



AALS Section on Professional Responsibility

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FALL 2018 NEWSLETTER

Chair's Message



Margaret C. Tarkington, Chair

Indiana University
Robert H. McKinney School of Law

With Gratitude to An Exceptional Community

As my term as Chair draws to a close, I want to begin by thanking the members of this section for supporting and embracing me as a scholar, teacher, and friend over the past decade. I hope you will forgive my taking a detour into my own personal experience with members of this section and scholarly community.

In 2006, I entered academia as a Visiting Assistant Professor. At the very first AALS meeting that I attended (which

was a midyear meeting sponsored by two different sections—not Professional Responsibility), I brought along my second child, who was still breastfeeding. In one of the first sessions, I sat by a very established scholar who asked me if I had dinner plans. I said I didn't, and he told me that while he was planning on having dinner with another scholar (whom he named), he wondered if I would be interested in having dinner with his wife—as she would not be joining him for dinner and had their child with her. I was crushed—I went back to my hotel room and cried. I felt sure that if I continued to tote around kids with me to conferences, I would never be seen as a scholar, but only as a mother. At the same time, I was rather hellbent on having a large family and being a devoted mother, and so I found myself quite discouraged, as I worried that my two life choices would prove largely incompatible.

A couple years later, I published my first article in the field of Professional Responsibility after being assigned to teach the course twice. So I decided to join this section. At the AALS annual meeting, I brought my third child (who was not nearly as well behaved as my second). Everyone was extremely

friendly and sincere at the PR section program. I met the outgoing and incoming section chairs for that year (**Laurel Terry** and **Susan Carle**), as well as **Judith Maute** and **Carol Needham**. They invited me to join them for lunch with my baby in tow. They discussed my scholarship with me and were very supportive of it and of me. I subsequently met **Monroe Freedman**, with whom I had lunch and who was amazingly supportive of my research and highlighted it on the Legal Ethics Forum, with **John Steele** doing the same. At subsequent conferences both at AALS and other venues—even though I was almost always pregnant or tagging along a baby--everyone treated me as a scholar and a valued member of the section and Professional Responsibility community.

In addition to those above, **Russell Pearce**, **Renee Newman Knake**, **Tom Morgan**, **Bruce Green**, **Roy Simon**, **Alice Wooley**, **Andy Perlman**, **Susan Fortney**, **Charlie Geyh**, **Barbara Glesner-Fines**, **Stephen Pepper**, **Deborah Rhode**, **Neil Hamilton**, **Norm Spaulding**, **Ron Rotunda**, **Brad Wendel**, **Lonnie Brown**, **Rob Vischer**, **Sam Levine**, **Timothy Floyd**, **Peter Margulies**, **Carol Silver**, **Eli Wald**, **Milan**

Markovic, Ben Cooper, Leslie Levin, Mike Cassidy, Randy Lee, Martha Pagliari, Peter Joy, and so many others along the way fully supported me whether or not I happened to be attached to a baby. At an AALS meeting where I had my fourth child with me and was having a hard time maneuvering my stroller over a curb outside the hotel, the person who came to my aid was none other than **Jack Sahl**, whom I had not previously met—although we were aware of each other’s work. After helping me, we introduced ourselves and discussed our work in the section and in the field. A fast friendship emerged—and we recently were co-authors on the textbook, *PROFESSIONAL RESPONSIBILITY IN FOCUS*.

When I was made Chair-elect of this section two years ago, I had with me a baby—my sixth and youngest child, Hal. I am at the end of my child-bearing years (that’s not a promise, it’s just factual), and I feel so grateful to this national community of scholars and professors who have supported and valued me and my work—and who also put up and even assisted me with my babies at conferences, lunches, and dinners, allowing me the freedom and ability to be both a mother and a scholar. So I want to say thank you to all of you. Even if I failed to specifically mention you, I have been overwhelmed over the past decade with the support and encouragement I have felt from you all. This is not just a thank you, but a tribute to the goodness of those in our national community of Professional Responsibility scholars and teachers. You live what you teach.

Detour completed, I will move to our upcoming section activities. The ethics of lawyers both in government service and advising government officials continues to draw national attention and be of acute importance to the integrity of our democratic institutions. Our section program this year will thus be on *The Ethics of Lawyers in Government*, and we are pleased to have **Richard Painter, Kathleen Clark, and Melissa Mortazavi** on our panel, with **Ellen**

Yaroshefsky and Rebecca Roiphe as our panelists selected from our call for papers. The program will be held on **Thursday, January 3, from 10:30 am to 12:15 pm**.

Further, on the **morning of January 3**, we will be holding our **section breakfast**, which you must register for when you register for the Annual Meeting if you want to attend. This year we are trying holding our section meal as a “ticketed event” at AALS. At the breakfast, we will be awarding this year’s **Zacharias Memorial Prize for Scholarship in Professional Responsibility** to **Eric S. Fish** for his paper, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419 (2018).

At the section breakfast, we will also have short tributes given to **Geoff Hazard** (by **Jack Sahl**) and **Ron Rotunda** (by **John Dzienkowski**). We will also thank the departing members of the section’s executive committee for their service, specifically, **Leslie Levin, Milan Markovic, Nicole Iannarone, and Melissa Mortazavi**. We will additionally introduce our slate of incoming Executive Committee members and Section Officers, who include: **Josh Davis, Michelle DeStefano, Irene Joe, Vincent Johnson, and Hannah Demerit** for the Executive Committee, and incoming officers **Ben Cooper** (Chair), **Renee Knake** (Chair-Elect), **Paula Schaefer** (Secretary) and **Sande Buhai** (Treasurer). I want to emphatically thank **Leslie Levin**—who has done an absolutely exceptional job as the Chair of our Nominating Committee.

Also on January 3, our section will be holding a works-in-progress session at 3:30 pm, entitled *New Voices in Professional Responsibility*. We will have three junior scholars present papers, followed by commentary from more established scholars. Special thanks to **Melissa Mortazavi** for her work in organizing this program. **Nicole Iannarone** will be the moderator, and the scholars and their papers are as follows:

- **John Bliss**, *The Michael Cohen Problem: A New Legal Ethics Framework for Lawyers Secretly Recording Their Clients*; Commentator: **Milan Markovic**.
- **Irene Oritseweyinmi Joe**, *Managing the Public Defender*; Commentator: **Peter Margulies**.
- **Jodi Nafzger**, *Bridging the Justice Gap: The Role of the Judiciary*; Commentator: **Carol Needham**.

Finally, our section will be co-sponsoring the program of the new Section on Leadership, which will be addressing the related topic, *Leadership in Challenging Times*. Their program will be held on Saturday, January 5, at 8:30 am.

In closing, I also want to thank **Nicole Iannarone** for her work as the Newsletter Editor throughout this year. I very much appreciate her excellent work and substantial efforts in keeping our section informed. I want to also thank **Roy Simon** for his amazing column—it is an incredible contribution that helps all of us keep up to date on changes in the law of lawyering. This edition of the newsletter also includes a very thoughtful piece by **Brian Murray** about prosecutorial responsibilities as to collateral consequences of convictions. And, of course, I would like to thank **Pamela Brannon** for putting together the *Recent Scholarship* column.

I look forward to seeing all of you in New Orleans. Indeed, it was in New Orleans that I attended my first PR Section meeting years ago and was so impressed with this community’s camaraderie and sincere support of each other’s work.

-Margaret

2019 AALS Annual Meeting Section Events

Professional Responsibility Section Annual Program: *The Ethics of Lawyers in Government*

Thursday, January 3, 2019
10:30 am – 12:15 pm

Within the United States today, the role of the government lawyer has catapulted to the national stage. The ethics of government officials and their personal lawyers, of lawyers employed by the government, and lawyers heading government agencies and investigations are facing national scrutiny and attention.

High-ranking government attorneys, including Sally Yates, James Comey, and Preet Bharara, have been removed from office, leaving academics, the media, and the public to question the wisdom of the President's decision to remove them.

The press and citizenry are engaged in a robust debate regarding the legitimacy and integrity of our system of government and its processes. In such a climate, it is critical for legal academics to examine the role and ethical obligations of lawyers in government service.

What ethical responsibilities do lawyers have—and what concrete actions can they take—if and when lawyers find themselves working for a governmental employer who is engaged in potentially unethical, unconstitutional, or illegal activity?

What can lawyers do—both in and out of government employment—to preserve and improve the legitimacy and integrity of our system of government?

Moderator: Margaret Tarkington, Indiana University McKinney School of Law

Panel: Richard Painter, University of Minnesota Law School
Kathleen Clark, Washington University Law School

Melissa Mortazavi, University of Oklahoma College of Law
Rebecca Roiphe, New York Law School
Ellen Yaroshesky, Hofstra University Maurice A. Deane School of Law

New Voices in Professional Responsibility: Works in Progress Session

Thursday, January 3, 2019
3:30-4:45 pm

Moderator: Nicole Iannarone, Georgia State University College of Law

Paper: John Bliss (University of Denver Sturm College of Law), *The Michael Cohen Problem: A New Legal Ethics Framework for Lawyers Secretly Recording Their Clients*.

Commentator: Milan Markovic, Texas A&M School of Law

Paper: Irene Oritseweyinmi Joe (UC Davis School of Law) will be presenting her paper, *Managing the Public Defender*.

Commentator: Peter Margulies, Roger Williams University School of Law

Paper: Jodi Nafzger (Concordia University School of Law), *Bridging the Justice Gap: The Role of the Judiciary*

Commentator: Carol Needham, St. Louis University School of Law

Leadership in Times of Challenge

Saturday, January 5, 2019
8:30-10:15 am

The Professional Responsibility section is co-sponsoring the inaugural program of the new Leadership Section of the AALS. The program description follows:

American lawyers have long held leadership positions in both the public

and private sector, but few have had formal training for their roles. This panel will explore challenges facing contemporary lawyer leaders, strategies to address them, and what legal education can do to more intentionally and effectively prepare graduates for leadership responsibilities.

The panel, moderated by Leadership Section chair **Deborah Rhode**, includes **Steven Bright**, former President of the Southern Center for Human Rights, **Gary Jenkins**, Dean, University of Minnesota School of Law, **Robert Post**, former Dean, Yale Law School, **Susan Sturm**, Professor at Columbia Law School and winner of the Section Leadership paper award, and **Kelleye Testy**, President of the Law School Admission Council, and former President of the Association of American Law Schools.

Join us for Breakfast!

On Wednesday, January 3, we will be holding a section breakfast as a "ticketed event," which will be officially hosted by AALS and noted in the schedule. In order to attend, you will need to register for the breakfast when you register for AALS. The breakfast will not only be a great time to mingle with colleagues from across the nation, but we will also be having a short tribute to **Geoffrey Hazard** (by Jack Sahl) and **Ronald Rotunda** (by John Dzienkowski) at the breakfast—in addition to awarding this year's Zacharias Memorial Prize for Scholarship in Professional Responsibility. Members leaving the section's Executive Committee will be thanked for their service, and incoming Executive Committee members and Section Officers will be introduced at the breakfast as well.

If you already registered for the conference and failed to register for the breakfast, but would like to attend, please email Margaret Tarkington (mtarking@iupui.edu) and she will work with AALS registration to add you to the breakfast.

Items of Interest

Teaching Ethics Website to Begin Email Updates

Teachers interested in legal ethics and professionalism are encouraged to make sure by December 1 that they are registered users on the [International Forum on Teaching Legal Ethics and Professionalism](http://www.teachinglegalethics.org) website: www.teachinglegalethics.org.

The Forum, which maintains the largest international on-line repository of materials on teaching legal ethics and professionalism, is about to add a new user feature: regular email notices of new material added to Forum as well as guides to a range of existing Forum resources.

The Forum's [Resource Library](#) currently contains over 750 entries, including references and links to 169 conference papers and presentations, 161 articles, and 66 sets of sample materials for teaching. Thanks to a grant from the International Bar Association, the Forum is also building a library of lawyer regulations from around the world, including [codes of conduct](#), requirements for licensing, standards for legal education, standards and procedures for discipline, and [student practice rules](#).

Following a major system upgrade this summer, the Forum also provides several features for staying on top of [upcoming conferences](#), including month by month [calendar summaries](#) and deadline dates for calls for papers and registration.

Although most of the Forum's content is freely available to anyone with internet access, the new email notices will only go to registered users.

[Registration](#) is free to anyone with a stated interest in ethics and professionalism and takes only a few minutes by going to: <http://www.teachinglegalethics.org/user/register>. The Forum has a rigorous [privacy policy](#).

The Forum is intended to be a user-driven resource; registered users can post their own materials on the website as well as conference announcements. The Forum currently has over 600 users in 45 different countries. The Forum's editors are [Clark Cunningham](#), W. Lee Burge Chair of Law & Ethics and Director of the [National Institute for Teaching Ethics & Professionalism](#) (NIFTEP), [Georgia State University College of Law](#), and [Nigel Duncan](#), Professor of Legal Education, [The City Law School](#), London, England. The Forum is administered at the GSU College of Law. Inquiries about website registration and other issues can be directed to NIFTEP Deputy Director Tiffany Roberts: twroberts@gsu.edu

45th National Conference on Professional Responsibility

May 29-31, 2019
Vancouver, Canada

From the ABA CPR:

Bringing together legal scholars, jurists and specialists in the professional responsibility field for two days of intensive seminars covering a wide range of issues. Conference topics address recent trends and developments in legal ethics, professional discipline for

lawyers, professionalism and practice issues. Registration opens January 2019.

35th National Forum on Client Protection

May 31-June 1, 2019
Vancouver, Canada

From the ABA CPR:

A national educational, informational and networking event for professionals working in the area of client protection. Registration opens January 2019.

Submit Nominations for the 2019 Michael Franck Professional Responsibility Award

Nominations are now being accepted for the 2019 Michael Franck Professional Responsibility Award.

The Michael Franck Award is presented annually by the ABA Center for Professional Responsibility to a person who has demonstrated the highest commitment to professionalism, and the highest standards of legal ethics, as exemplified by Michael Franck.

The deadline for nominations is December 31st. The nomination form, along with more information, is available [here](#).

New Jersey Attorney General Guidance on Collateral Consequences and Prosecutorial Responsibility



By **Brian M. Murray**
Associate Professor of Law
Seton Hall Law School

While prosecutors still have few, clear cut requirements under formal codes of professional conduct when it comes to collateral consequences, the New Jersey Attorney General, with recent Guidance "Regarding Municipal Prosecutors' Discretion in Prosecuting Marijuana and Other Criminal Offenses," acknowledged the implications of collateral consequences for the plea-bargaining approaches of municipal prosecutors, particularly in the context of marijuana prosecutions.

There is a growing scholarly and legal consensus that prosecutors need to be more transparent about their decision-making about collateral consequences and consider collateral consequences, especially for low-level offenders. This is because collateral consequences often form the harshest sanctions faced by offenders, especially low-level offenders. The Attorney General's Guidance explicitly advises that the decision whether or not to pursue charges may

depend upon a defendant's exposure to severe, extra-judicial sanctions.

This is a welcome change in the wake of *Padilla v. Kentucky* eight years ago, where the professional responsibility implications fell mostly upon defense attorneys, who were tasked with acquiring knowledge about and advising defendants of immigration consequences or risk being labeled constitutionally ineffective. The Attorney General's Guidance pivots further and recognizes that prosecutors are front and center when it comes to the effects of the existing collateral consequences regime. Interestingly, the Department of Justice has allowed for consideration of collateral consequences when prosecuting white-collar crime and corporations for years. The NJ AG's Guidance uses similar logic, but as applied to street crime, and particularly low-level drug prosecutions given the backdrop of legislative decriminalization of marijuana.

To some extent, the Guidance fills a gap in existing ethical rules for prosecutors regarding collateral consequences. As I wrote a few years ago in an article titled *Prosecutorial Responsibility and Collateral Consequences*, whereas other branches of government have responded, albeit slowly, to an expansive collateral consequences regime, prosecutors have lagged behind given a lack of constitutional or statutory constraints on prosecutorial behavior. I argued that although a constitutional argument might be crafted to impose notice obligations on prosecutors, especially for unrepresented persons, the rules of professional responsibility or internal prosecution standards are most likely the best route for making prosecutors more aware of how collateral consequences implicate justice.

This is because Rule 3.8: The Special Responsibilities of Prosecutors, in the Model Rules of Professional Conduct, relates almost entirely to pre-trial evidentiary disclosure despite the realities of the plea-bargaining paradigm. The Comments to Rule 3.8 reference that a prosecutor is a "minister of justice" but do not elaborate otherwise. The New Jersey Rules of

Professional Conduct do not contain any additional clarification.

In contrast, this Guidance builds on the ABA's Standards for the Prosecution Function, which recognize that prosecutors have the responsibility to "seek to reform and improve the administration of justice." Those Standards acknowledge the "quasi-judicial" role of prosecutors, especially with respect to the "character, quality, and efficiency" of the whole system. In particular, Standard 3-4.2 bars "intentional deception...by the prosecutor respecting the sentence to be imposed..." Additionally, the National District Attorneys Association requires prosecutors to consider "undue hardship caused to the defendant" when negotiating plea deals.

The AG's Guidance recognizes that as a matter of professional responsibility a prosecutor who intends to "do justice" while bargaining needs to evaluate how collateral consequences inform the justice of the outcome. Although the Guidance does not allow municipal prosecutors to refrain from charging where the collateral consequences might be steep (given the requirements of New Jersey law regarding the role of municipal prosecutors and the initiation of charges), it might be said that the Guidance represents a good first step in the direction of connecting the prosecutorial role as a minister of justice with the realities of modern-day plea-bargaining for a majority of defendants.

In particular, it allows prosecutors to recommend to the courts the dismissal of significant charges if the defendant pleads guilty to a lower charge arising out of the same transaction. More significantly, it allows prosecutors to amend charges or dismiss them for "good cause." While "good cause" generally means insufficient evidence, the Guidance acknowledges that "other reasons might justify amendment or dismissal of a complaint." The Guidance states that "to the extent permitted by law," municipal prosecutors "should consider the impact of adverse collateral consequences of a conviction based on the specific circumstances or factors presented by the defendant or elicited by the court." The Guidance proceeds to list

several, non-exhaustive factors, such as age, criminal record, nature of the offense and arrest, adverse consequences relating to employment, military enlistment, immigration, education, housing, public benefits, and family, and “other factors identified in the National Prosecution Standards published by the National District Attorneys Association.” The Guidance also explicitly allows prosecutors to support favorable sentencing for defendants by doing so orally, on the record, or refraining from objections to defendant requests.

In short, the Guidance advances conversations regarding the role of the ethical prosecutor during plea-bargaining vis-à-vis collateral consequences, embracing a more comprehensive, or holistic view of justice beyond the direct sentence. It leaves room for creative prosecutorial responses to charges. It follows actions taken in large municipalities elsewhere, such as Los Angeles, where prosecutors have been directed to consider immigration consequences for years.

Of course, there are strengths and weaknesses to using professional responsibility norms to alter prosecutorial behavior. Imposing ethical constraints on prosecutors provides defendants with a non-waivable check on prosecutorial behavior, assuming prosecutors take it seriously and internally enforce the norm. Given that this directive comes from the Attorney General’s Office, it should help with normalizing consideration of the harsh effects of collateral consequences, and hopefully for the better. But given that progress regarding the prosecutor’s role as a matter of constitutional or statutory law is likely to remain slow, utilizing Guidance like the AG’s, with an ethical backdrop, can be useful in alleviating the effect of collateral consequences.

DEVELOPMENTS IN THE REGULATION OF LAWYERS



By Roy Simon
Distinguished Professor of Legal
Ethics Emeritus,
Maurice A. Deane School of Law at
Hofstra University

In this column, I report on some of the changes in our field since the Fall 2017 PR Section Newsletter, and I preview some possible new developments that are formally or informally under consideration. I hope this column will be especially useful and accessible to professors who have started teaching professional responsibility fairly recently. Students want to know that the field of professional responsibility is dynamic and illustrates the constant struggle between tradition and innovation.

I first discuss changes and proposed changes at the national level, then discuss them in the aggregate at the state level (as opposed to focusing on specific states). Law professors who are interested in exploring recent and contemplated changes in lawyer regulation in specific states can consult the individual state resources available through the ABA Center for Professional Responsibility at <http://bit.ly/rysMoA> (Links of Interest), as well as legal ethics websites that keep up with important developments around the country, such as [http:// faughnanonethics.com](http://faughnanonethics.com), <http://bernabepr.blogspot.com>, and <http://www.lawsitesblog.com>.

Before I get to the substance, let me post

a sort of “Help Wanted” ad. I have been writing the column once or twice a year since 1991. (This is probably my 50th column.). I enjoy writing it but I encourage someone else to co-author this column with me, or to write a Spring column (because I now write this column only in the Fall), or to take over the column altogether. If you are even slightly interested, even if you don’t want to start until some future date, please contact me at roy.simon@hofstra.edu. I have learned an enormous amount writing this column over the years, but twenty-seven years is a long time and I’d like to get someone else in a position to take over the column at some point. Meanwhile, here’s what’s been happening in our field over the past year or so.

NATIONAL DEVELOPMENTS American Bar Association Developments

ABA Model Rules of Professional Conduct: The advertising and solicitation provisions of the ABA Model Rules of Professional Conduct (Rules 7.1 through 7.5) were significantly amended at the ABA’s Annual Meeting in August 2018. The ABA simplified and reorganized those Rules and their Comments, moving much of former Rule 7.5 (Law Firm Names and Letterhead) to the Comments to Rule 7.1, and moving the key black letter language of Rule 7.4 (governing claims of specialization) to Rule 7.2(c).

ABA Formal Ethics Opinions: Since the Fall 2017 PR Section Newsletter was distributed in November 2017, the ABA Standing Committee on Ethics and Professional Responsibility has issued six new Formal Opinions: Formal Opinion 478: Independent Factual Research by Judges Via the Internet (December 8, 2017); Formal Opinion 479: The “Generally Known” Exception to Former-Client Confidentiality (December 15, 2017); Formal Opinion 480: Confidentiality Obligations for Lawyer Blogging and Other Public Commentary (March 6, 2018); Formal Opinion 481: A Lawyer’s Duty to Inform

a Current or Former Client of the Lawyer's Material Error (April 17, 2018); Formal Opinion 482: Ethical Obligations Related to Disasters (September 19, 2018); and Formal Opinion 483: Lawyers' Obligations After an Electronic Data Breach or Cyberattack (October 17, 2018). That's a lot of opinions – twice as many as the year before.

ABA Model Code of Judicial Conduct for State Administrative Law Judges: At its August 2018 Annual Meeting, the ABA House of Delegates for the first time adopted an ABA Model Code of Judicial Conduct for State Administrative Law Judges. In jurisdictions that adopt this new Code, it will apply to members of the "administrative judiciary," which includes all individuals whose exclusive role in the administrative process in the states is to preside and make decisions in judicial or quasi-judicial capacity in evidentiary proceedings. (The administrative judiciary does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head.) The new Code, which is based upon the ABA Model Code of Judicial Conduct, is available online at https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/2018-model-code-statealj.pdf.

ABA Model Impairment Policy for Legal Employers: At its August 2018 Annual Meeting, the ABA House of Delegates adopted the ABA Model Impairment Policy for Legal Employers and urged legal employers to adopt it. The goals of the new policy are: (1) to foster early identification of impairment, as well as proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) to prevent a lawyer's impairment from compromising professional standards and the quality of legal work for clients.

Federal and Foreign Statutes, Rules, and Regulations

The regulation of lawyers is primarily a matter of state law, but Congress and

federal rule makers and policy makers—and sometimes foreign countries—play an active role in regulating lawyers. This section reports on recent and upcoming developments regarding the regulation of lawyers at the national level in the U.S. and overseas.

Federal Rules of Civil Procedure: No amendments to the Federal Rules of Civil Procedure directly relevant to the regulation of lawyers have taken effect since November 2017. However, the Advisory Committee on Civil Rules continues to study a proposal to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of litigation funding agreements "under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise." The Advisory Committee considered the same proposal in 2014 and 2016, but both times the proposal was carried forward for further consideration. On December 6, 2017, the Advisory Committee on Civil Rules reported to the Standing Committee on Civil Rules that thoughtful consideration of the proposed disclosure requirement would need to begin with "a careful quest for information that may be hard to come by," and that the topic "may be no more ripe for further work now than it was in 2014 or 2016." The Advisory Committee therefore delegated the proposal to a Subcommittee that has been appointed to develop information about proposals affecting multi-district litigation (MDL). (The proposed new rule of civil procedure is closely related to the proposed Litigation Funding Transparency Act of 2018, discussed below. Both measures are being promoted by the U.S. Chamber Institute for Legal Reform.)

For historical information and up-to-date versions of federal procedural rules, visit the well-organized and well-maintained website of the U.S. Courts at <http://www.uscourts.gov/rules-policies>.

Code of Conduct for U.S. Judges: The Code of Conduct for United States Judges, which is based on but not identical to the ABA Model Code of Judicial Conduct, may soon be amended for the first time since 2009. On September 13, 2018, the United States Judicial Conference's Committee on Codes of Conduct released proposed changes to the Code of Conduct for U.S. Judges for public comment. Most of the proposed changes address sexual harassment and other inappropriate conduct. For example, a proposed new Canon 3B(4) would provide: "A judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct." The deadline for public comments was November 13, 2018. The proposed changes are available at <https://bit.ly/2OF2PrA>.

United States Supreme Court Rules: The Justices of the United States Supreme Court, unlike all other federal judges, are not governed by the Code of Conduct for U.S. Judges. The Supreme Court thus is not bound by the same recusal rules that govern lower court judges. But on November 1, 2018 the Supreme Court circulated proposed new language in Supreme Court Rules 14.1(b) and 15.2 that would "require parties to identify any trial and appellate court cases that are directly related to the case in this Court." The press release explained that the proposed new language "is designed to assist the Justices in determining whether their participation in a case before joining the Court might necessitate recusal." (The problem is that many cases change names and parties as they wind their way through the state and federal courts, so sitting Supreme Court Justices may not realize that they presided over the lower court proceedings.) The proposed rules are available at <https://bit.ly/2DrJKmY>. Comments on the proposals are due to the Clerk of the Supreme Court by November 30, 2018.

United States Patent and Trademark Office: On November 6, 2017, the

United States Patent and Trademark Office (USPTO) adopted a new provision that extends the attorney-client privilege to communications between clients and their patent agents or foreign patent practitioners in connection with trials before the Patent Trial and Appeal Board (PTAB). (Patent agents are not licensed attorneys but are certified to prepare and prosecute patent applications before the USPTO.) Until the new provision was adopted, no provision expressly covered privilege for patent agents or foreign patent practitioners, and PTAB judges had ruled on privilege on a case-by-case basis. The new provision, 37 C.F.R. § 42.57 (Privilege for patent practitioners), clarifies the law. The key paragraph in § 42.57 provides as follows:

(a) *Privileged communications.* A communication between a client and a USPTO patent practitioner or a foreign jurisdiction patent practitioner that is reasonably necessary and incident to the scope of the practitioner's authority shall receive the same protections of privilege under Federal law as if that communication were between a client and an attorney authorized to practice in the United States, including all limitations and exceptions.

Extensive background materials about the new patent practitioner privilege are available at 82 Fed. Register 51570 (Nov. 7, 2017).

In an unrelated development, on November 3, 2017 the USPTO's Office of Enrollment and Discipline launched a pilot program that will permit diversion (instead of formal discipline) for patent or trademark practitioners who have engaged in minor misconduct stemming from (i) physical, mental or emotional health issues (including substance or alcohol abuse), or (ii) poor law practice management that has caused little or no harm to a client. The pilot diversion program aligns the USPTO with the practices of more than thirty state attorney discipline systems that have already adopted similar diversion programs. Background information is

available at <https://www.uspto.gov/about-us/news-updates/uspto-launches-two-year-diversion-pilot-program>.

Proposed Lawsuit Abuse Reduction Act:

In each Congress since 2011, U.S. Rep. Lamar Smith (R-Tex) has sponsored a bill entitled the Lawsuit Abuse Reduction Act (LARA) that would require courts to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure for frivolous lawsuits, and would remove the 21-day safe harbor in Rule 11 that allows a party to avoid sanctions by withdrawing a potentially improper pleading or motion within 21 days after an opposing party threatens to move for sanctions. LARA would thus undo the 1993 amendments to Rule 11 that created the 21-day safe harbor and made sanctions discretionary rather than mandatory. In past years the bill did not get out of committee, but in March 2017 the House passed the bill (H.R. 720) by a vote of 230-188. The Senate has not yet voted on the bill, but the Senate Judiciary Committee held hearings in November 2017.

Proposed Litigation Funding

Transparency Act of 2018: In May 2018, Senate Judiciary Committee Chairman Charles Grassley (R-Iowa) introduced a bill called the Litigation Funding Transparency Act of 2018 (S.2815). The main thrust of the bill would be to require class counsel in any class action to (1) disclose in writing to the court and all other named parties the identity of any commercial litigation funder that "has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise"; and (2) produce the litigation funding agreement for inspection and copying (unless otherwise stipulated or ordered by the court). The same requirements would apply in multidistrict litigation (MDL). The bill was referred to the Judiciary Committee but no hearings have been held.

India: In a case called *Bar Council of India v. A.K. Balaji*, Civil Appeal Nos. 7875-

7879 OF 2015 (Supreme Court of India March 13, 2018), the Supreme Court of India ruled that foreign (*i.e.*, non-Indian) lawyers may conduct international commercial arbitrations in India, and may give legal advice to clients on a casual "fly-in-fly-out" basis, as long as they do not appear in Indian courts or engage in the practice of law in India. The Supreme Court's decision came in response to appeals by the Bar Council of India, the Association of Indian Lawyers, and Global Indian Lawyers from a 2012 lower court decision that extended similar rights to foreign lawyers.

DEVELOPMENTS IN THE STATES

This section discusses some of the many changes at the state level in the past year. My discussion is based primarily on the invaluable work of the ABA Center for Professional Responsibility, which constantly keeps track of federal, state, and ABA developments regarding professional responsibility. The Center's remarkable website links to current and historical resources about the ABA Model Rules of Professional Conduct and other regulatory models—see <http://bit.ly/lzkq83>. (If you are not a member of the Center, please consider joining. Membership has many benefits. Check it out at

https://www.americanbar.org/groups/professional_responsibility/membership/.)

Here is a summary of broad trends in the states with respect to the ABA Model Rules of Professional Conduct and various ABA model court rules.

Ethics 20/20 Adoptions and Reviews: At least 36 jurisdictions have adopted a significant portion of the Ethics 20/20 amendments to the ABA Model Rules of Professional Conduct—including California as of November 1, 2018. Also, committees in many jurisdictions are still actively studying the Ethics 20/20 amendments. For an up-to-date chart showing state adoptions of the Ethics 20/20 amendments (as well as adoptions of other ABA provisions), visit <http://bit.ly/2vwRTzj>.

Comments to the ABA Model Rules of Professional Conduct: With respect to adopting the Comments to the ABA Model Rules, the state high courts fall into three basic categories: (a) formal adoption of Comments (about 37 jurisdictions); (b) publication of Comments without formal adoption (7 states — HI, ME, MI, MN, NH, SD and WI); and (c) no adoption or official publication of Comments (6 states — LA, MT, NV, NJ, NY, OR). For a state-by-state chart providing a detailed analysis of Comment status as of 2011, with links to primary sources, see <https://bit.ly/2CLKQKL>.

Amended Comment [8] to ABA Model Rule 1.1: In 2012, on the recommendation of the ABA Commission on Ethics 20/20, the ABA amended Comment [8] (formerly Comment [6]) to Rule 1.1 (Competence) to provide as follows: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*. . . .” (Emphasis added.) The language of Comment [8] has been controversial, but at least 32 jurisdictions have adopted the amended Comment, including Vermont since our previous edition. For a full (but unofficial) list of jurisdictions that have adopted the “technology competence” amendment, see Robert Ambrogio’s LawSites blog at <https://www.lawsitesblog.com/tech-competence/>.

Multijurisdictional Practice (“MJP”) Rules: Forty-seven U.S. jurisdictions have adopted a multijurisdictional practice rule similar or identical to ABA Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), usually without the ABA’s February 2016 amendments. In addition, the Mississippi Supreme Court is considering a recommendation to adopt a version of Rule 5.5. Only Texas, Hawaii, and Montana are not considering adopting any equivalent to ABA Model Rule 5.5. A state-by-state chart

regarding ABA Model Rule 5.5 is at <http://bit.ly/18jioaO>.

Post-Conviction Duties of Prosecutors: A decade ago, in 2008, the ABA House of Delegates added paragraphs (g) and (h) to Rule 3.8 (Special Responsibilities of a Prosecutor) to impose post-conviction responsibilities on prosecutors who learn of new, credible, and material evidence that a person who did not commit an offense was nevertheless convicted. Since then, 4 states (CA, ID, IL, and WV) have adopted ABA Model Rule 3.8(g) and (h) verbatim; 14 states (AK, AZ, CO, DE, HI, MA, NC, NM, NY, ND, TN, WA, WI, and WY) have adopted modified versions of Rule 3.8(g) and (h); and 4 jurisdictions (DC, NE, PA, and VT) are studying paragraphs (g) and (h). For the ABA’s state-by-state chart on the status of the 2008 amendments to ABA Model Rule 3.8, see <http://bit.ly/2xM37ko>.

Anti-Discrimination and Anti-Harassment Rules: According to the report submitted in support of the August 2016 amendment to ABA Model Rule 8.4(g), 25 jurisdictions have adopted some version of anti-discrimination and/or anti-harassment provisions in the black letter text of their Rules of Professional Conduct. Another 13 jurisdictions address the issue in a Comment similar to former Comment [3] to ABA Model Rule 8.4 (AZ, AR, CT, DE, ID, ME, NC, SC, SD, TN, UT, WY, WV), and 14 states do not address discrimination or harassment at all in their Rules of Professional Conduct (AL, AK, GA, HI, KS, KY, LA, MS, MT, NV, NH, OK, PA, VA).

However, with respect to ABA Model Rule 8.4(g) specifically, so far only Maryland, Florida, and Vermont have adopted the ABA Model or substantially similar language. About a dozen jurisdictions are actively studying it; North Carolina has deferred action; and Arizona, Idaho, South Carolina, and Tennessee have formally rejected it. (Minnesota also rejected it, but only because its existing version of Rule 8.4 already encompassed the principles of

ABA Model Rule 8.4(g).). For the ABA’s up-to-date list of state actions on Rule 8.4(g), visit <http://bit.ly/2vwRTzj>.

In-House Counsel Registration Rules: The ABA Model Rule for Registration of In-House Counsel, adopted in 2008, authorizes in-house lawyers to provide legal services to their employers without being fully admitted to the bar of the state where they work, subject to certain conditions. In February 2016, the ABA added language specifying that a state’s highest court has discretion to allow registration as in-house counsel by foreign in-house lawyers who cannot be “members of the bar” under the law and practice of their home countries. About 35 states and the District of Columbia have adopted an in-house registration rule in some form (including some states whose rules had already encompassed non-admitted foreign lawyers even before the ABA’s 2016 amendments). Other states have not adopted the ABA in-house registration rule but have adopted ABA Model Rule 5.5(d)(1), or similar rules or policies, allowing in-house lawyers to practice without being admitted. For a state-by-state chart, see <http://bit.ly/1tWlqTl>.

Major Disaster (Katrina) Rule: In 2007, to respond to unauthorized practice problems caused by the dislocation of lawyers and clients after Hurricane Katrina, the ABA adopted the so-called “Katrina Rule” or “Major Disaster Rule” (officially named the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster). The Katrina Rule (i) authorizes out-of-state lawyers to provide pro bono services in a stricken state that has adopted the Katrina Rule, and (ii) allows lawyers from a stricken state to carry on their home state practices while physically in jurisdictions where they are not admitted to practice that have adopted the Katrina Rule. The Katrina Rule has had a mixed reception in the states — 19 states have adopted the Katrina Rule; 9 have rejected it; and other states are still considering it. In Texas, in August 2017 the Texas Supreme Court issued a temporary order in the wake of

Hurricane Harvey largely parallel to the Katrina Rule. For a state-by-state chart showing each jurisdiction's reaction to the Major Disaster rule, see <http://bit.ly/1soUsRo>.

Military Spouse Rule: In 2011, a newly formed organization called the Military Spouse J.D. Network (MSJDN) began developing a Model Rule for Admission of Military Spouse Attorneys. The rule seeks to avoid delays in bar admission for lawyers married to a member of the armed forces who is suddenly transferred to a different jurisdiction on military orders. In 2012, both the ABA House of Delegates and the Conference of Chief Justices adopted a resolution urging states to relax the requirements for admission of military spouse attorneys. At least 25 states have adopted a military spouse rule—including FL, HI, MO, NE, NV, and WY since the Fall 2017 Newsletter—and more than a dozen additional jurisdictions are formally considering it. For a state-by-state map showing the status of the rule, see <http://www.msjdn.org/rule-change/>.

Malpractice Insurance Disclosure Rules: In 2004, the ABA adopted a Model Court Rule on Insurance Disclosure. Today, at least 24 states require some form of malpractice insurance disclosure. Of these, 18 jurisdictions require disclosure on their bar registration statements, and 7 states require disclosure directly to clients. (This adds up to 25 because New Mexico requires both.) Some states are still considering a legal malpractice disclosure rule; but 5 states (AR, CT, FL, KY, TX) have expressly rejected the ABA Model Court Rule on Insurance Disclosure, and 1 state (NC) at one time required insurance disclosure but dropped the requirement in 2010. Only 1 state (OR) requires lawyers to carry legal malpractice insurance. For a state-by-state chart regarding malpractice insurance disclosure, visit the ABA Policy Implementation Committee's website at <http://bit.ly/1zURgAH>.

ABA Client Protection Programs: Malpractice insurance disclosure rules are just one example of the many "client protection programs" adopted by the ABA over the years. Other client protection programs include ABA Model Court Rules for (a) Trust Account Overdraft Notification (44 states), (b) Random Audit of Lawyer Trust Accounts (12 states), (c) Payee Notification (15 states), (d) Mandatory Fee Arbitration (12 states), and (e) Mediation of Non-Fee Disputes (23 states). A chart entitled State-by-State Adoption of ABA Client Protection Programs is available online at <http://bit.ly/2hMN7s7>.

Uniform Bar Examination (UBE): The Uniform Bar Examination (UBE) is an examination prepared by the National Conference of Bar Examiners (NCBE). The UBE consists of six Multistate Essay Examination questions, two Multistate Performance Test questions, and the Multistate Bar Examination. It has been adopted in 33 jurisdictions, though 6 of those states (IL, MD, NC, OH, RI, and TN) will not begin to administer the UBE until 2019 or 2020. Additional adoptions are likely in coming years because in February 2016 the ABA adopted Resolution 109, which "urges the bar admission authorities in each state and territory to adopt expeditiously the Uniform Bar Examination."

For a color-coded map showing the first administration date in each state that has adopted the UBE, see <https://bit.ly/2CrcNpU>.

For information about the UBE itself, see <http://www.ncbex.org/about-ncbe-exams/ube/>.

For detailed state-by-state information about bar admission, see the latest edition of the ABA's Comprehensive Guide to Bar Admission Requirements, which is available online at <https://bit.ly/2Q232G9>.

Recent Scholarship



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[Includes publication announcements sent to the Editor or included in CILP from May 4, 2018 to October 19, 2018]

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