OH) have adopted the ABA Model Rules of Professional Conduct, and all four of these states are actively moving toward changing to the ABA Model Rules. In New York and Ohio, which are the only two states still using the old Model Code, special committees have developed full sets of proposals based on the format and much of the language of the ABA Model Rules. In California and Maine, which have unique rules based on neither the Model Code nor the Model Rules, special committees are comprehensively reviewing their rules with an eye toward adopting the ABA language and numbering system. And the many states that have revised their rules based on the work of the ABA Ethics 2000 Commission seem to be sticking closer to the ABA Model Rules than in the past. The overall result is that by the end of this decade, we may return the era of national uniformity that existed under the reign of the ABA Model Code of Professional Responsibility. For an up-to-date chart of state-by-state responses to the work of the ABA Ethics 2000 Commission, visit the home page of the ABA Center for Professional Responsibility at www.abanet.org/cpr (click at left on "Implementation Initiatives," and scroll down to "Ethics 2000 Review Status Chart, including status of review and links to committee reports.")

Malpractice insurance disclosure: In August of 2004, the ABA adopted a Model Court Rule on Insurance Disclosure. Today, sixteen states require lawyers to make some form of disclosure about their malpractice insurance. Only five (AK, NH, OH, PA and SD) require disclosure directly to clients. Eleven more (AZ, DE, IL, KS, MI, NE, NV,

NM, NC, VA and WV) require disclosure on an annual lawyer registration statement. Eight more (CA, ID, KY, MA, MN, NY, UT and WA) are actively developing or evaluating proposed malpractice insurance disclosure rules. Only Arkansas has so far voted to reject such a rule. For state-by-state details, see the remarkable chart maintained for the ABA Standing Committee on Client Protection by staff attorney John Holtaway of the ABA Center for Professional Responsibility at www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

Multijurisdictional practice: About 25 states have now adopted a rule similar or identical to ABA Model Rule 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice") as it was amended in 2003 based on the work of the ABA Commission on Multijurisdictional Practice. In another 5 states, proposed rules similar or identical to ABA Model Rule 5.5 are pending before the highest court. Only the Connecticut Bar has formally voted to reject ABA Model Rule 5.5, and in New York the State Bar recently asked the courts to defer consideration of the Bar's proposal to amend DR 3-101(B) after the courts informally expressed concerns about it. For state-by-state information, visit www.abanet.org/cpr/jclr/5_5_quick_guide.pdf.



STATE-BY-STATE DEVELOPMENTS

In this section I will discuss highlights of some of the developments that have come to my attention since the last issue of this newsletter. If you want detailed information about developments in particular states, visit the web sites given below after each state, or find links to each state's resources on a

national legal ethics web site such as www.law.cornell.edu/ethics/listing.html, www.abanet.cpr/links.html, or www.legaethics.com.

Arizona (www.azbar.org): Effective January 1, 2007 (not 2006), the Arizona Supreme Court will amend Supreme Court Rule 32(c)(11)(A) to require Arizona lawyers to certify annually on their registration form whether they are engaged in private practice and, if so, whether they carry professional liability insurance. If a lawyer's coverage lapses or is discontinued, the lawyer must notify the Arizona bar within thirty days. The rule provides that the State Bar of Arizona will make all information available to the public on its web site. The new rule is available at www.supreme.state.az.us/rules/ramd_pdf/R-04-0025.pdf.

California (www.calbar.ca.gov, www.courtinfo.ca.gov, and www.leginfo.ca.gov):

In March, the State Bar Board of Governors voted 12-5 to oppose a pending bill (now before the Senate Judiciary Committee) that would grant an exception to the duty of confidentiality for government lawyers who blow the whistle on fraud by public officials. However, the Board sent the issue to the Bar's Rules Revision Commission, which is comprehensively reviewing and simplifying the California Rules of Professional Conduct. The pending bill is similar to bills that were passed by the California Legislature in recent years but vetoed by Governor Davis and then Governor Schwarzenegger. Ironically, those bills were introduced because the California Supreme Court rejected the State Bar's own proposed exception to the confidentiality rules to permit whistleblowing by government lawyers.

Also in March, a committee of the State Bar Board of Governors Committee on Regulation, Admissions and Discipline

("RAD") approved three proposed amendments to the California Rules of Court: (1) extending the waiting period to petition for reinstatement after disbarment from five to seven years; (2) a requirement that anyone seeking reinstatement take and pass the bar exam; and (3) a list of seven factors that might justify permanent disbarment (including stealing client funds, conviction of a crime of public malfeasance, engaging in the unauthorized practice of law and engaging in conduct "so egregious that the member should be permanently disbarred"). The proposals, all of which passed in the RAD Committee by 3-2 votes, will go to the full Board of Governors this summer and, if approved there, will be sent to the Supreme Court.

District of Columbia (www.dcbar.org):

The District of Columbia Court of Appeals is considering whether to adopt proposed amendments to the D.C. Rules of Professional Conduct. The period for public comment closed on December 5, 2005 – the court received 41 comments on the proposed rules – and the court is expected to make a decision sometime this year. The D.C. Bar Board of Governors recommended the proposed amendments to the Court of Appeals in June 2005, following six years of study and review by the D.C. Bar Rules of Professional Conduct Review Committee, whose Reporter is Professor Leah Wortham of Catholic University School of Law. The full text of both the "Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations" and the markup showing revisions are available online at www.dcbar.org/inside_the_bar/structure/reports/index.cfm. Meanwhile, D.C. continues to explore possible improvements to its disciplinary system. The Disciplinary System Study Committee ("DSSC") held a public hearing on March 27th regarding

proposed changes to Rule XI of the D.C. Court of Appeals Rules Governing the D.C. Bar. The DSSC, which was established in 2003, is exploring ways to promote “a faster, fairer, and more transparent process in the disciplinary system of the District of Columbia.” In early March it issued a report on recommending changes to Rule XI. The committee’s report and recommendations are available for public comment through May 5, 2006.

Florida (www.flabar.org): Florida’s amended versions of Rules 1.5, 5.4, 5.5, and 8.4, took effect on January 1, 2006, along with a new and unique Rule 5.8, which explains the limits of allowable client contact by lawyers and law firms when a lawyer is leaving a law firm or when a law firm is dissolving. The full Order amending the rules is posted at www.floridasupremecourt.org/decisions/2005/sc05-206.pdf

On April 26, 2006, The Florida Bar filed its annual petition with the Florida Supreme Court recommending that the court amend various Rules Regulating The Florida Bar.

The Florida Bar Special Committee to Study Paralegal Regulation has been focusing on issues such as (a) Is it in the public interest to establish educational and ethical standards for persons using the title “paralegal” and, if so, should the standards be voluntary or mandatory? (b) If standards are established, who should make the determination that the paralegal has met the standards – a supervising attorney, or another body such as The Florida Bar? (c) Should a grievance system be established? (d) Should a distinction be made between the terms “paralegal” and “legal assistant?” (e) Should there be multiple status levels for paralegals? (f) Who will bear the cost of a regulatory scheme? (g) What should be the composition of the regulatory body – all paralegals, all lawyers, nonlawyers who are not paralegals, or a combination? (h) Should

paralegal fees be regulated? and (i) Should there be more standardization in the educational institutions offering paralegal studies?

Illinois (www.isba.org): An amendment to the Illinois UPL law (705 ILCS 205/1) took effect on January 1, 2006. The amended law provides that no person without a law license may “advertise or hold himself or herself out to provide legal services.” The penalty for a violation is a finding of contempt of court.

As reported last time, in 2005 the Illinois Supreme Court finally adopted mandatory continuing legal education rules (Supreme Court Rules 790-798) and simultaneously created a new Supreme Court Commission on Professionalism (Supreme Court Rule 799). The new MCLE rules apply to all lawyers licensed in Illinois unless they are retired, on inactive status, serving as judges, doing active military duty, licensed and actively practicing in another state with MCLE, or otherwise able to show good cause justifying exemption. Lawyers will be required to have 20 hours of CLE for the first two-year reporting period (which begins July 1, 2006 for the first half of the alphabet); 24 hours in the second two-year period, and 30 hours every two years after that.

Finally, the Illinois Supreme Court is still considering the Illinois State Bar Association’s June 2004 recommendation that Illinois comprehensively amend the existing Illinois Rules of Professional Conduct to bring them more into line with the current ABA Model Rules of Professional Conduct and to formally adopt the Comments to the rules. (The existing Illinois rules do not include the Comments.)

Michigan (www.michbar.org): The Michigan Supreme Court is still considering comprehensive amendments to the Michigan Rules of Professional Conduct that the court circulated for public comment in June of

2004. The proposals include alternative versions of Rule 4.2. Alternative B (which Michigan's Attorney General favors) would add: "This rule does not apply to otherwise lawful investigative actions of lawyers employed by the government who are engaged in investigating and/or prosecuting violations of civil or criminal law." The proposals are available at www.michbar.org (click on the home page on "admissions, ethics and regulation," then scroll down to "Ethics Rules").

Meanwhile, effective October 18, 2005, the Michigan Supreme Court Rule 1.15 to "create interest rate parity with non-IOLTA investments ... and to make other revenue-enhancing modifications to the IOLTA program" (according to a Staff Comment). In a bold attack on the practice of many banks to pay only a miniscule interest rate on IOLTA accounts, the Michigan Supreme Court has amended Rule 1.15(a)(2), which contains the ordinarily innocuous definition of an "eligible institution." (Lawyers must keep their IOLTA accounts in an "eligible institution.") The amended definition provides that to qualify as an eligible institution, a bank "must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications." (The amended rule contains many other detailed provisions as well.)

In April of 2006, the State Bar of Michigan – like various other bars around the country – created a task force to make recommendations concerning the compelled or coerced waiver of the attorney-client privilege.

Missouri (www.mobar.org): Amended versions of Rules 5.5 and 8.5 of the Missouri Rules of Professional Conduct took effect on January 1, 2006. Amended Rule 5.5

conforms closely to their ABA counterparts, except that Missouri's rule will not permit lawyers engaged in federal practice to establish an office or otherwise practice in Missouri more than "temporarily. Amended Rule 8.5 tracks the ABA model verbatim."

Also effective January 1, 2006, Missouri has significantly amended its three main rules governing advertising and solicitation (Rules 4-7.1, 4-7.2, and 4-7.3). The amended rules prohibit any written solicitation that "vilifies, denounces or disparages any other potential party," and all advertisements going beyond a lawyer's name, address, and practice areas must contain the following conspicuous disclosure: "The choice of a lawyer is an important decision and should not be based solely on advertisements." The new targeted mail rule draws on advertising provisions from Florida, Rhode Island, and South Carolina, including a 30-day blackout period for written solicitations to personal injury victims.

New York (www.nysba.org and www.courts.state.ny.us): In a landmark move, the New York State Bar Association voted unanimously to recommend that the New York Appellate Division courts change over to the format of the ABA Model Rules of Professional Conduct. However, the State Bar won't formally transmit that recommendation to the courts until the N.Y. State Bar House of Delegates finishes debating the proposals of the Committee on Standards of Attorney Conduct ("COSAC"), whose proposed New York Rules of Professional Conduct are posted at www.nysba.org/cosacreport. (Some of the posted proposals will change soon in response to public comments.) The debate will occur at the next six quarterly meetings of the next six meetings of the House of Delegates, which will be held from June 2006 through November of 2007.

The rules governing lawyer advertising (DRs 2-101 through 2-105) are almost certain to be amended much sooner. In January 2006, the State Bar House of Delegates approved wide-ranging proposals, developed since last June by the State Bar's Task Force on Lawyer Advertising, recommending that the courts adopt (a) a 15-day blackout period for targeted mail following any accident or disaster, (b) mandatory electronic filing with a newly created central depository of all television advertisements, foreign language advertisements, billboards, and subway placards, and (c) random sampling of ads, with referral to a grievance committee when an advertisement violates the rules. The courts have not yet acted on the proposals but are believed to be moving on a fast track.

Regarding multijurisdictional practice, in March of 2006 the State Bar President wrote a to the courts asking them to "defer" consideration of the Bar's proposal to amend DR 3-101(B) and DR 1-105(B), which would have brought New York into line with ABA Model Rules 5.5 and 8.5. The State Bar asked for the deferral because the courts had informally expressed concerns about the proposals. The State Bar will forward a revised version of the MJP rules sometime after November 2007 as part of the comprehensive COSAC package.

Ohio (www.sconet.state.oh.us): On February 15, 2006, the public comment period expired on proposed Ohio Rules of Professional Conduct, which the Supreme Court of Ohio approved for publication last October. The proposals were produced by a Task Force appointed by Ohio's Chief Justice in March of 2003 to review the Ohio Code of Professional Responsibility in light of the work of the ABA Ethics 2000 Commission. The report is posted at www.sconet.state.oh.us/Atty-Svcs/ProfConduct/default.asp. The Task

Force will now reconvene to review the comments and make revised recommendations to the Supreme Court.

Texas (www.texasbar.com) (formerly www.texasbar.org): In December 2005, to assist lawyers advertising in the public media or soliciting prospective clients by written communications, the Texas Advertising Review Committee adopted an Interpretive Comment regarding Texas Rule 7.02(a)(2) (equivalent to ABA Model Rule 7.1), which was amended in 2005. The amendments explain when a lawyer's reference in a public media advertisement to "past successes or results" is false or misleading. (Interpretive Comments are designed to establish objective means for staff members to review advertisements or writings and to determine whether they comply with Part 7 of the Texas Disciplinary Rules of Professional Conduct. If the statements and representations contained in advertisements or writings comply with the Interpretive Comments, staff is authorized to approve them.)

Virginia (www.vsb.org): Virginia is incredibly active regarding lawyer regulation. Effective February 2006, the Virginia Supreme Court adopted the following new Comment 4 to Rule 1.3 ("Diligence"): "A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity."

Effective May 1, 2006, the Virginia Supreme Court amended Supreme Court Rule 1A:5. ("Virginia Corporate Counsel & Corporate Counsel Registrants"), a lengthy and detailed rule governing in-house counsel.

On March 3, 2006, the Virginia State Bar revised its Clients' Protection Fund Rules.

Currently, the Virginia Supreme Court is reviewing a long series of amendments to the Rules of Professional Conduct and other rules proposed by the Virginia State Bar. A proposed amendment to Rule 5.6(b) would delete the word "broad" before the phrase "restriction on the right to practice." The prohibition in Rule 5.6(b) would thus be "expanded to reach all restrictions on the right to practice in settlement agreements, other than those within the exception afforded for settlement agreements approved by a tribunal or governmental entity." Amendments to Rules 5.5 and 8.5, which are patterned after the equivalent ABA Model Rules, were proposed in December of 2005. But proposed Virginia Rule 5.5 defines a "Foreign Lawyer" to include lawyers licensed in non-U.S. jurisdictions (as well as U.S. jurisdictions), and a Foreign Lawyer who wishes to practice temporarily in Virginia must "inform the client and interested third parties in writing: (i) that the lawyer is not admitted to practice law in Virginia; (ii) the jurisdiction(s) in which the lawyer is licensed to practice; and (iii) the lawyer's office address in the foreign jurisdiction." Comments on proposed Rules 5.5, 5.6(b), and 8.5 are due on May 22, 2006.

Finally, the Virginia Supreme Court is still considering amendments to Rules 1.2 and 4.2 of the Virginia Rules of Professional Conduct, which were proposed in 2005. The only amendment to Rule 4.2 would be a new Comment 4 that includes the following two sentences: "A lawyer who learns that a pro se litigant is being 'coached' or receiving advice from another lawyer shall inquire of that lawyer whether the litigant is *pro se* or represented. If the lawyer is advised that the litigant is *pro se*, then there

shall be no prohibition against communication with the litigant."

Washington (www.wsba.org): In June 2005, the Washington State Bar Association's Practice of Law Board circulated a draft of a proposed new Limited Practice Rule for Legal Technicians. The purpose of the proposed rule is to authorize nonlawyers to provide assistance or advice in defined areas of law, provided a nonlawyer satisfies certain requirements for education, experience, CLE, pro bono, and other subjects. This spring, after hearing a presentation on the proposed rule, reviewing extensive member comments, and debating ways to address the dire need for civil legal services in Washington State, the Washington State Bar Association Board of Governors voted to oppose the broad rule in its present form. The proposed rule is available at <http://www.wsba.org/lawyers/groups/practiceoflaw/aprjunedraftchange.pdf>.



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*By Fred Zacharias
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