



AALS Section on Professional Responsibility

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FALL 2017 NEWSLETTER

Chair's Message



Susan Saab Fortney, Chair
Texas A&M School of Law

On a weekly basis, legal and government ethics concern capture the headlines. A number of our colleagues from the Professional Responsibility Section have played prominent roles in helping reporters and the public understand ethics issues. These professors have critically examined ethics concerns related to practicing lawyers, law firms, corporations, and government officials. As a group we have devoted far less attention to looking inwardly. Beyond a very small number of programs that have focused on the ethics of law professors and law students, few have tackled

institutional issues related to the ethics of legal education. To help fill the gap, this year our Section program on January 6, 2017 is devoted to examining ethics issues related to legal education and law school operations. This promises to be an outstanding program, featuring leaders in legal education. Thanks to Professors Renee Knake and Paula Schaefer for their hard work in organizing the AALS annual program events and for making arrangements for the Professional Responsibility Lunch at the School of Law at the University of San Diego. We deeply appreciate Dean Stephen C. Ferruolo, Professor David McGowan, and the other great people at the University of San Diego for graciously hosting the lunch and providing transportation to the lunch. During the lunch we will conduct our annual meeting and present the Fred C. Zacharias Memorial Award. The day wraps up with Professional Responsibility Section's Works-in-Progress session from 3:30-5:15 p.m. We encourage you to attend all of our Section's events on January 6th.

Thanks to Professor Marie Failing, Professor Sam Levine and the entire Fred C. Zacharias Memorial Award Committee for their work in reading numerous submissions and selecting an award recipient. I also appreciate the work of members of other Section Committees, including the Executive Committee.

One goal this year was to improve Section communications and to foster connections between and among Section members. This outreach included pairing mentors and junior professors, as well as outreach to adjunct professors. We started the process of improving the website, a work still in progress.

Our Section Newsletter continues to be a great resource. We are very fortunate to have Professor Nicole Gail Iannarone as our Newsletter editor.

Finally, thanks for giving me an opportunity to serve as Chair of the Section. It was a joy and honor to do so.

Section Events at the AALS Annual Meeting

January 3-6, 2018
San Diego, California

The Ethics of Legal Education
Saturday, January 6, 2018
8:30 am – 10:15 am

This panel will explore the ethical challenges U.S. law schools have faced during the past decade and will consider the path ahead. Speakers will address various subjects that may include alternative and accelerated degree programs, for-profit law schools, accreditation decisions, admissions and scholarship practices, employment issues, and litigation filed by students and alumni against law schools. The panel will explore the factors that have influenced ethical and values-based decision-making, leadership challenges, and how law school leaders' ethics and values in this area may influence the future of the legal education and the legal profession.

Speakers: Susan S. Fortney, Texas A&M University School of Law, Moderator;

Joan W. Howarth, Michigan State University College of Law;

David McGowan, University of San Diego School of Law;

Andrew M. Perlman, Suffolk University Law School;

Daniel B. Rodriguez, Northwestern University Pritzker School of Law;

Brian Z. Tamanaha, Washington University in St. Louis School of Law

AALS ANNUAL MEETING



Section Lunch & Annual Meeting
Saturday, January 6, 2018
11:30 am – 1:30 pm
Hosted by the University of San Diego Law School

A bus will depart the AALS hotel lobby at 11:30AM, with lunch beginning at noon, followed by the annual meeting and presentation of the Zacharias Award. The bus will return to the hotel at 1:30PM. *USD Law is generously providing this lunch for our section. In order to participate, you must RSVP in advance no later than November 30 in order to attend. Please RSVP to Pam Watson: phwatson@law.tamu.edu with "AALS PR Section Lunch RSVP" as the subject.*

JOIN US IN SAN DIEGO

For more information on programs at the AALS 2018 Annual Meeting in San Diego, CA and to register, visit <https://www.aals.org/am2018/>

Professional Responsibility Works in Progress Session
Saturday, January 6, 2018
3:30 pm – 5:15 pm

Peter Marchetti, Thurgood Marshall Law, *The Need to Regulate For-Profit Law Schools to Prevent Inherent Conflicts of Interest* (commentary by Ben Barton, Tennessee Law)

Irene Joe, UC Davis Law, *Ethics of Mass Prosecution* (commentary by Ellen Yaroshefsky, Hofstra Law)

Veronica Root, Notre Dame Law *Two Paths Forward* (commentary by Renee Knake, Houston Law)

Moderator: Benjamin P. Edwards, UNLV Law

2018-2019 SECTION SLATE

The Nominating Committee is pleased to present the following slate to be voted upon at the Section's Annual Meeting:

Chair: Margaret Tarkington

Chair Elect: Ben Cooper

Secretary: Renee Knake

Treasurer: Paula Schaefer

Executive Committee:

Lonnie Brown

Cynthia Hawkins DeBose

Veronica Root

Items of Interest:

Conferences and Fellowships

CONFERENCE ON THE REGULATION OF LEGAL AND JUDICIAL SERVICES: COMPARATIVE AND INTERNATIONAL PERSPECTIVES

December 8-9, 2017
Fordham Law School

Fordham Law School will host this conference, at which invited participants from around the world will present and discuss papers offering comparative perspectives on the regulation of lawyers and judges internationally, including in Australia, Canada, Central Europe, China, Eastern Europe, Ghana, Israel, Japan, Palestine, Singapore, South Africa and the US. The conference is co-sponsored by the International Association of Legal Ethics, the Fordham International Law Journal (which will publish the papers), and Fordham's Stein Center for Law and Ethics.

If you have any questions or would like additional information, please contact the Sarah Leberstein, Associate Director of the Stein Center for Law and Ethics, at 212-636-6988 or leberstein@law.fordham.edu.

SUMMER ETHICS FELLOWSHIP FOR LAW STUDENTS AND RECENT GRADUATES

FASPE (Fellowships at Auschwitz for the Study of Professional Ethics) is now accepting applications for its 2018 Law program.

FASPE Law is a fully-funded, two-week summer program that uses the conduct of lawyers and judges in Nazi Germany as a launching point for an intensive study of contemporary legal ethics. FASPE Law is predicated upon the power of place. Fellows visit Auschwitz and other sites in Germany and Poland where they consider how to apply the lessons of history to the ethical challenges they will face in their careers.

In 2018, the program will take place from Monday, May 21 to Friday, June 1. (Fellows are expected to arrive in Europe by Sunday, May 20.) All program costs are covered, including the equivalent of round-trip travel from New York to Europe, as well as all European travel, lodging, and food. FASPE Law Fellows travel and share some seminars with Fellows in the FASPE Business and Journalism programs.

FASPE Law is open to current JD and LLM students and those who received a JD or LLM between May 2016 and January 2018. It is designed to address ethical challenges in all fields of law, including the private sector, public interest organizations, and the government.

To learn more about FASPE and to apply, please visit: <http://www.faspe-ethics.org/law/>.

FASPE programs are non-denominational. Candidates of all religious, ethnic and cultural backgrounds are encouraged to apply.

FASPE staff is happy to talk with applicants concerned about potential conflicts with clerkships or bar preparation. For a list of previous

Fellows, please visit <http://www.faspe-ethics.org/fellows-by-year/>. Completed applications are due by Thursday, January 11, 2018. If you have questions, please contact Thorin Tritter, Executive Director of FASPE, at ttritter@FASPE-ethics.org or 646.571.2200.

SAVE THE DATE:

NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY

Louisville, KY, May 30-June 1, 2018.

PROPOSED BYLAWS AMENDMENT

At the January 6, 2017 Annual Meeting of the AALS Section on Professional Responsibility, the following amendment to the Bylaws of the AALS Section on Professional Responsibility will be proposed for membership consideration and vote:

Article IV, Section 2, subsection (c), entitled **ABA Section Counterparts Liaison Committee** be amended to add the following sentence:

"After notice to the Executive Committee, the Chairperson may elect to appoint an individual to serve as liaison, rather than appointing a committee."

DEVELOPMENTS IN THE REGULATION OF LAWYERS



By Roy Simon
Distinguished Professor of Legal Ethics
Emeritus,
Hofstra University School of Law

In this column, which I have been writing since 1991, I report on some of the changes in our field since the Fall 2016 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.

I discuss the changes either at the national level or 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 to Other Legal Ethics and Professional Responsibility Pages"), as well as legal ethics websites that keep up with important developments around the country, such as, <http://faughnanonethics.com>, <http://bernabepr.blogspot.com>, and <http://www.lawsitesblog.com>.

NATIONAL DEVELOPMENTS

American Bar Association Developments

ABA Model Rules of Professional Conduct: The ABA Model Rules of Professional Conduct have not been amended in any way over the past year. However, the ABA Standing Committee on Ethics and Professional Responsibility is considering whether to amend Rules 7.1 through 7.5, which govern advertising and solicitation. By way of background, in 2015 and 2016 the Association of Professional Responsibility Lawyers (APRL) published reports urging the ABA to streamline these rules (see https://www.aprl.net/publications/statement_s.html and click on "Download pdf" for each report). In early 2017, Myles Lynk, immediate past Chair of the ABA Standing Committee on Ethics and Professional Responsibility, created a Joint Working Group of ABA and non-ABA groups to analyze the APRL proposals. The Joint Working Group conveyed its views to the ABA Standing Committee on Ethics and Professional Responsibility, which hopes to produce drafts for consideration by the ABA in 2018.

Is simplifying the advertising rules a thing? Maybe. Effective July 1, 2017, the Virginia Supreme Court amended Virginia Rules 7.1 and 7.3, deleting Rules 7.2, 7.4, and 7.5 completely. But the Law Society of Upper Canada went the opposite direction, adding new public protection measures at its February 23, 2017 meeting to strengthen its lawyer advertising rules. And the Chairman of the House Judiciary Committee, Rep. Bob Goodlatte (R-Va.), has urged states to adopt a "requirement that attorney commercials which may

cause patients to discontinue medically necessary medications have appropriate warnings that patients should not discontinue medications without seeking the advice of their physician." Rep. Goodlatte also asked the ABA to amend the ABA Model Rules regulating lawyer advertising in the same way.

The Standing Committee on Ethics and Professional Responsibility has also discussed a draft proposal by the ABA Gatekeeper Task Force to amend Model Rule 1.2 to address money laundering issues. That proposal appears to be dormant but has not been pronounced dead.

However, some proposals that the Standing Committee was discussing a year ago are dead. First, the Standing Committee is no longer considering whether to amend Comment [7] to Rule 1.5 (Fees) regarding the limits on the joint responsibility of unaffiliated lawyers for each other's conduct when they share fees for a joint representation. Second, the Standing Committee is no longer considering whether to amend the black letter text of Rule 5.4 (Professional Independence of a Lawyer) to expressly allow a lawyer who completes the unfinished work of a deceased, disabled, or disappeared lawyer to pay the lawyer's representative the proportion of the total compensation that fairly represents the services rendered by the deceased, disabled, or disappeared lawyer, and consequently the ABA is no longer considering a corresponding amendment to Rule 1.17 (Sale of Law Practice) and to Comment [15] to Rule 1.17.

In the courts, the United States successfully challenged New

Mexico's version of Rule 3.8(e), which is identical to ABA Model Rule 3.8(e). The question was whether the rule applied to federal prosecutors bringing a matter before a federal grand jury in New Mexico. The district court sided with the United States, holding that the New Mexico rules "conflict with federal law and are preempted." The Tenth Circuit affirmed and the Supreme Court denied cert.—see *United States v. Supreme Court of New Mexico*, 980 F. Supp. 2d 1334 (D.N.M. 2013), *aff'd*, 839 F.3d 888 (10th Cir. 2016), *cert. denied*, 2017 WL 2444653 (U.S., Oct. 2, 2017). The ABA filed an amicus brief (available online at <http://bit.ly/2h3virZ>) in support of granting the petition for certiorari. The ABA brief provided background information on the adoption of Model Rule 3.8(e), which was based on a 1986 report by the ABA Criminal Justice Section addressing the "alarmingly increasing frequency" of grand jury subpoenas issued to opposing counsel in criminal matters.

ABA Model Rules for Continuing Legal Education: In February 2016, the *Journal of Addiction Medicine* published a study of 13,000 U.S. attorneys. According to the study, more than 20 percent of all U.S. lawyers experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders. Younger attorneys are even more likely to display disordered drinking behaviors. Nearly a third of attorneys in their first decade of practice exhibit problem drinking patterns, and a larger-than-average number show signs of other mental health issues like depression and anxiety.

At the ABA's February 2017 Mid-Year Meeting, the ABA House of Delegates responded to this study by

approving changes to the ABA Model Rules for Continuing Legal Education—the first time the ABA had amended the ABA Model Rules on CLE since 1988. The amendments, which were part of Resolution 106, add requirements of (a) one CLE credit hour every three years on mental health and substance abuse issues, (b) one ethics and professionalism CLE credit each year, and (c) one diversity and inclusion CLE credit every three years. (Three states—North Carolina, Nevada and California—already require CLE on mental health and substance abuse.) With respect to the requirement of CLE credits in mental health and substance use disorders, the Comments to the amended Model Rule note that "research indicates that lawyers may hesitate to attend such programs due to potential stigma; requiring all lawyers to attend such a program may greatly reduce that concern."

The resolution also accredits CLE programs that allow for the use of distance learning and does not limit the number of credits that can be earned using a particular delivery format. For more information, see Elizabeth J. Cohen & Joan C. Rogers, *Model Rule on MCLE Gets Major Makeover After Nearly Three Decades*, 33 *Law. Man. Prof. Conduct* 93 (Feb. 22, 2017).

ABA National Task Force on Lawyer Well-Being: In 2016, the ABA created a National Task Force on Lawyer Well-Being, comprised of entities from within and outside the ABA. The dual mission of the Task Force is (1) to attack problems in the legal profession such as high rates of stress, depression, and substance use, and (2) to promote greater health for lawyers. In August 2017, the Task Force published *The Path to*

Lawyer Well-Being: Practical Recommendations for Positive Change, a 73-page report filled with statistics, analysis, and recommendations.

ABA Standing Committee on Professional Discipline: Several years ago, the ABA Standing Committee on Professional Discipline began educating lawyer regulators and others about a regulatory concept called "Proactive Management-Based Regulation" (PMBR). The concept of PMBR refers generally to proactive regulatory measures designed to help lawyers and law firms develop ethical infrastructures that *prevent* misconduct, rather than simply reacting to it. Australia and certain Canadian provinces are in the process of implementing their own forms of PMBR. In January 2017, the Supreme Court of Illinois became the first state supreme court in the United States to adopt rules creating a system of Proactive Management-Based Regulation.

ABA Resolution in Support of Common Interest Privilege: At its August 2017 Annual Meeting, the ABA House of Delegates approved Resolution 102 in support of the so-called "common interest" privilege. The resolution, which was recommended by the ABA Tort Trial and Insurance Practice Section, urges all legislative, judicial, and other governmental bodies to support the following principles whenever "the communications or materials shared relate to the parties' common interests":

- (1) the holder of the attorney-client privilege does not waive the privilege by sharing communications or materials (or by having

contemporaneous communications with) with another person (not jointly represented by the same counsel) who,

(a) having common legal interests with the holder in some litigated, potentially litigated, or nonlitigated matter or in related matters (such as parallel lawsuits),

(b) has agreed with the holder of the privilege or protection (i) to cooperate with one another to develop and pursue a joint legal strategy with respect to some aspect of the matter or matters in which the parties have common interests, and (ii) to maintain the confidentiality of any privileged or protected communications or materials shared in pursuit of such cooperation. . . .

ABA Section of Legal Education and Admissions to the Bar:

In February 2017, the ABA House of Delegates rejected a proposal by the Council of the ABA Section of Legal Education and Admissions to the Bar to amend Standard 316 to require that graduates who take a bar exam pass at a rate of 75% or higher within *two* years of their graduation (rather than the current *five* years). But the proposal is not totally dead. Rather, the Council is seeking information

from law schools on how the proposed amendment might impact their ability to comply with Standard 316.

The Council is also considering amendments to Standard 501(b), which provides that a law school “shall only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar.” In addition, after Harvard Law School announced that it would accept the GRE in place of the LSAT beginning in fall 2017, the Council circulated for public comment a proposed change to Standard 503 that would establish a process to approve tests other than the LSAT for use by all law schools (and would eliminate any individual school’s ability to use a test that has not been approved by the Council). As of this writing, at least eight schools accept the GRE. They are (in order of adoption) Arizona, Harvard, Northwestern, Georgetown, Hawaii, Washington University in St. Louis, Wake Forest, and St. John’s. More are sure to follow. The shift to acceptance of the GRE is driven in part by a desire to attract applicants with STEM backgrounds (science, technology, engineering, and math), and in part by evidence that the GRE is an equally good predictor of success in law school. The LSAT is not dead, but its monopoly is over.

In another development related to law school admission, in August 2017, the ABA approved Resolution 108, which was proposed by the Law Student Division. Resolution 108 says: “A state court vested with exclusive authority to regulate admission to the bar may, by rule, order, or other affirmative act, permit an undocumented alien seeking legal status to obtain a professional license

to practice law in that jurisdiction.”

ABA Model Rules for Lawyer Disciplinary Enforcement:

At the ABA’s 2017 Annual Meeting, the ABA amended Rule 7 of the ABA Model Rules for Lawyer Disciplinary Enforcement. The amendments expand the scope of information that the ABA would require a lawyer to provide as part of the annual registration process regarding client and third-party funds held in trust accounts. Under amended Rule 7, a lawyer must clearly identify which persons have access to client and third-party funds and which persons are responsible for proper trust account management. The amendments are part of the ongoing effort to minimize instances of lawyer misappropriation of monies held in trust accounts and hold lawyers accountable via discipline when appropriate.

ABA Committee on Specialization:

The ABA Committee on Specialization re-submitted a Resolution to the ABA’s August 2017 Annual Meeting recommending that the House of Delegates accredit the Privacy Law program of the International Association of Privacy Professionals (IAPP)—but the Resolution was withdrawn before a vote to allow certain ABA sections time to provide more input into the process. The resolution is likely to come up for a vote at the ABA’s February 2018 Mid-Year Meeting.

ABA Formal Ethics Opinions:

Over the past year, the ABA Standing Committee on Ethics and Professional Responsibility has issued Formal Opinions 475 (Safeguarding Fees That Are Subject to Division With Other Counsel), 476 (Confidentiality Issues when Moving to Withdraw for Nonpayment of Fees

in Civil Litigation), and 477 (Securing Communication of Protected Client Information). The Committee also agreed to submit to the ABA House of Delegates for consideration at the 2018 Annual Meeting a Resolution seeking to revise its name to the "Standing Committee on Professional Regulation."

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—also play an active role in regulating lawyers. This section reports on recent and upcoming developments in Washington, D.C. and occasionally outside the United States regarding the regulation of lawyers.

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 last year, but the Advisory Committee on Civil Rules has discussed a proposed rule amendment that would require disclosure of third-party litigation funding arrangements in any civil action filed in a federal court, and on November 7, 2017 the Advisory Committee set up a new subcommittee to study the proposal. The disclosure issue will be on the agenda for the Advisory Committee's spring meeting, which scheduled for April 10, 2018. Moreover, in January 2017 the United States District Court for the Northern District of California adopted a policy allowing defendants in class actions to discover whether their opponents are getting funding from outside investors. 33 Law. Man. Prof. Conduct 67, 2/8/17 For more information on the disclosure

proposal, see Joan C. Rogers, *Federal Rules Panel to Look at Third-Party Litigation Funding* (33 Law. Man. Prof. Conduct 641, Nov. 15, 2017). For up-to-date rules and historical information, visit the website of the U.S. Courts at <http://www.uscourts.gov/rules-policies>.

United States Patent and Trademark Office (USPTO): Effective December 7, 2017, the USPTO adopted a final rule clarifying and expanding the situations in which it recognizes attorney-client privilege for communications between clients and nonlawyer patent agents or non-U.S. patent attorneys. The new rule is codified in 37 C.F.R. Part 42, and provides as follows:

§ 42.57 Privilege for patent practitioners.

(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.

(b) *Definitions.* The term "USPTO patent practitioner" means a person who has fulfilled the requirements to practice patent matters before the

United States Patent and Trademark Office under § 11.7 of this chapter. "Foreign jurisdiction patent practitioner" means a person who is authorized to provide legal advice on patent matters in a foreign jurisdiction, provided that the jurisdiction establishes professional qualifications and the practitioner satisfies them. For foreign jurisdiction practitioners, this rule applies regardless of whether that jurisdiction provides privilege or an equivalent under its laws.

(c) *Scope of coverage.* USPTO patent practitioners and foreign jurisdiction patent practitioners shall receive **the same treatment as attorneys on all issues affecting privilege or waiver**, such as communications with employees or assistants of the practitioner and communications between multiple practitioners. [Emphasis added.]

For details and background information about the privilege issue, see 82 Federal Register. 51570 (Nov. 7, 2017) and Tony Dutra, *Patent Office OKs Attorney-Client Privilege Before Review Board* (33 Law. Man. Prof. Conduct 656, Nov. 15, 2017).

In an unrelated development, the USPTO's Office of Enrollment and Discipline (OED) has launched a two-year pilot diversion program for patent and trademark practitioners who commit minor misconduct without harming clients. The new program reflects increasing attention to the mental and physical well-being of lawyers (see entry above on "ABA

National Task Force on Lawyer Well-Being”), and it aligns the USPTO with national trends in the arena of lawyer discipline and wellness. According to the ABA, more than 30 jurisdictions allow complaints involving minor lawyer misconduct to be handled through a diversion program that provides an alternative to discipline. For more information on the USPTO program, see Joan C. Rogers, *USPTO Trying Out Diversion Program for Struggling Practitioners* (33 Law. Man. Prof. Conduct 642, Nov. 15, 2017).

Department of Homeland Security Regulations: This is the first time this column has mentioned the Department of Homeland Security, which has heretofore not been a big player in the world of lawyer regulation. In 2009, the Department of Homeland Security issued Directives providing that, at U.S. border crossings, “in the course of a border search, with or without individualized suspicion, an Officer [of the U.S. Customs and Border Protection or Immigration and Customs Enforcement] may examine electronic devices and may review and analyze the information” The Directives do not exclude lawyers, so the Directives empower border patrol agents to search and review confidential information in a lawyer’s laptop computers, cell phones, and other electronic devices.

In May 2017, with assistance from the ABA Standing Committee on Ethics and Professional Responsibility, ABA President Linda Klein sent a letter to the Department of Homeland Security asking it to clarify the border search standards. The Standing Committee on Ethics and Professional Responsibility has also discussed whether an ethics opinion on maintaining confidential information at the U.S. border would

be helpful to U.S. lawyers. (The New York City Bar ethics committee recently issued an opinion on that subject—see N.Y. City 2017-5.) In September 2017, a group of plaintiffs (none of them lawyers) filed a federal suit in Massachusetts claiming that the government’s practice of searching laptops and cellphones at the border is unconstitutional. The issue may take a long time to resolve.

United States Department of Labor Final “Persuader Rule”: The Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §203(c) — referred to as the “Persuader Rule”—requires employers and their labor relations consultants to report activities undertaken with an object, directly or indirectly, to “persuade” employees about how to exercise their rights to be represented by a union and to engage in collective bargaining. But §203 does not require employers to report mere “advice” to the employer (such as advice from lawyers). Under a prior interpretation of this “advice exemption” by the U.S. Department of Labor (DOL), mandatory reporting was triggered only if a consultant communicated *directly* with employees, not if the consultant communicated only with the employer—but during the Obama Administration the DOL said that interpretation “created a huge loophole where employers could hire consultants to create materials, strategies, and policies for organizing campaigns — and could even script managers’ communications with employees — without disclosing anything.”

In 2016 (81 Fed. Reg. 15924), during the last year of the Obama administration, the DOL adopted a final Persuader Rule. The final rule required employers and their hired

consultants to report not only when consultants directly persuaded workers (as under the old interpretation), but also (under the new, narrower interpretation of the “advice” exemption) when consultants (i) “Plan, direct, or coordinate managers to persuade workers”; or (ii) “Provide persuader materials to employers to disseminate to workers”; or (iii) Conduct union avoidance seminars; or (iv) “Develop or implement personnel policies or actions to persuade workers.”

Shortly after the final Persuader Rule was announced, the National Federation of Independent Business (NFIB) and other business groups — soon joined by the Attorneys General of ten states — filed a suit (*National Federation of Independent Business v. Perez*) in federal court in Lubbock, Texas, alleging that the final Persuader Rule violates the First Amendment and Due Process rights of employers and favors unions, which are not required to file similar disclosure reports. On November 16, 2016, the Texas court issued a nationwide preliminary injunction blocking the DOL from enforcing its new interpretation of the advice exemption in §203(c). But the courts are split. In a similar suit filed in the District of Minnesota (*Labnet Inc. v. DOL*), the court declined to issue an injunction.

Soon the split may be resolved by getting rid of the Obama-era final rule. On June 12, 2017, the Office of Labor-Management Standards (OLMS) published in the Federal Register a Notice of Proposed Rulemaking (NPRM) that proposes to rescind the regulations enjoined in *NFIB v. Perez*. The comment period closed on August 11, 2017. OLMS is still reviewing the comments it

received.

Consumer Financial Protection Bureau (CFPB) Regulation O:

This item requires an over-simplified explanation of a complex regulatory scheme, followed by a split in the federal courts regarding whether CFPB Regulation O applies to lawyers. The Consumer Financial Protection Bureau (CFPB), which was created by Congress in the Consumer Protection Act of 2010, regulates “unfair or deceptive acts or practices ... involving loan modification and foreclosure rescue services.” 12 U.S.C. §5538(a)(1). During the foreclosure crisis, many companies swindled consumers by making big promises and taking large advance fees but doing little or nothing to help homeowners. The CFPB countered with Regulation O, which generally bans advance fees for mortgage relief services — but Regulation O exempts attorneys from the ban on advance fees if an attorney “(1) Deposits any funds received from the consumer prior to performing legal services in a client trust account; and (2) Complies with all state laws and regulations, including licensing regulations, applicable to client trust accounts.”

In *CFPB v. The Mortgage Law Group, LLP*, 157 F. Supp. 3d 813 (W.D. Wis. Jan. 14, 2016), the CFPB sued two law firms and four lawyers engaged in the mortgage relief business for violating Regulation O. The court held that the CFPB had exceeded its authority by trying to regulate lawyers, because the Consumer Protection Act itself provides that the CFPB ordinarily “may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.”

However, in *FTC v. Lanier Law, LLC*, 194 F. Supp.3d 1238 (M.D. Fla. July 7, 2016), the Florida federal court expressly rejected the Wisconsin decision and upheld Regulation O in an enforcement action against a lawyer and his law firms. The CFPB then moved for reconsideration in the Wisconsin case, citing *Lanier*, but the Wisconsin court denied the motion and stood by its 2016 opinion — see 2017 WL 1411544 (W.D. Wis. April 20, 2017). In November 2017, however, the Eleventh Circuit affirmed the Florida district court’s holding in *Lanier* — see *FTC v. Lanier Law, LLC*, 2017 WL 5035084 (11th Cir. Nov. 2, 2017). Thus, there is a head-to-head split within the federal courts, and the applicability of Regulation O to lawyers remains an open issue.

Proposed Fairness in Class Action Litigation Act of 2017:

On February 9, 2017, Rep. Bob Goodlatte (R-Va) introduced a bill (H.R. 985) entitled the Fairness in Class Action Litigation Act. A month later, the House passed it pretty much along party lines by a vote of 220-201. One provision of the bill would require class counsel to “disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action” — in other words, to disclose litigation funding arrangements. (A proposed amendment to the Federal Rules of Civil Procedure would also require disclosure of litigation funding arrangements — see above.) The Senate received the bill and referred it to the Judiciary Committee, which has not yet acted.

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 prior years, the LARA 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 taken up the bill, and in November 2017 Lamar Smith announced that he was retiring from Congress, so the bill may never become law.

BROAD TRENDS AT THE STATE LEVEL

This section discusses aggregate changes at the state level over the last 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, and 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>.

Before I get into the substance, I want to note the enormous contributions of two wonderful and dedicated ABA professionals who retired from their posts at the ABA Center for Professional Responsibility during the past year — Art Garwin, the former Director, and John Holtaway, former Lead Senior Counsel for Client

Protection and Policy Implementation. They helped me many, many times over the years, with this column and in many other ways. Art and John were fountains of knowledge about the legal profession and the rules governing lawyers. They both devoted their careers to improving the legal profession, and they made a positive impact that will resonate for years to come. We also welcome their very capable successors, Tracy L. Kepler (the new Director of the Center) and Briana Billingslea (the new Lead Senior Counsel for Policy Implementation).

Ethics 20/20 Adoptions and Reviews:

At least 35 jurisdictions have adopted a significant portion of the Ethics 20/20 amendments to the ABA Model Rules of Professional Conduct—including AK and TN since last year—and 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 <http://bit.ly/2idizmk>.

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] 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.) Amended Comment [8] has been controversial, but at least twenty-eight (28) jurisdictions have adopted the amended Comment, including Colorado, Nebraska, and Tennessee since last year—and Canada is now considering a similar rule. Florida also now requires that 3 credit hours of CLE every three years “must be in approved technology programs.” For a full (but unofficial) list of jurisdictions that have adopted the “technology competence” amendment, see Robert Ambrogi’s fantastic LawSites blog at <http://bit.ly/1MGgSS1> (perhaps the best blog in the galaxy about new developments in technology for lawyers.)

Multijurisdictional Practice Rules:

Forty-seven (47) 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/18jjoaO>.

Post-Conviction Duties of Prosecutors:

In 2008, the ABA House

of Delegates added paragraphs (g) and (h) to Rule 3.8 (Special Responsibilities of 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 convicted. Since then, 3 states (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 5 jurisdictions (CA, 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 form 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).

With respect to ABA Model Rule 8.4(g) specifically, Maryland and Vermont have adopted ABA Rule 8.4(g); the Tennessee Supreme Court is considering a petition, jointly filed by the TBA and the Tennessee Board of Professional Responsibility on November 15, 2017, urging the court to adopt a modified version of ABA

Rule 8.4(g); Colorado, Connecticut, New York, and Pennsylvania are actively studying ABA Rule 8.4(g); North Carolina has deferred action; and South Carolina and Minnesota have formally rejected it (although Minnesota rejected it 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 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/1tWlgTL>.

Major Disaster Rule ("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 known as 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 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 14 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 resolutions urging states to relax the requirements for admission of military spouse attorneys. At least 25 states have adopted a military spouse rule — including AK, CT, MI, and OH in 2017 — 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. (NM 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) previously required insurance disclosure but dropped the requirement in 2010. Only one 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 (42 states), (b) Random Audit of Lawyer Trust Accounts (12 states), (c) Payee Notification (14 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 27 jurisdictions, and

more 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 more information about the UBE, see <http://www.ncbex.org/about-ncbe-exams/ube/>. For more detailed state-by-state information about bar admission, see the ABA’s Comprehensive Guide to Bar Admission Requirements, which is available online at <http://bit.ly/1VXrhC4>. For developments involving law school admission, see the entry above on “ABA Section of Legal Education and Admissions to the Bar,” which discusses the growing acceptance of the GRE in place of the LSAT.

Recent Scholarship



By Pamela C. Brannon
Georgia State University College of Law

The Recent Scholarship Column includes publication announcements sent to the Newsletter Editor or included in CLIP from May 2017 to October 2017.

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