Summer 2008 Edition

AALS PROFESSIONAL RESPONSIBILITY SECTION NEWSLETTER

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

Message from the Chair

Irma S. Russell (University of Tulsa)

As the Chair of the Professional Responsibility Section, I am happy to report on some of the developments in the Section over the last few months, including amendments to the Bylaws, the upcoming program for the 2009 Annual Meeting, the mentoring program, and the liaison to the ABA Standing Committee on Ethics and Professional Responsibility.

First, at the Section business meeting on January 3, 2008, the membership adopted the Bylaws Amendment proposed by the Executive Committee that creates the position of Secretary as an officer to take and distribute the minutes from our meetings. The Executive Committee elected Carol Needham to the Secretary position in its first phone conference meeting of 2008. The Bylaws Amendment also increased the number of Executive Committee members to twelve in addition to the three officers. The Executive Committee suggested this change to better represent the large membership of our section and to get a broader range of views about Section initiatives. Finally, the Bylaws Amendment increased the term for Executive Committee members from two years to three years as a way of promoting continuity and institutional memory. Peter Joy of Washington University Law School has agreed to chair a subcommittee to nominate six new members of the Executive Committee. Please contact him if you would like to nominate someone for the committee. Self-nominations are also encouraged. I will provide the new language of the Bylaws as they are now amended at the end of this message.

Second, the AALS Clinical Section invited the PR Section to offer a joint program at the 2009 AALS Annual Meeting with the potential to be an extended (3-hour) program, including a 40-year commemoration of the Council on Legal Education for Professional Responsibility (CLEPR) and scholarly presentations on the state of the Legal Academy today.

Please see *Message from Chair* continued

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The two sections have proposed the idea to the AALS.

Third, I want to report that the project on mentoring is continuing. If you would like to serve as a mentor or to receive mentoring, please contact Antoinette Lopez (lopez@law.unm.edu) or Leslie Levin (leslie.levin@law.uconn.edu).

Finally, Ted Schneyer is the liaison to the ABA Standing Committee on Ethics and Professional Responsibility. Ted will provide a brief report in this Newsletter on his experiences as liaison and some of the items on the Standing Committee's docket.

The PR Section provides wonderful interaction for professors as scholars and teachers interested in professional responsibility issues and teaching. The Section also provides helpful support for new professors with its mentoring program. Thanks to all of you who work in this important area of the law and in the Section. I am inspired by the efforts and accomplishments of the Section and the Section's members. We plan to continue all of the programs for interacting with each other and helping each other. I hope you will get in touch with me (irma-russell@utulsa.edu) if I can be of help to you or if you are interested in serving on any of the programs mentioned here or in serving as a member of the Executive Committee. Thank you to everyone for your support of the work of the Section.

BYLAWS AMENDMENT
Article III. Officers, Committees

Section 1. Officers. The officers of this section are the chairperson, the chairperson-elect, and the secretary.

The chairperson-elect shall be elected at each annual meeting of the Association, shall qualify by acceptance and shall succeed to the office of chairperson at the close of the next annual meeting. The secretary shall be elected for a two-year term at every other annual meeting.

Section 2. The Executive Committee.

(a) The Executive Committee of the section is the chairperson of the section, chairperson-elect, secretary, and twelve other members.

(1) The three members elected at the annual meeting in 2008 shall be deemed to be elected to a three-year term. Following enactment of these bylaws, the Executive Committee shall fill the vacancies pursuant to (2) below with one member to serve a three-year term, four members to serve a two-year term, and four members to serve a one-year term. Thereafter all members will be elected to a three-year term.

(2) In the case of a vacancy on the Executive Committee, the chairperson shall appoint a member of the section to fill the vacancy, subject to the approval of the Executive Committee.

(b) The Executive Committee shall act in the interval between annual meetings and may create standing and special committees.

Section Announcements

Executive Committee of the AALS Section on Professional Responsibility
January 2008-January 2009 (before new positions are added)

CHAIR:

Irma S. Russell
NELPI Professor of Law
The National Energy-Environment
Law & Policy Institute
University of Tulsa College of Law
3120 E. 4th Place
Tulsa, OK 74104
Office: 918-631-5621
Fax: 918-631-2194
irma-russell@utulsa.edu

Chair Elect:
Professor Laurel S. Terry
Penn State Dickinson School of Law
150 S. College St.
Carlisle, PA 17013
(717) 240-5262
Fax: (717) 240-5126
Email: LTerry@psu.edu
Webpage:
http://www.personal.psu.edu/faculty/l/s/lst3/

Secretary
Professor Carol Needham
(term expires 1-2010)
Saint Louis University
School of Law
3700 Lindell Blvd.
St. Louis MO 63108
314-977-7104 (phone)
314-977-3332 (fax)
Email: needhamc@slu.edu

Newsletter Editor: Prof. Randy Lee
Widener University School of Law-Harrisburg
3800 Vartan Way
P.O. Box 69381
Harrisburg, PA 17106
Phone: 717.541.3940
GLee@widener.edu

Executive Committee:

Susan Carle (term expires January 2010)
Professor of Law
Washington College of Law American
University
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016
(202) 274-4188 (w)
(202) 274-4130 (fax)
scarle@wcl.american.edu
ssrn: http://ssrn.com/author=622585

Andrew Perlman (term expires Jan. 2010)
Associate Professor of Law
Suffolk University Law School
120 Tremont Street
Boston , MA 02108
(617) 573-8777 (o)
(617) 305-3086 (f)
Web Page:
http://www.law.suffolk.edu/faculty/directories/faculty.cfm?InstructorID=42
SSRN Author Page:
http://ssrn.com/author=263003
Blog: www.legalethicsforum.com
aperlman@suffolk.edu

Peter Joy (term expires January 2010)
Professor of Law
Washington University in St. Louis
One Brookings Drive
St. Louis, MO 63130
314-935-6445, phone
314-935-5356, fax
joy@wulaw.wustl.edu

Please see *Executive Committee of the AALS Section* continued

Prof. Margareth Etienne – (term expires January 2009)
Until April 2008:
The University of Chicago
1111 East 60th Street
Chicago, IL 60637
773-702-1184
metienne@uchicago.edu

After April 2008:
University of Illinois College of Law at Urbana-Champaign
504 E. Pennsylvania Ave.
Champaign, IL 61820
217-265-0878 (phone)
217-244-1478 (facsimile)
metienne@law.uiuc.edu

Samuel J. Levine (term expires January 2009)
Professor of Law
Pepperdine University School of Law
24255 Pacific Coast Highway
Malibu, CA 90263
(310) 506-6892
Fax: (310) 506-4063
samuel.levine@pepperdine.edu

Antoinette Lopez – (term expires January 2009)
University of New Mexico School of Law
MSC11 6070
1 University of New Mexico
Albuquerque, NM 87131-0001
Ph.: 505-277-8662
FAX: 505-277-0068
lopez@law.unm.edu

Ex Officio – Past Chair:

Russell G. Pearce
Edward & Marilyn Bellet Professor of Legal Ethics, Morality, and Religion
Fordham University School of Law
140 W. 62d St.
NY, NY 10023
phone: 212-636-6834
fax: 212-636-6899 att: Prof. Pearce
rpearce@law.fordham.edu

Liaison to the ABA Standing Committee on Ethics

Ted Schneyer
Milton O. Riepe Professor of Law
The University of Arizona James E. Rogers College of Law
P.O. Box 210176
Tucson, Arizona 85721-0176
Office Phone: (520) 621-5633
Office Fax: (520) 621-9140
Email: *schneyer@law.arizona.edu*

AALS Executive Committee Liaison:

Judith McMorrow
Boston College Law School
Newton Campus
885 Centre Street
Newton Centre, MA 02459
617.552.3578
mcmorrow@bc.edu

CALL FOR AALS ANNUAL MEETING PRESENTATION PROPOSALS

Joint Professional Responsibility and Clinical Sections 2009 AALS Annual Meeting Program, Jan.7-10, 2009; Session Commemorating the Fortieth Anniversary of the Council on Legal Education for Professional Responsibility (CLEPR)

By Susan Carle (American University)

The Planning Committee for the 2009 AALS Annual Meeting Joint Program of the Professional Responsibility and Clinical Sections is seeking innovative proposals for presentations or posters related to the teaching of ethical reflection in law practice and related topics for possible inclusion in the 2009 annual meeting program. Preference will be given to proposals involving interactive presentations. Potential presentation topics might include: innovative methods of teaching reflective learning about professional values and goals through case rounds, simulations, case studies, or externship seminars; teaching of legal ethics and professionalism values through the pervasive method and/or by integrating ethics and professional reflection into substantive law courses and subjects; and assessment in course components addressed to the development of reflective, ethics and professionalism skills. The Planning Committee will consider proposals for possible oral or poster presentations. Please submit proposals describing anticipated presentation, along with any supporting materials, to Susan Carle at scarle@wcl.american.edu, by June 15, 2008.

WOULD YOU LIKE A MENTOR?

The AALS Professional Responsibility Section has created a mentoring system to assist law faculty who are interested in finding a mentor.

Mentors are available for law faculty who would like assistance from more experienced teachers in curricular development or the teaching of Professional Responsibility. Mentors are also available to faculty who are interested in producing scholarship in the areas of Professional Responsibility or the Legal Profession.

If you would like a mentor, please contact Leslie Levin at: (leslie.levin@law.uconn.edu) or Antoinette Sedillo Lopez (lopez@law.unm.edu).

NOMINATIONS FOR NEW EXECUTUVE COMMITTEE MEMBERS SOUGHT

By Peter Joy (Washington University in St. Louis)

Nominations are now open to fill six new vacancies on the Professional Responsibility Section Executive Committee. At the January business meeting of the Section, the Section membership adopted a bylaw amendment expanding the size of the Executive Committee from officers and six members to officers and twelve members. In order to fill these six openings, Chair Irma Russell has appointed a Nominations Committee consisting of Peter Joy (Chair) (joy@wulaw.wustl.edu), Carol Needham (needhamc@slu,edu), Russell Pearce (rpearce@law.fordham.edu), and Laurel Terry (lterry@psu.edu).

Please see *NOMINATIONS EXECUTUVE COMMITTEE MEMBERS* continued

One reason underlying the expansion of the Executive Committee was to encourage more members to participate and to increase the diversity of the Committee by bringing in newer faculty. If you are interested in getting more involved in the Section, we encourage you to self-nominate. The workload is not heavy and should not interfere with your scholarly commitments.

The Nominations Committee urges you to send your nominations to any member of the committee via e-mail. Any person who is member of the Professional Responsibility Section and is a full-time faculty member at an AALS member school is eligible to serve, and persons may suggest themselves as well as others. The procedure calls for the Nominations Committee to make recommendations to the Section Chair, Irma Russell, who shall appoint members of the Section to fill the vacancies subject to the approval of the Executive Committee. One new member will be appointed to serve a three-year term, four persons will be appointed to serve a two-year term, and one person will be appointed to serve a one-year term.

In order to fill these positions expeditiously, a deadline for nominations has been set for the easy to remember deadline of May 22, 2008. If you know of anyone whom you think would make a good member of the Section Executive Committee, or if you are interested in serving, please send your nominations.

First Impressions Of The Work Of The ABA Ethics Committee

By Ted Schneyer (University of Arizona)

Last Summer, the Executive Committee appointed me as the Section's liaison to the ABA Committee on Ethics and Professional Responsibility, a body I've been interested in for many years. See Ted Finman & Theodore J. Schneyer, "The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct," 29 UCLA L. Rev. 67 (1981). I attended my first meeting in August 2007. This is a brief report on my experience so far.

The Committee has ten members and is staffed by two lawyers at the ABA Center for Professional Responsibility, which also provides research support. Besides our Section, the Association of Professional Responsibility Lawyers, the National Organization of Bar Counsel, and the ABA General Practice, Solo and Small Firm Division now have liaisons to the Committee. We have the privilege of the floor, but neither vote nor are reimbursed by the ABA for expenses. (I pay my own expenses) The work is demanding. The Committee holds four two-day meetings a year and five or six teleconferences. Memos, drafts, and documents are circulated by email. Debate is lively and informed. The Committee is best known for its ethics opinions, which interpret the Model Rules of Professional Conduct. Two opinions have been issued since I came aboard.

Please see *First Impressions of Aba Ethics Committee* continued

ABA Formal Opinion 07-447 (Aug.9, 2007) concerns the ethics of collaborative law ("CL"), a dispute resolution process used chiefly in divorce work. Spouses and their respective lawyers agree to make a good faith effort to negotiate a marital dissolution agreement without litigation. To keep the focus on negotiations, each lawyer makes a commitment to the other spouse to limit the engagement to the collaboration. This, according to one state ethics opinion, creates an unwaivable conflict of interest by "impair[ing]" the lawyer's ability to represent the client if collaboration fails and "inevitably interfere[ing]" with the lawyer's judgment in considering the alternative of litigation. Colo. Formal Op.115 (Feb. 2007).

In Opinion 07-447, the Committee disagreed. It describes the arrangement as "a limited scope representation" that creates no conflict and poses no risk of impairing a lawyer's competence within the scope of the representation as limited. The opinion notes that Model Rule 1.2(c) permits reasonable limitations on scope, and finds nothing in the Rule to suggest that an engagement limited to "a collaborative effort to reach a settlement is per se unreasonable."

ABA Formal Opinion 07-448 (Oct. 20, 2007) stresses that the client-lawyer relationship is consensual. It concludes that when a lawyer is appointed to represent a person who declines the representation, that person is not entitled to expect the lawyer to fulfill the duties that generally arise out of a lawyer-client relationship. The lawyer's legal duties, if any, are instead defined by the appointing tribunal and are limited to the duties a lawyer owes under the Model Rules to tribunals or persons other than clients.

In addition to writing ethics opinions, the Committee proposes amendments to the Model Rules, and comments on changes proposed by others. (A Committee proposal to amend Model Rule 1.10 to permit the screening of a lawyer who moves from one private firm to another, so that others in the new firm are not barred from participating in a matter in which the "migrating" lawyer is disqualified is likely to be on the House of Delegate agenda at the ABA Annual Meeting in August 2008.) The Committee is also consulted on other ethics-related matters that come before the House, such as proposed changes to the ABA Criminal Justice Standards.

In working with the Committee, I have been particularly struck so far by the challenge the Committee and the Center face in trying to maintain coherence and consistency in the positions that the House and the ABA's many sections, committees, and other bodies take on matters of legal ethics and professional regulation.

Newsletter Announcements

If you have an interest in writing the Recent Cases column for the newsletter, please contact Randy Lee at *glee@widener.edu* by June 1, 2008.

It's not too early to send in announcements for next summer's professional and personal announcements issue, an issue constantly in production. Please send your announcements about personal events, professional activities and awards, or conferences and professional opportunities to Randy Lee at

glee@widener.edu by August 16, 2008 (if not before!).

If you have a teaching tip you'd like to share with colleagues through the Newsletter, please send it to Randy Lee at glee@widener.edu.

PROFESSIONAL OPPORTUNITIES

34TH ABA NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY AND 24TH NATIONAL FORUM ON CLIENT PROTECTION

There's still time to register for the ABA National Conference on Professional Responsibility and National Forum on Client Protection May 28-31, 2008 at the Seaport Hotel and World Trade Center in Boston. More than a dozen section members will be presenting, and on Friday afternoon there will be a Scholarship roundtable providing an opportunity to share "forthcoming research projects, works in progress, half-baked ideas, and scholarship ideas that others might pursue." For additional information, please visit www.abanet.org/cpr/events/prconf.html.

FUNDING OPPORTUNITY FOR SCHOLARSHIP RELATING TO LITIGATION

The ABA Litigation Section has announced the establishment of the Litigation Research Fund "to support original and practical scholarly work that significantly advances the understanding of civil litigation in the United States. The Litigation Section anticipates making individual awards of between $5,000 and $20,000." Legal academics are invited to apply.

While there is no deadline and awards will be made on a rolling basis,

priority consideration for the initial awards will be given to submissions received by January 1, 2008. Applications should be submitted by email with the subject line "Litigation Research Fund" to Patsy Engelhard, Executive Director, ABA Section of Litigation, pengelhard@staff.abanet.org with a copy to Robert Nelson, Director, American Bar Foundation, rnelson@abfn.org.

The Litigation Research Fund will be administered by a Litigation Section Task Force chaired by Fordham Professor Bruce Green, a former Chair of the AALS Section on Professional Responsibility. For additional information on this program, please contact Professor Green at bgreen@law.fordham.edu

THIRD INTERNATIONAL LEGAL ETHICS CONFERENCE CALL FOR PAPERS

The Third International Legal Ethics Conference will be held on Australia's Gold Coast on July 13-16, 2008 and hosted by Griffith University and the University of Queensland. The theme of the conference is Integrity in Legal Practice. For more information, visit: http://www.griffith.edu.au/conference/legal-ethics-2008 or email legalethics@griffith.edu.au

2008 ABA COLAP CONFERENCE

The ABA Commission on Lawyers Assistance Programs has set their 2008 Conference for Tuesday, October 21

through Friday, October 24 in Little Rock, Arkansas.

Selected Case Developments: May 2007–March 2008

By Susan D. Carle (American University) (who gratefully acknowledges the assistance of Kathy Tuznik, WCL '09, in the preparation of this column)

Conflicts of Interest and Attorney Disqualification

In re Advisory Comm. on Prof'l Ethics Opinion 705, 926 A.2d 839 (N.J. 2007)

The Court held that New Jersey's Conflict of Interest Law, which prohibits screening to cure a law firm's imputed disqualification based on former state government lawyer conflicts, trumps the New Jersey Professional Conduct Rule that allows screening of former government employees. The Court reasoned that the statute prohibiting screening serves the legitimate governmental purpose of preserving and enhancing the public's confidence in government and its civil servants. The Court requested that the N.J. Rules Committee propose a rule that would bring New Jersey's professional conduct rules on screening in line with the state statute. In the meantime, New Jersey attorneys formerly employed by the state need only comply with the professional conduct rule.

Ark. Valley State Bank v. Phillips, 171 P.3d 899 (Okla. 2007)

The Court held that courts in Oklahoma can no longer use the "appearance of impropriety" standard when evaluating disqualification motions. Reasoning that the right to employ the

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counsel of one's choice is a fundamental right and a disqualification order is a drastic and subjective action, the Court decided that more than a minimal showing of some doubt about counsel's propriety will be needed in order to disqualify counsel. The new standard for evaluating disqualification motions will be "whether real harm to the integrity of the judicial process is likely to result if an attorney is not disqualified."

Compton v. Safeway, Inc., 169 P.3d 135 (Colo. 2007)

After counsel notified Safeway that his client, a Safeway employee, had sustained a workplace injury, Safeway's internal risk management and loss control department interviewed employees who witnessed the accident and recorded their statements. During the subsequent litigation arising out of the incident, Safeway refused to produce the statements on grounds of attorney-client privilege. The court rejected Safeway's theory, holding that claim investigation was part of Safeway's ordinary course of business since it was self-insured so that the statements were prepared in the ordinary course of business, not in anticipation of litigation. Moreover, attorney-client privilege did not apply because Safeway's attorneys were not involved in the preliminary investigation that produced the witnesses' statements.

People v. Mills, 163 P.3d 1129 (Col. 2007)

Two public defenders representing defendants in two separate cases moved to withdraw from representation where they

had good faith bases for believing that their colleagues provided prior ineffective assistance to their clients. The court created a new course of action for public defenders encountering such problems: the attorneys, after engaging in minimal investigation, should file sealed affidavits that state with specificity a colorable claim that the prior counsel's representation was deficient. Only if trial court determines that such a claim exists will it then determine if there is a conflict of interest that prohibits the current public defender to pursue further the ineffective assistance of counsel claim.

Duvall v. State, 923 A.2d 81 (Md. 2007)

Maryland's highest court held that a public defender's office must be treated like a private firm for conflict of interest purposes. Duvall, represented by a public defender, argued that another man, also represented by the same public defender's office, committed the crime with which he had been charged. Duvall's counsel's motion for continuance to cure the conflict was denied, and Duvall was convicted of the crime. The court reversed his conviction on the ground that an actual conflict of interest existed in the case.

State v. Baker, 934 A.2d 820 (Vt. 2007)

A prosecutor could represent the state in a criminal case where a state witness against the defendant was an individual whom the prosecutor had defended in an unrelated matter while in private practice. The defendant was charged with robbery and filed a motion to disqualify the prosecutor after learning that the prosecutor had represented the state's chief witness ten years earlier. The Vermont Supreme Court found no substantial similarity between the defendant's case and the witness's earlier DUI and false information to a police officer charges. Because the charges did not involve substantially related matters, the prosecutor did not have a conflict of interest.

Young v. Sixth Judicial Dist. Court, 236 S.W.3d 207 (Tex. Crim. App. 2007)

The court overturned an appellate order that barred a prosecutor from handling a DWI case against a criminal defendant whom the prosecutor had defended against another DWI charge while in private practice. The court reasoned that the "substantial relationship" test, applied in civil cases to disqualify attorneys, had not been adopted in the criminal context and that the defendant had not argued, and could not argue, that the present DWI case was the same case in which the prosecutor had represented him while in private practice.

Roush v. Seagate Tech., LLC, 58 Cal. Rptr. 3d 275 (Cal. Ct. App. 2007)

A plaintiff in a sexual harassment claim failed to prove that defense attorneys should be disqualified because they obtained information from the plaintiff's former supervisor, who had previously retained the same attorney as the plaintiff and had discussed the case with the plaintiff and their common attorney. The plaintiff and her former supervisor both filed separate cases against their employer, but the supervisor later obtained new counsel and settled his case. In the settlement agreement, the supervisor agreed to waive his client-attorney privilege and provide the

Please See *Selected Case Developments* continued

employer with all information in his possession relating to the plaintiff's sexual harassment claim. The court held that the

defendant's attorney should not be disqualified because the plaintiff had failed to show that the supervisor possessed confidential information materially related to the plaintiff's case, or that the plaintiff and the supervisor previously had been involved in a joint representation arrangement.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE

Hayden v. State, 972 So. 2d 525 (Miss. 2008)

A client who gave fraudulent documents to his attorney could not claim attorney-client privilege to prevent his attorney from being called to testify against him about the circumstances in which he received these documents.

Lynch v. Hamrick, 968 So. 2d 11 (Ala. 2007)

Attorney-client privilege was waived when a client's daughter accompanied the client to a meeting with an attorney to discuss the client's will. The client signed a will in which she conveyed half of her property to the daughter, but the client's son contested the will, claiming that his sister had coerced their mother into signing the document. The court held that attorney-client privilege was waived because the daughter's presence at the meeting was not necessary and the interests of the mother and daughter were not sufficiently aligned to establish a joint interest privilege.

In re Green Grand Jury Proceedings, 492 F.3d 976 (8th Cir. 2007)

The court held that an attorney's opinion work product was protected from disclosure even though the attorney's services were retained to further a crime, because the lawyer was unaware of the client's wrongful intentions. Although the crime-fraud exception defeated work product protection as to the client, it did not overcome the protection the attorney could assert over his own notes and recordings.

Howell v. Joffe, 483 F. Supp. 2d 659 (N.D. Ill. 2007)

A conversation between a client and his attorney accidentally recorded on an opponent's voicemail when the attorney failed to correctly hang up the phone was protected by attorney-client privilege where the conversation was conducted for the purpose of securing legal advice, the attorney intended the conversation with his client to be in confidence, and the disclosure had been inadvertent.

Wyly v. Milberg Weiss Bershad & Shulman, LLP, 850 N.Y.S.2d 14 (N.Y. App. Div. 2007)

The court held that absent class members did not have an automatic right to review documents in class counsel's files. The absent class members lacked the customary attorney-client relationship with class counsel because they were not traditional clients as they had no right to direct the course of the litigation, testify at trial, participate in discovery or dismiss class counsel. They also could be relatively

Please See *Selected Case Developments* continued

detached from the litigation and avoid certain burdens that face traditional plaintiffs. The court held that a better practice is to require an absent class member to establish entitlement to class counsel's files on a case-by-case basis.

Scott v. Beth Israel Med. Ctr., 2004 WL 3053351 (N.Y Sup. Ct.. 2007)

A physician employed by a hospital used the hospital's e-mail system to communicate with his attorney. The physician later sued the hospital, and the hospital's attorney advised the physician that he had obtained the e-mail correspondence with his attorney. The physician moved for a protective order requiring the hospital to return all email communications between him and his lawyer, but the court ruled that the hospital's policies of prohibiting use of its email system for personal matters and monitoring correspondence sent through its email system, along with the physician's knowledge of these policies, eliminated his expectation of privacy and defeated any attorney-client privilege claim. Likewise, attorney work-product protection was waived because the work product was disclosed in a manner that materially increased the likelihood that an adversary would obtain the information. The confidentiality notice the physician's lawyer attached to the end of his e-mails did not prevent waiver of any privilege claim.

LAWYER BREACH OF FIDUCIARY DUTY

Corr v. Smith, 2008 WL 375953 (Okla. 2008)

The lawyer for a ninety-eight-year-old client named Mrs. Corr, who had been hired by Mrs. Corr's great-niece and her husband to represent Mrs. Corr in her will proceedings, breached her fiduciary duty to her client. The lawyer did not appear to have been sufficiently disinterested from the interest of the great-niece and her husband to give impartial and confidential advice. She did not hold a private consultation with Mrs. Corr and most likely did not make it clear to Mrs. Corr what exactly was being done to her estate. The attorney, along with the great-niece and her husband, used undue influence to change the client's will, a direct breach of trust.

Goebel v. Arnett, No. 2006-CA-001656-MR, 2007 WL 2404576 (Ky. Ct. App. 2007)

The court reversed a summary judgment motion entered against a birth mother who had sued an adoption attorney who did not disclose that she was the owner of the adoption agency and was also representing the prospective adoptive parents. The court held that sufficient evidence existed in the record to support the birth mother's breach of fiduciary duty claim based on allegations that the adoption attorney and her agency had deceived, threatened and forced the birth mother into terminating her parental rights.

FIRST AMENDMENT RIGHTS OF ATTORNEYS

Alexander v. Cahill, No. 5:07-CV-117, 2007 WL 2120024 (N.D.N.Y. 2007)

Please see *Selected Case Developments* continued

The district court declared several of the 2007 amendments to New York State's disciplinary rules on lawyer advertising and

solicitation unconstitutional on First Amendment grounds. The provisions invalidated included prohibitions on: 1) client endorsements or testimonials in pending matters; 2) ads that portray a judge or fictitious law firm, or imply that lawyers not associated with a firm are part of it; 3) attention-getting techniques that lack relevance to selecting an attorney; 4) use of a nickname or trade name that implies an ability to obtain results; and 5) "pop-up/under" advertisements on the Internet that are not on the lawyer's or firm's own Website. The court held that these amendments either failed to materially advance a state interest or were not narrowly enough drawn.

On the other hand, the court upheld a 30-day waiting period on unsolicited communications following a personal injury or wrongful death and a restriction on the use of URL domain names that do not include the name of the lawyer or the firm. The court further held that none of the amendments could be applied to nonprofit legal organizations that did not charge fees to their clients.

Olsen v. Gonzales, 368 B.R. 886 (D. Or. 2007)

The court held unconstitutional a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act that prohibits lawyers from advising clients to acquire debt in contemplation of bankruptcy. The court reasoned that the provision had a chilling effect on attorneys' pre-bankruptcy planning advice to their clients and was over-inclusive because it

affected legitimate pre-bankruptcy preparation.

Fieger v. Mich. Supreme Court, No. 06-11684, 2007 WL 2571975 (E.D. Mich. 2007)

The district court declared two rules of the Michigan Rules of Professional Conduct unconstitutional. Rule 3.5(c) forbids lawyers from engaging in "undignified or discourteous conduct" toward tribunals and Rule 6.5(a) requires lawyers to treat everyone involved in the legal process with "courtesy and respect." The court held that these so-called courtesy rules are overbroad and vague, and violate both lawyers' First Amendment right to free speech and Fourteenth Amendment right to due process of law. The court noted that the rules regulate almost every form of judicial criticism, provide no exceptions for truth, political speech, or speech that does not create a substantial likelihood of material prejudice in a pending case, and fail to define "undignified" or "discourteous," thus making it difficult for persons of ordinary intelligence to understand their meaning.

COMMUNICATIONS WITH WITNESSES

Arons v. Jutkowitz, 2007 WL 4163865 (N.Y. 2007)

The Court held that an opposing attorney can privately interview an adverse party's physician if the adverse party has placed her medical condition in controversy. Such request for an interview must comply

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with the procedural prerequisites set forth by the Health Insurance Portability and

Accountability Act (HIPAA). Plaintiffs in medical malpractice cases cannot refuse to sign "HIPAA-compliant" authorizations for opposing counsel to interview their treating physicians, but the physicians can choose whether to cooperate or not. In addition, an attorney who interviews such a physician must disclose his client's identity and his own interests in the interview. The interview is limited in scope to the particular medical conditions at issue in trial.

Muriel Siebert & Co, Inc. v. Intuit, Inc., 868 N.E.2d 208 (N.Y. 2007)

The Court held that so long as measures are taken to steer clear of privileged or confidential information, an opposing counsel may conduct private informal interviews of an adversary's former employees, so long as the attorney conforms to all applicable ethical standards when conducting the interviews. No disciplinary rule prohibits attorneys from communicating with former employees of a company, even those who were privy to the company's privileged and confidential information.

FEES

Sole v. Wyner, 127 S. Ct. 2188 (2007)

The Court ruled that a plaintiff who wins a preliminary injunction does not qualify for an award of counsel fees under § 1988(b) if the merits of the case are ultimately decided against her.

Rodriguez v. West Publ'g Corp., No. CV05-3222R, 2007 WL 2827379 (C.D. Cal. 2007)

The district court refused to award incentive payments class counsel promised to named representatives of a class action suit if the plaintiffs prevailed. The court held that the incentive agreement violated California's rules against fee-sharing with non-lawyers by promising clients an up-front fee for agreeing to be class representatives, and also violated rules prohibiting fee-splitting among lawyers because the named class representatives were all lawyers. The court further reasoned that the agreement was contrary to public policy because it improperly aligned the interests of the named plaintiffs with their attorneys, potentially disadvantaging the remaining class members.

Miscellaneous

SECURITIES LAW

Stoneridge Inv. Partners v. Scientific-Atlanta, Inc, 128 S. Ct. 761 (2008)

In a case of future potential relevance to lawyers involved in securities offerings, the U.S. Supreme Court reiterated that Section 10(b) of the 1934 Securities Exchange Act and SEC Rule 10b-5 create liability only as to primary violators, and not to those who aid and abet their conduct. Investors who lost money after purchasing a company's stock had sued customers and suppliers who had agreed to arrangements that allowed the company to issue misleading financial statements. The Court noted that the customers and suppliers had made no false representations to the public and had no duty to the investors. Moreover, the investors had not relied upon statements or representations the

Please See *Selected Case Developments* continued

customers and suppliers had issued, and these secondary actors had played no role in preparing or disseminating the company's misleading financial statements.

Mediation

Winsatt v. Superior Court, 61 Cal. Rptr. 3d 200 (Cal. Ct. App. 2007)

A former client sued a law firm for a breach of fiduciary duty for allegedly making an unauthorized settlement offer during mediation proceedings in a case in which he was a plaintiff. The former client learned of this offer through a confidential mediation brief submitted to the mediator by attorneys for the defendants in the lawsuit. The court held that California's mediation confidentiality statutes barred disclosure of the mediation brief and e-mails referring to the brief, but the statutes did not protect from discovery the alleged settlement offer itself, where it was not clear that the offer had been communicated during the mediation.

WRONGFUL DISCHARGE

Heckman v. Zurich, 242 F.R.D. 606 (D. Kan. 2007)

Following case law from other jurisdictions, the district court concluded in a case of first impression under Kansas law that an in-house counsel fired for whistle-blowing could sue her former employer for retaliatory discharge. The court held that a client's right to end an attorney-client relationship does not immunize an employer-client from liability for retaliatory discharge, and that the discharged counsel is entitled to reveal confidential information to the extent necessary to establish her claim under the "claim or defense" exception in Rule 1.6.

RULE 11

Walker v. S.W.I.F.T., 517 F. Supp. 2d 801 (E.D. Va. 2007)

The duty to conduct reasonable investigation before filing suit, imposed by FRCP 11, does not permit plaintiffs to rely on a newspaper article containing anonymous and contradictory information as the basis for filing a class action suit.

DEVELOPMENTS IN THE REGULATION OF LAWYERS

BY ROY SIMON (HOFSTRA)

Below are some significant national and state developments since the Fall 2007 Newsletter came out last December, plus some anticipated future developments. If you know of developments that I missed, or if you learn of new developments that I should mention in the next column (or if you have corrections to this column), please contact me at roy.simon@hofstra.edu.

NATIONAL DEVELOPMENTS

American Bar Association Developments

The American Bar Association, with more than 400,000 members, is the largest professional organization in the world. It devotes significant resources to the study and improvement of the rules governing lawyers and judges. Several ABA developments have occurred since the Fall 2007 Newsletter.

Please see *Selected Case Developments* continued

ABA Model Rules of Professional Conduct: At the ABA's February 2008 Mid-Year Meeting, by voice vote, the ABA amended Rule 3.8 ("Special Responsibilities of a Prosecutor"). This is a momentous event. The amendments to Rule 3.8 impose important post-conviction responsibilities on prosecutors. The amendments were originally proposed in 2006 in a written form by the New York City Bar's Committee on Professional Responsibility by Fordham's Bruce Green and Cardozo's Ellen Yaroshefsky. In November 2007, the New York State Bar Association House of Delegates adopted the proposals, with some modifications, as part of New York's comprehensive rule revision process). The ABA Criminal Justice Section, Chaired by Stephen Saltzburg of George Washington, further refined the proposals in consultation with the ABA Standing Committee on Ethics and Professional Responsibility. The amendments approved by the House of Delegates this February add the following new paragraphs (g) and (h) to Rule 3.8:

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and
(2) if the conviction was obtained in the prosecutor's jurisdiction,

(A) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

The new rule is accompanied by the following three new Comments:

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a

Please See *Selected Case Developments* continued

court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

The Criminal Justice Section's Report and Recommendation is available online at www.abanet.org/crimjust/policy/rule3-8amend.pdf

We can be proud of our colleagues who took an idea and patiently and persistently shepherded it through the long and demanding process necessary to create a new ABA Model Rule.

ABA Model Rule on Conditional Admission to Practice Law (proposed): The ABA Commission on Lawyer Assistance Programs (CoLAP) and the ABA Section on Criminal Justice are co-sponsoring a proposed Model Rule on Conditional Admission to Practice Law. The rule is designed to free bar admission authorities from the stark binary choice between admission or denial of admission when an applicant has a history of problems with mental illness or substance abuse but also shows signs of recent rehabilitation. The proposed Model Rule would create a third option: conditional admission to an applicant who agrees to get mental health care or undergo monitoring for up to two years after admission.

The proposed rule serves twin aims: (a) encourage troubled lawyer students to get early treatment by removing the fear that a history of treatment will trigger a denial of admission, and (b) protect the public by ensuring that an applicant's recovery continues after admission to the bar. A conditional admission option is already available in Puerto Rico and eighteen states (Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Kentucky, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, South Dakota, Texas, and West Virginia). The proposal will probably be debated at the ABA's August 2008 Annual Meeting in New York City. The proposal and the CoLAP/CrimJustice report are available online at www.abanet.org/crimjust/policy/conditionaladmission.pdf.

Federal Statutes, Rules, and Regulations

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

Please See *Selected Case Developments* continued

Federal Rules of Evidence: In September 2007, in an effort to codify various doctrines governing waiver of the attorney-client privilege and work product, the Judicial Conference of the United States voted to send proposed Rule 502 directly to Congress, bypassing the usual stop at the Supreme Court. Proposed Rule 502 provides as follows:

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

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

(a) *Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver.* — When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

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

(1) the disclosure is inadvertent;

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

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

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

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) *Controlling effect of a court order.* — A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court - in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) *Controlling effect of a party agreement.* — An agreement on the effect of disclosure in a federal proceeding is binding only on the

Please See *Selected Case Developments* continued

parties to the agreement, unless it is incorporated into a court order.

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

(g) *Definitions.* — In this rule:

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

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

Under 28 U.S.C. 2074(b), any "rule creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." Therefore, in contrast to most proposals to amend federal rules, inaction by Congress for 90 days will not result in automatic adoption of the rule. Rather, Rule 502 will not become law unless and until both house of Congress affirmatively enact it. The legislative process is now proceeding. On February 27, 2008, the Senate unanimously approved S. 2450, a bill adding new Evidence Rule 502 to the Federal Rules of Evidence. See Sen. Rept. No. 110-264. The House has yet to act, but on March 21, 2008, the ABA sent a letter to the Hon. John Conyers, Chair of the House Judiciary Committee, strongly supporting passage of S. 2450.

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

Rules for Judicial-Conduct and Judicial-Disability Proceedings: On March 11, 2008, the Judicial Conference of the United States approved a binding, nationwide set of rules for handling conduct and disability complaints against federal judges. The new rules, which took effect on April 10, 2008, are authorized under the Judicial Conduct and Disability Act of 1980, which allows any person to file a complaint alleging that a federal judge has engaged in conduct "prejudicial to the effective and expeditious administration of the business of the courts." The statute also permits the filing of a complaint relating to a judge's inability to perform his or her duties because of "mental or physical disability."

The Judicial Conference approved these rules in response to recommendations made in September 2006 by the Judicial Conduct and Disability Act Study Committee, a special committee chaired by Justice Breyer. The rules cover such topics as complaint initiation and review, venue, confidentiality and publication, remedies, the conduct of investigations, and the rights and roles of participants in the process. Unlike the Illustrative Rules that they replace the new rules are binding, Judicial councils will retain

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the power to adopt local rules regarding procedural details of the complaint-handling process, provided that those rules do not contradict the new uniform rules. The new rules are available online at www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf.

DEVELOPMENTS IN THE STATES

Broad Trends

"Ethics 2000" reviews. In recent years, many states have reviewed their ethics rules in light of the work of the Ethics 2000 Commission, the ABA Commission on Multijurisdictional Practice, and the 2003 amendments to ABA Model Rules 1.6 and 1.13. Since the Fall 2007 PR Newsletter was published in December, amended ethics rules have taken effect in four jurisdictions (all effective January 1, 2008): Colorado, Connecticut, New Hampshire, and Oklahoma. Looking at the big picture, since the Ethics 2000 Commission released its final report in 2001, 34 states and the District of Columbia have adopted revised rules; 10 states have circulated proposed rules that remain pending (AK, CA, IL, KY, ME, MI, NY, TX, VT, WV); 5 states have appointed review committees that have not yet issued a report (GA, HI, MA, NM, TN); and 1 state is not considering the recent revisions (AL). For a detailed chart of state-by-state responses and ongoing projects relating to the work of the Ethics 2000 Commission, visit www.abanet.org/cpr/links.html.

Malpractice insurance disclosure rules. Another broad trend is the adoption of ethics rules or court rules requiring lawyers to disclose whether they carry professional liability insurance. In August 2004, when few states required lawyers to disclose their malpractice insurance coverage, the ABA adopted a Model Court Rule on Insurance Disclosure. Today, at least twenty-three states require some form of malpractice insurance disclosure, either on their bar registration statements (18 states) or directly to clients (5 states), and at least four additional states (California, New York, Utah, Vermont) are actively considering some form of legal malpractice disclosure rule. For a state-by-state chart on the status of rules and proposed rules governing disclosure of insurance coverage, see www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

For detailed information about developments in particular states, visit the web sites given after each state listed below, or find a link to individual state resources at www.law.cornell.edu/ethics/listing.html or www.abanet.org/cpr/links.html. Please note that I have not performed a "50 state survey" of ethics developments – the states covered below are just the ones that have come to my attention one way or another. If you know of significant developments that are not covered below, please let me know at roy.simon@hofstra.edu and I will try to include them in the Fall 2008 Newsletter.

Alabama (www.alabar.org)***:*** The Alabama Supreme Court is considering a July 2007 proposal to amend Alabama's Rule 1.15 to make Alabama's IOLTA program mandatory. Alabama is currently one of only 16 states whose IOLTA program is not mandatory.

Arkansas (http://courts.arkansas.gov/opinions)***:*** On January 10, 2008, *In re Arkansas Rules of Civil Procedure 4 and 26,* the Arkansas Supreme Court adopted a new Ark. R. Civ. P. 26(b)(5) to govern inadvertent disclosure. A

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party who discloses material without intending to waive a claim of privilege will be presumed not to have waived the privilege claim if it (a) notifies the receiving party within 14 calendar days of discovering the inadvertent disclosure by giving a specific description of the material and asserting the privilege or doctrine that protects it; and (b) amends any relevant written discovery responses as part of the notice. After receiving such a notice, the receiving party must return, sequester, or destroy the materials and all copies within 14 days, and "may not use or disclose the materials in any way." However, the receiving party may challenge the claim of privilege and inadvertent disclosure for reasons such as the timeliness of the notice or whether the surrounding circumstances show waiver. In this connection, Rule 26(b)(5) also provides that despite Rule 3.7 of the Rules of Professional Conduct ("Lawyer as Witness"), counsel for the disclosing party may testify about the circumstances of the disclosure and the precautions taken to prevent inadvertent disclosure.

In the same opinion, the Arkansas Supreme Court also adopted the following two provisions amending Rule 502 of its Rules of Evidence:

> (e) *Inadvertent disclosure.* A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if the disclosing party follows the procedure specified in Rule 26(b)(5) of the Arkansas Rules of Civil Procedure and, in the event of a challenge by a receiving party, the circuit court finds in accordance with Rule 26(b)(5)(D) that there was no waiver.
>
> (f) *Selective waiver.* Disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

An Explanatory Note expressly recognizes that the new selective waiver provision adopts a minority view. (The United States Judicial Conference dropped a similar selective waiver provision from Proposed Fed. R. Evid. 502 before transmitting it to Congress because the Judicial Conference considered it too controversial.)

California *(www.calbar.ca.gov, www.courtinfo.ca.gov,* and *www.leginfo.ca.gov):* On December 13, 2007, the Regulation, Admissions and Discipline Oversight Committee of the State Bar of California ("RAD Committee") voted to release for public comment proposed new Rule of Professional Conduct 3-410. This is the third time that the Bar has released an insurance disclosure proposal for public comment. The latest proposed Rule 3-410 would (1) require a lawyer to notify the client that the lawyer lacks insurance whenever "it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours"; (2) add a provision stating that the "rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client"; (3) add a provision stating that the rule does not apply where the member has previously advised the client that the member does not have professional liability insurance; and (4)

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clarify that the exemptions for government lawyers and in-house counsel apply "when that member is representing or providing legal advice to a client in that capacity."

At the same time, the RAD Committee voted to recommend that the State Bar (a) study methods of making professional liability insurance more affordable and more widely available to attorneys, (b) study additional means of compensating clients who are harmed by uninsured attorneys; and (c) assess the effect of any new insurance disclosure rule, after the effective date of any such rule. The RAD Committee also voted against a motion recommending that the Board of Governors approve new Rule of Court 9.7 that would have required certification regarding professional liability insurance coverage to the State Bar, and the State Bar web site would then identify individual attorneys who do not have insurance.

In March 2008, the State Bar of California's Commission for the Revision of the Rules of Professional Conduct, which has been comprehensively reviewing California's unique rules since 2001 to make them more like the ABA Model Rules, issued thirteen new draft rules (making a total of 45 draft rules so far). The new rules include a version of ABA Model Rule 1.13 that rejects the whistleblowing feature adopted by the ABA in 2003. The other dozen proposed rules all differ from the ABA Model Rule in some way. The Commission expects to release a final batch of proposed rules for public comment this year. The proposals use the numbering, the format, and much of the language of the ABA Model Rules of Professional Conduct.

Colorado (www.cobar.org): Comprehensively amended Rules of Professional Conduct took effect in Colorado on January 1, 2008. For a PDF of the new rules, go to http://www.cobar.org/page.cfm/ID/3156.

Connecticut (http://www.jud.ct.gov/PB.htm): Effective January 1, 2008, Connecticut amended Rules 1.2, 1.8, 1.15, 3.5, 5.5, and 7.4B. Specifically, Rule 1.2(a) was amended to add: "Subject to revocation by the client and to the terms of the contract, a client's decision to settle a matter shall be implied where the lawyer is retained to represent the client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss, and the third party elects to settle a matter without contribution by the client." Rule 1.2(c) was amended to add that a client's informed consent to a settlement "shall not be required when a client cannot be located despite reasonable efforts where the lawyer is retained to represent a client by a third party which is obligated by contract to provide the client with a defense." Similar language was added to Rule 1.8(f) and Rule 1.8(g). Amended Rule 5.5 generally tracks ABA Model Rule 5.5, but Rule 5.5(a) adds: "Conduct described in subsections (c) and (d) [of Rule 5.5] in another jurisdiction shall not be deemed the unauthorized practice of law ," and a new Rule 5.5(e) adds, in language similar to ABA Model Rule 8.5(a):

> A lawyer not admitted to practice in this jurisdiction and authorized by the provisions of this Rule to engage in providing legal services on a temporary basis in this jurisdiction is thereby subject to the disciplinary rules of this jurisdiction with respect to the activities in this jurisdiction.

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Finally, an unusual new Rule 5.5(f) provides:

> A lawyer desirous of obtaining the privileges set forth in subsections (c) (3) or (4), (1) shall notify the Statewide Bar Counsel as to each separate matter prior to any such representation in Connecticut, (2) shall notify the Statewide Bar Counsel upon termination of each such representation in Connecticut, and (3) shall pay such fees as may be prescribed by the Judicial Branch.

The notification provision in Rule 5.5(f) is potentially onerous and is likely to catch many lawyers off guard, but it represents a huge step forward from a few years ago when the Connecticut Bar rejected any version of ABA Model Rule 5.5 that would allow expanded multijurisdictional practice.

Delaware *(*http://courts.delaware.gov/Rules*):* On October 11, 2007 (which I should have caught for the Fall Newsletter), the Delaware Supreme Court became the twenty-seventh jurisdiction to adopt a new Supreme Court Rule 55.2 permitting "foreign legal consultants" to give advice about the laws of their home jurisdictions. Much more boldly, the Delaware Supreme Court also amended Rule 5.5(c) in its multijurisdictional practice rule to allow lawyers admitted "in a foreign jurisdiction" to provide temporary legal services in Delaware on the same terms as lawyers licensed in another United States jurisdiction.

Florida *(www.flabar.org):* An unbelievable amount of regulatory news comes out of Florida. On December 20, 2007, the Florida Supreme Court amended various rules. See *Amendments to the Rules Regulating the Florida Bar.* The amendments include a new Rule 4-1.5(i) providing that if a retainer agreement includes a mandatory arbitration clause, the retainer agreement must include the following clause in bold print:

> **NOTICE: This agreement contains provisions requiring arbitration of fee disputes. Before you sign this agreement you should consider consulting with another lawyer about the advisability of making an agreement with mandatory arbitration requirements. Arbitration proceedings are ways to resolve disputes without use of the court system. By entering into agreements that require arbitration as the way to resolve fee disputes, you give up (waive) your right to go to court to resolve those disputes by a judge or jury. These are important rights that should not be given up without careful consideration.**

Separately, the court amended Rule 3-6.1, which governs employment of lawyers who have been suspended or disbarred or allowed "disciplinary resignation." Such attorneys much not (a) handle any trust funds or client property; (b) practice law or hold themselves out as eligible to practice law; or (c) be supervised by any attorney that they supervised within three years before suspension, disbarment, or disciplinary resignation.

The court also amended Rule 17-1.3(b) in its "authorized house counsel" rule to require authorized house counsel to disclose, in any communication with people outside the company, that they are not licensed to practice law in Florida.

The court also amended Rule 3-5.1(b)(3) to authorize grievance committees to assess a fee of $1,250 against a lawyer who is found guilty or admits to being guilty of "minor misconduct."

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All of these amendments took effect on March 1, 2008.

Also on March 1, 2008, a new Florida Supreme Court program took effect that allows paralegals to use the designation "Florida Registered Paralegal" if they meet minimum educational, certification, or work experience criteria, and agree to abide by an established code of ethics.

At its May 30, 2008 meeting, the Florida Bar Board of Governors consider a stunning proposal that every new lawyer in Florida must be paired with a mentor, as a required element of the transition from law school to practice. The proposal was jointly developed by the Florida Supreme Court Commission on Professionalism and the Bar's Standing Committee on Professionalism,

At the same meeting, the Board of Governors will also consider proposed amendments to Florida's rules governing client perjury, lawyer advertising, and professional misconduct. If the Board of Governors approves the amendments, they will be presented to the Florida Supreme Court. Highlights of the proposed amendments include:

Rule 4-3.3 ("Candor Toward The Tribunal"): Proposed amendments to Comment would (a) delete language stating that a lawyer's knowledge of false evidence can be inferred from the circumstances and that a lawyer cannot ignore an obvious falsehood; (b) make clear that the rules do not differentiate between the obligations of a civil lawyer and a criminal lawyer regarding client perjury; and (c) delete language regarding withdrawal, making clear that withdrawal alone will likely never be an adequate remedial measure when there has been a misrepresentation to the court." (The amendments would not change the text of Rule 4-3.3.)

Rule 4-7.4 ("Direct Contact With Prospective Clients"): The proposed amendment would prohibit a lawyer from sending direct mail to the respondent in proceedings involving a petition for injunction for protection against any form of physical violence if the lawyer knows or should know such individual has not been served with notice of process in the matter.

Rule 4-7.5 ("Advertisements in the Electronic Media Other Than Computer-Accessed Communications"): Proposed amendment would delete the requirement in Rule 4-7.5(b) that a lawyer advertisement using a nonlawyer spokesperson must orally disclose that the spokesperson is a spokesperson and is not a lawyer.

Rule 4-7.10 (Definition of "Lawyer Referral Service"): A proposed amendment to paragraph (c) would revise the definition of a "lawyer referral service" to clarify that the referral of clients for any consideration constitutes a referral service.

Rule 4-8.4 ("Misconduct"): The proposed amendment, in connection with a companion amendment to Rule 3-7.11(f), would specify that failure to respond to an official bar inquiry without good cause shown may be a matter of contempt.

The proposed amendments to the lawyer advertising rules come on the heels of a separate December 20, 2007 Florida Supreme Court opinion correcting technical errors in some recent amendments to the advertising rules, but adding a new Rule 4-7.8(d) that exempts "a communication mailed only to existing clients, former clients, or other lawyers" from the filing requirements of Rule 4-7.7 (which requires lawyers to submit advertisements to the

Please See *Selected Case Developments* continued

Florida Bar for review unless the advertisement falls within an exempt category). The amendments took effect on February 1, 2008. See *Amendments to the Rules Regulating the Florida Bar—Advertising*.

Also related to lawyer advertising, in January 2008 a personal injury law firm and Public Citizen, Inc. filed a lawsuit in federal court challenging the constitutionality of Florida's lawyer advertising rules. The Florida Bar asked the federal court to abstain from hearing the suit until the issues were first addressed in a state court and challenged the standing of both the law firm and Public Citizen, but on February 29, 2008 the court refused to abstain and held that both plaintiffs have standing. See *Harrell v. Florida Bar* (M.D. Fla.).

Finally, on September 28, 2007, the Florida Supreme Court approved a new disciplinary rule setting forth procedures that lawyers must follow if they ask a medical malpractice plaintiff to waive fee caps set in 2004 by the state constitution. See *In re Amendment to the Rules Regulating the Florida Bar—Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct*. The five-vote majority applied the settled principle that Florida citizens may waive constitutional rights that were designed solely for their own protection. The two dissenting justices agreed that individuals may waive their constitutional rights but would have required judicial oversight to guarantee that the waiver was knowing and voluntary. (I missed this item in the Fall 2007 Newsletter.)

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

Maine *(www.mebaroverseers.org/ethicsweb/ethicsmain.html)***:** On September 21, 2007, Maine's Task Force on Ethics 2000 submitted its Recommendations and Report to the Maine Supreme Judicial Court. (The Reporter for the Task Force is Professor Louis Lupica of the University of Maine.) The proposed rules conform to the structure of the ABA Model Rules, and to conform to the language of the ABA Model Rules except where established Maine law and practice warrant divergence or variation. The Supreme Judicial Court will likely seek additional public comment and conduct a public hearing on the Recommendations, but it may instead instruct the Task Force to revise the proposals before circulating them for public comment. In the meantime, Maine remains one of only three states (along with California and New York) that have not yet adopted the format and numbering system of the ABA Model Rules.

Michigan *(www.michbar.org)***:** As reported in every issue of this Newsletter for the last three years, the Michigan Supreme Court is still considering comprehensive amendments to the Michigan Rules of Professional Conduct that were circulated by the court for public comment in July 2004. (The comment deadline expired in February 2005.) "Clean" and "redlined" versions of the proposed amendments are available at *www.michbar.org* (click on the home page on "admissions, ethics and regulation," then click on "Ethics Rules, Opinions and Resources," then scroll down to "Ethics Rules").

Missouri *(www.mobar.org)***:** Effective July 1, 2008, Missouri will amend Rules 1.2 and 1.16 to account for unbundled legal services, especially a "limited appearance." The December 21,

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2007 order announcing the rules amendments is available online at www.courts.mo.gov/sup/index.nsf/d45a7635d4bfdb8f8625662000632638/bc30137852d5dd4a862573b8007a8da1?OpenDocument.

As for details, Rule 1.2(c) will be amended to provide:

> (c) A lawyer may limit the scope of representation if the client gives informed consent in a writing signed by the client to the essential terms of the representation and the lawyer's limited role. Use of a written notice and consent form substantially similar to that contained in the comment to this Rule 4-1.2 creates the presumptions:
>
> > (a) the representation is limited to the lawyer and the services described in the form, and
> >
> > (b) the lawyer does not represent the client generally or in any matters other than those identified in the form.
>
> An otherwise unrepresented party to whom limited representation is being provided or has been provided is considered to be unrepresented for purposes of communication under Rule 4-4.2 and Rule 4--4.3 except to the extent the lawyer acting within the scope of limited representation provides other counsel with a written notice of a time period within which other counsel shall communicate only with the lawyer of the party who is otherwise self-represented.

This is the first rule I have ever seen in which the text of the rule refers to the Comment. I imagine it does so because the "written notice and consent form" in Comment 2 is about two pages long and is only a model – any form "substantially similar" will suffice. The form in Comment 2 ends with the following summary paragraph:

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

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

***New Hampshire* (*www.nhba.org*):** Comprehensively amended New Hampshire Rules of Professional Conduct took effect on January 1, 2008. The new rules are available online at www.nhbar.org/publications/ethics/default.asp. I also strongly recommend looking at the New Hampshire Supreme Court's 162-page July 25, 2007 Order, announcing the new rules, which is found at www.courts.state.nh.us/supreme/orders/20072507.pdf. Each rule that differs from the corresponding ABA Model Rule of Professional Conduct is followed by a "New concisely explains how and why New

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Hampshire departed from the ABA Model Rule. These comments are among the most thoughtful I have seen from any state.

New Jersey (www.judiciary.state.nj.us/rules/apprpc.htm): In 2004, the New Jersey Supreme Court adopted a rule similar to ABA Model Rule 5.5 but said that in 2007 the Court's Professional Responsibility Rules Committee (PRRC) would "undertake a comprehensive evaluation of the experience gained in multijurisdictional practice …." In February 2007, the PRRC issued a report recommending minor amendments and clarifications to Rules 5.5, but the Supreme Court declined, instead asking the PRRC "for an overall review and evaluation of the provisions of current RPC 5.5." In January 2008, the PRRC released its review and evaluation, recommending many amendments to Rule 5. 5that would open up New Jersey to more multijurisdictional practice. The heart of the proposed amendments would permit lawyers in good standing in other U.S. jurisdictions to engage in the lawful practice of law in New Jersey only if:

> (1) the lawyer is admitted to practice pro hac vice … or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or
>
> (2) the lawyer is an in-house counsel and complies with R. 1:27-2; or
>
> (3) under any of the following circumstances:
>
> (i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
>
> (ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
>
> (iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;

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(iv) the lawyer associates in a matter with a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

The PRRC's report is available online at www.judiciary.state.nj.us/reports2008/prrc.pdf.

New York (www.nysba.org and www.courts.state.ny.us)***:*** In *Alexander v. Cahill*, 2007 WL 2120024 (N.D.N.Y., July 23, 2007) (Scullin, J.), the court held that DR 2-101(C)(1), (3), (5), and (7), and DR 2-101(G)(1) of New York's new (Feb. 1, 2007) lawyer advertising rules are unconstitutional, but also held that New York's 30 day blackout period for targeted mail or newspaper or broadcast advertising seeking personal injury or wrongful death clients in connection with a "specific incident" is constitutional. Both the state and the plaintiffs appealed. The appeal is pending before the Second Circuit.

Meanwhile, proposals for comprehensive amendments to the New York Code of Professional Responsibility, which were approved by the State Bar's House of Delegates in November 2007, were forwarded to the Presiding Justices of the four Appellate Departments in late January 2008. (In New York, the highest court has no role in adopting the rules. By tradition, new ethics rules are adopted only by consensus of the four Appellate Departments.) The proposals follow the format, numbering system, and much of the language of the ABA Model Rules of Professional Conduct. No one knows when the courts will act on the proposals.

Oklahoma (www.okbar.org)***:*** Oklahoma adopted comprehensively revised Rules of Professional Conduct effective January 1, 2008. The new rules are available online at www.okbar.org/ethics/ORPC07.pdf.

Vermont (www.vtbar.org)***:*** In December 2006, the Vermont Bar's Civil Rules Committee proposed that the Vermont Supreme Court, as part of the Rules for Licensing of Attorneys, adopt a rule requiring insurance disclosure. The Committee asked the court to consider requiring disclosure of both liability limits and deductibles. The proposal is still pending.

Virginia (www.vsb.org): At its June 19, 2008 meeting, the Virginia State Bar Council ("Bar Council") will consider a proposed Supreme Court Rule regarding the Provision of Legal Services Following Determination of Major Disaster (a so-called "Katrina rule"). The proposal generally

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follows the ABA Model Court Rule on this subject, with a few modifications.

On March 1, 2008, the Virginia State Bar Council approved proposed amendments to Rules 5.5 and 8.5, both patterned on the ABA Model Rules. Public comments were due by April 30, 2008. The proposed rules are slightly modified versions of proposals that were originally forwarded to the Virginia Supreme Court in 2006 but later withdrawn.

Also on March 1, 2008, the Virginia State Bar Council approved changes to Rules 1.9 and 1.11 of the Rules of Professional Conduct. Regarding Rule 1.9, the proposals would amend Comment [5] to provide reciprocal guidance regarding lawyers who move from private to public employment. Regarding Rule 1.11, the amendments would move part of Comment [10] into the body of the rule because the Comment addresses a substantive issue. (Comment [10] deals with the disqualification of other lawyers a government agency when one of the lawyers is disqualified from a matter based on work in private practice.) Public comments on the proposed amendments were due by April 30, 2008.

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

Wisconsin *(www.wisbar.org):* In April 2008, the Wisconsin Supreme Court adopted, with minor modifications, an amended Rule 5.5 that generally tracks ABA Model Rules 5.5 and 8.5 but omits ABA Model Rule 5.5(d)(1) regarding in-house counsel. Instead, in-house counsel will be required to register and pay a registration fee to practice in the state. However, an in-house attorney could, after a certain number of years, apply for reciprocity for admission. A copy of the Bar's petition regarding Rules 5.5 and 8.5 (which was modified by the court before adoption) is available at *http://wicourts.gov/supreme/docs/0606petition.pdf*.

Also in April 2008, the court unanimously denied a State Bar Petition to establish a system for licensure and regulation of paralegals in Wisconsin. The court, instead, encouraged the Bar to work with other interested groups to consider creating a voluntary certification program using programs currently used in other states as models. The court identified Delaware, Florida, Louisiana, New Mexico, North Carolina, Ohio, and Texas as states that already have voluntary certification programs in place.

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Section: **Chair**: **Irma S. Russell**, University of Tulsa College of Law, 3120 E. 4th Place, Tulsa, OK 74104, 918-631-2194, e-mail irma-russell@utulsa.edu.

Editor: **G. Randy Lee**, Widener University, 3800 Vartan Way, P.O. Box 69382, Harrisburg, PA 17106-9382, 717-541-3940, e-mail GLee@widener.edu.

Assistant Editor: **Jessi Tomayo**, Fordham University, 140 West 62nd Street, New York, NY 10023, email jessitamayo@yahoo.com; Paul Tremblay, Boston College, 885 Centre Street, Newton, MA 02459, e-mail tremblap@bc.edu.

Production Designer: **Keith A. Heard**, Widener University, 3800 Vartan Way, P.O. Box 69382, Harrisburg, PA 17106-9382, 717-541-3947, e-mail kaheard@widener.edu.