

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

REFLECTIONS: LOOKING BACK ~ LOOKING FORWARD

By Laurel S. Terry

(Penn State Dickinson School of Law)

At this time of semester, I usually find myself reflecting on the past and thinking about the future. When I draft my Fall Semester exam, I think about what I did well and what I wish I had done better. And when I procrastinate drafting my exam (which is pretty often right about now), I usually start thinking about my syllabus for the Spring Semester.

This year, as my term as Section Chair comes to an end, I have been thinking about both the past and the future of the AALS Section of Professional Responsibility. Our Section is relatively young. If you glance at the list of the past Section Chairs, what is notable is the percentage of people you might know

personally, or have heard speak, or feel that you know because their articles are still current and useful:

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Irma S. Russell, The University of Tulsa 2008
 Russell G. Pearce, Fordham University 2007
 Carol A. Needham, Saint Louis University 2006
 Marie A. Failing, Hamline 2005
 Judith A. McMorro, Boston College 2004
 Greg Randy Lee, Widener 2003
 Robert F. Cochran, Jr., Pepperdine 2002
 Steven H. Hobbs, Alabama 2001
 Teresa S. Collett, South Texas 2000
 Bruce A. Green, Fordham 1999
 Nancy J. Moore, Rutgers-Camden 1998
 Fred C. Zacharias, San Diego 1997
 Mary C. Daly, Fordham 1996
 Theodore J. Schneyer, Arizona 1995
 Lisa Gabrielle Lerman, Catholic 1994
 Roy D. Simon, Jr., Hofstra 1993
 Judith L. Maute, Oklahoma 1992
 Robert Harris Aronson, University of Washington 1991
 William W. Hodes, Indiana 1990
 Stephen Gillers, New York University 1989
 David J. Luban, Maryland 1988
 Deborah L. Rhode, Stanford 1987 and 1986
 Ronald D. Rotunda, Illinois 1985
 Susan R. Martyn, Toledo 1984

Charles W. Wolfram, Cornell 1983
Thomas D. Morgan, Emory 1982
Andrew L. Kaufman, Harvard 1981
Norman Redlich, New York University 1980

One of the privileges of working in a young field is that until recently, most of its founders, leaders and giants were not only still around, but were actively working. But last year's death of former chair Mary Daly, winner of the 2009 Michael Franck award, and this year's death of former Section Chair, prolific scholar and all-around-good-guy Fred Zacharias (see the tribute on page 23) have reminded me that the Section is entering middle age and that we have begun to see a generational turnover.

When reflecting on the past of the AALS Section, I found myself wishing that the Section had an oral history project or some other kind of institutional memory that would show us how the Section has changed and evolved over time and perhaps provide a brief snapshot of those who have been involved in the Section. I had hoped to work on this project during my tenure as Chair, but I never quite got around to it. Maybe next year...

When reflecting on the future of the Section, I found myself wondering where the Section and its members were headed. I remembered one of Russ Pearce's 2007 "Chair's Columns," in which he stated, *inter alia*:

My central argument is that our colleagues in the legal academy do not consider legal ethics a serious academic field. While this has long been a problem, we had some momentum in the past generation, which led to at least token support for legal ethics. I believe that momentum either is gone or is dissipating...

I then thought about a comment from a colleague that legal ethics (and international legal ethics in particular) does not seem like a

"field" as much as a hodge-podge of topics. And finally, I thought about the 2009 AALS New Teachers Workshop, where Tom Morgan had graciously agreed to hand-deliver a set of materials that we had prepared for new PR teachers. Both of us were very surprised to learn that there was only one person at that Workshop who, during the subject matter breakout groups, identified themselves as a professional responsibility teacher and scholar.

Notwithstanding the above, when I look around at all of the interesting work that my friends and colleagues are doing, I have a hard time thinking that we are not a "field." To the extent that things sometimes look chaotic and all over the map, I assume this reflects our "middle age" stage of life, the wide diversity of our interests, and the fact that things often look their most chaotic right before one reaches true understanding. So although I don't quite see the unifying "field theory" that ties all of our work together, I continue to believe that we are indeed a "field" and that we have much to learn and share with each other.

And that brings me to my final point, which perhaps will sound like my past Chair's columns. Our Section currently has 851 members, but only 47 people have signed up for the AALS Discussion listserv. I am confident that some of the 851 Section members do not work primarily in the field of professional responsibility but want to follow ethics developments so that they can include these developments in their work in other areas; this is a sentiment I applaud. But I am sure that there are more than 47 individuals who do think of themselves as part of this field. I'd like to encourage those individuals who have not yet done so to sign up for the discussion listserv and to start using it to share conference notices and in other creative ways that will build community. It's not a burdensome list – right now, we are probably averaging about 1 message per month. If

you're interested, follow the instructions on the Section's webpage at <https://connect.aals.org/p/co/ly/gid=145>

So in conclusion, I hope that we can honor our past while nurturing a vibrant new generation of professional responsibility scholars. Or perhaps that should be... allowing them to nurture those of us in the older generation. I hope to see many of you in New Orleans, where Assistant Professor Renee Knake has put together a "Hot Topics" panel on the 2009-2010 U.S. Supreme Court's lawyer regulation cases.

Laurel

SECTION ANNOUNCEMENTS

PROGRAMS OF INTEREST DURING THE 2010 AALS ANNUAL MEETING

Mark Your Calendars!

The following programs might be of special interest to Section Members:

Thursday, Jan. 7th, 8:45-5:00 pm: Workshop on [Pro Bono and Public Service](#)

Thursday, Jan 7th, 1:30-3:15 pm: [The United States Supreme Court's Increased Attention to the Law of Lawyering During the 2009-2010 Term: Mere Coincidence or Something More?](#)

Friday, Jan 8th, 10:30 am-12:15 pm: Section Business Meeting and Program: [The Transformative Effect of International Initiatives on Lawyer Practice and Regulation: A Case Study Focusing on FATF and Its 2008 Lawyer Guidance](#)

Friday, Jan 8th, 4:00-5:45 pm: [Overcoming the Difficulties of Teaching Negotiation Ethics](#)

Friday, Jan. 8th, 7:30 pm, Palace Café: Section dinner, RSVP by Dec. 27, 2010 to LTerry@psu.edu.

SECTION ELECTIONS DURING THE 2010 AALS ANNUAL MEETING

During the business meeting at the close of the Section's program at the 2010 AALS Annual Meeting, Section members will be asked to elect new members of the Executive Committee, a Secretary, and a Chair-Elect. According to the Section's Bylaws, Susan Carle (American), who is the current Chair-Elect, will automatically become Chair of the Section.

At that time, the Executive Committee will move the election of a slate of candidates recommended to it by the Nominations Committee. Both committees recommend the election of Peter Joy, Washington University in St. Louis, as Chair Elect, and the retention of Carol Needham, St. Louis University, as Secretary. The following are the nominees for the Executive Committee:

Sande Buhai, Loyola University Los Angeles,
Ben Cooper, University of Mississippi,
Louise Hill, Widener,
David Hricik, Mercer,
Camille Nelson, Hofstra,
Margaret Raymond, University of Iowa, and
Jack Sahl, Akron.

If elected, this slate will join Executive Committee Members Barbara Glesner Fines, University of Missouri Kansas City, Samuel J. Levine, Pepperdine University School of Law, Peter Margulies, Roger Williams University School of Law, Andrew Perlman, Suffolk University Law School, Ted Schneyer, The University of Arizona James E. Rogers College of Law, and Teri Dobbins, Saint Louis University School of Law.

The criteria the Committee used to select nominees for the Executive Committee were as follow: 1) the Section usually should not have more than one person on the Executive Committee from the same law school, and 2) the Section should strive for the greatest representation possible taking into account a mix of faculty from private and state schools, geography, gender and race/national origin diversity, classroom/clinical mix, and also including newer as well as more experienced teachers and scholars. In addition, each member of the Nominations Committee gave more or less weight to other factors such as field of research, personal knowledge of one's work, previous expressions of interest, leadership in organizational activities, and collaborative skills where known. Those interested in serving on the Executive Committee in the future should contact the incoming chair Susan Carle, the Washington School of Law at American University, scarle@wcl.american.edu.

THE ABA ETHICS COMMITTEE, 2009 – 2010

By Barbara S. Gillers
(Adjunct Professor of Law,
New York University School of Law
Fordham Law School)

Greetings!

How fortunate I am to succeed Ted Schneyer as the Section's liaison to the ABA Committee on Ethics and Professional Responsibility. I bring enthusiasm, experience teaching professional responsibility at NYU (in New York City and Singapore) and at Fordham, and many years of law practice. Among other things, I've advised lawyers and law firms on professional responsibility issues and served as the Chair of the Professional & Judicial Ethics Committee of the Association of the Bar of the City of New York. You can learn more about me at

www.nyu.edu/facultyprofiles . More importantly, I am eager to serve you, the Professional Responsibility Section, and the ABA Committee, whose work I have followed for years.

The ABA Ethics Committee consists of ten voting members, two ABA staff members, and several liaisons. In addition to me, there are liaisons from the ABA Board of Governors, the Association of Professional Responsibility Lawyers, the National Organization of Bar Counsel, and the ABA General Practice, Solo and Small Firm Division. Liaisons contribute to the work of the Committee principally by proposing, debating and drafting opinions, rule changes, and rules commentary. Liaisons do not vote. My expenses are not reimbursed by the ABA. I do not speak for the AALS.

The Committee is hard-working. This year five two-day meetings and seven conference calls are already scheduled. Memos, drafts, and documents are circulated by email. Debate is energetic, knowledgeable and collegial. Topics have included proposed opinions, changes to the judicial conduct rules, amendments to the m Model Rules, and ways to contribute to the work of the 20/20 Commission. You can learn more about the 20/20 Commission at www.abanet.org/ethics2020

The Committee has issued two formal opinions since June.

Formal Opinion 09-454 *Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense* (July 8, 2009): The disclosure obligations imposed on prosecutors by Rule 3.8(d) are more extensive than the obligations imposed by the due process clause, as interpreted by the Supreme Court in *Brady v. Maryland*. In part because the government is required to seek justice, not simply victory, the ethical obligation requires disclosure of information and evidence favorable to the

defense “without regard to the anticipated impact of the evidence or information on a trial’s outcome.”

The disclosure obligations under 3.8(d) include evidence and information that “tends to exculpate the accused when viewed independently,” as well as evidence and information that “tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.” The material need not be admissible. It must be turned over “as soon as reasonably practical.” Supervisory lawyers must ensure that subordinate prosecutors are adequately trained on this obligation. Internal office procedures must facilitate compliance. Prosecutors must seek a protective order if they wish to limit their 3.8(d) disclosure obligations.

Formal Opinion 09-455 *Disclosure of Conflicts Information When Lawyers Move Between Law Firms* (October 8, 2009): Lawyers changing firms may reveal information about clients and matters that is otherwise protected by Rule 1.6. The disclosure must be “no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts.” The disclosure must not compromise the attorney-client privilege or otherwise prejudice a client or former client. The law firm receiving the information has a duty not to disclose the information and must restrict its dissemination within the firm to “persons assigned to or involved in the conflicts analysis with respect to the particular moving lawyer.”

Finally, an invitation: Write me any time with your suggestions, thoughts, comments, or proposals about the work of the Committee at barbara.gillers@nyu.edu. I’ll keep you posted through this column and occasionally on the Section’s listserv. Keep in touch.

MEMBER NEWS

The *San Diego Law Review* plans to publish a memorial issue in honor of Professor **Fred Zacharias**, Herzog Research Professor of Law, to commemorate his immense contribution to the academic community and to the field of legal ethics. For details contact Annie Macaleer, Editor-in-Chief of the *San Diego Law Review* or Bruce Green, Louis Stein Professor at Fordham Law School.

2009-10 is proving a big year for legal ethics programs at Boston University School of Law. Following up on its fall semester conference on Ronald Dworkin’s forthcoming book, *Justice for Hedgehogs*, BU School of Law will hold “*Rights, Equality, and Justice*”: A Conference Inspired by the Moral and Legal Theory of Professor David Lyons on March 12 and March 13, 2010. Also this spring, BU will host its Max M. Shapiro Lecture, an annual event dedicated to the memory of Mr. Shapiro, a lawyer who was dedicated to examining the place of legal ethics in trial advocacy.

In the summer of 2010, **Frank H. Wu**, Professor at Howard Law School, will teach again at Peking University School of Transnational Law, a unique English-language JD program opened by the most prestigious institution of higher education in mainland China on its southern graduate campus. This is a complete law school started a year ago with Jeff Lehman, the former dean of Michigan Law School and former president of Cornell, as the founding Chancellor. Frank will teach Professional Responsibility, which is offered in the first year.

On October 17, 2009, **Melissa Heames Weresh**, Professor of Law at Drake University, accepted the 2009 Warren E. Burger Writing Competition Prize at an awards ceremony in the chambers of the U.S. Supreme Court in Washington, D.C. Melissa

received this award for her essay *I'll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, which will be published in the *South Carolina Law Review*. Melissa's essay examines the professional identity development of novice lawyers.

The Warren E. Burger Writing Competition seeks to encourage outstanding scholarship that "promotes the ideals of excellence, civility, ethics and professionalism within the legal profession." A distinguished panel of law scholars selected Melissa's essay in a blind contest, and **Kenneth Starr**, Dean of the Pepperdine University School of Law and a former law clerk for Chief Justice Burger, presented her the award at an event hosted by Justice Antonin Scalia.

Coincidentally, two days after the ceremony, the *National Law Journal* featured an interview with Melissa on her efforts to "get law students and young attorneys to think twice before they hit send on an e-mail, post a photo to their Facebook pages or update their Twitter accounts."

As good things seem to come in threes, Melissa also just had a new book released by the National Institute for Trial Advocacy. Co-authored with Drake law professor **Lisa Penland**, *Professionalism in the Real World: Lessons for the Effective Advocate* is "relevant and practical" and "walks the reader through the application of the Model Rules of Professional Conduct in everyday situations." Melissa and Lisa "provide countless humorous and heartening real-life examples of the ethical missteps of the unwary attorney" as their book discusses ethical and procedural rules, communication, advocacy and transactional lawyering. Useful advice and

checklists throughout the book also guide lawyers from the early stages of client engagement to appeals.

RESOURCES FROM THE ABA CENTER FOR PROFESSIONAL RESPONSIBILITY

The ABA Center for Professional Responsibility has released its 2010 Compendium of Professional Responsibility Rules and Standards. Law professors interested in reviewing this publication for possible use in an upcoming class can contact the ABA Service Center at 800-285-2221 to request a desk copy.

Also, if you're looking for research, hypothetical examples, or the most up-to-date information for your class, start with ABA ETHICSearch. Lawyers with expertise on professional responsibility law are available to help you find what you need through this free service from the ABA. Call 800-285-2221 (Option 8), e-mail ethicsearch@staff.abanet.org or visit the Web site at <http://www.abanet.org/cpr/ethicsearch> and complete the online inquiry form.

If you're an ABA member new to teaching professional responsibility (adjunct or regular), the Center for Professional Responsibility is offering a free one-year membership (\$100 value). Learn about the Center and its many member resources including online ethics opinion libraries, articles and conference materials, a subscription to *The Professional Lawyer* magazine, revised editions of the ABA Model Rules of Professional Conduct as issued, news and updates, and discounts on conferences and CLE programs.

Call for authors! *The Professional Lawyer* magazine is always interested in articles for this nationally distributed publication. Contact Editor Art Garwin at garwina@staff.abanet.org or 312-988-5294.

CASELAW UPDATE

By Professor Margaret Raymond
(University of Iowa College of Law)

Admission

Florida Board of Bar Examiners re: Consideration of the Final Report of the Character and Fitness Commission (July 21, 2009).

The Florida Board of Bar Examiners considered a recommendation from the Character and Fitness Commission regarding the use of personal websites in its background investigation of bar applicants. The Board decided not to request access to all applicants' personal Facebook and/or MySpace pages, but to investigate such sites on a case-by-case basis for applicants who are required to reestablish rehabilitation, have a history of substance abuse or dependence, have significant candor concerns, have a history of UPL allegations, have worked as Certified Legal Interns, reported self-employment in a legal field, or reported employment as an attorney pending admission, and applicants who positively responded to the question regarding involvement in an organization advocating the overthrow of the government of the United States or of any state or political subdivision.

Wiesmueller v. Kosobucki, 571 F.3d 699 (7th Cir. 2009).

Plaintiffs, graduates of out-of-state law schools who wished to practice law in Wisconsin, claimed that the "diploma privilege" that permits in-state law graduates

to be admitted to the bar without taking the bar examination discriminates against out-of-state law graduates in violation of the Commerce Clause. The Seventh Circuit (Posner, J.) held that the diploma privilege issue did state a claim on which relief could be granted, and remanded the case to the district court for further proceedings.

Conduct prejudicial to the administration of justice

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court v. Koenig, 769 N.W.2d 378 (Neb. 2009).

Koenig's paralegal, Garrison, was charged with driving without a valid registration. Koenig sent a letter to the deputy county attorney assigned to the case telling him that the newly elected County Attorney was in violation of the same law. He included a photograph of the County Attorney's license plate and a "Motion to Appoint Special Prosecutor," which he said he would file if Garrison's case was not dismissed. The letter concluded "Obviously, these motions are only proposed. Can't you dismiss [this case]? Our lips, of course, are forever sealed if [Garrison's] case gets dismissed." Koenig sent another request for settlement and enclosed a motion to dismiss for selective prosecution based on the fact that the County Attorney was engaged in the same conduct. Ultimately, the state appointed another prosecutor to handle Garrison's case, and Koenig never made any of the threatened motions. Koenig was disciplined for engaging in conduct prejudicial to the administration of justice. While Koenig argued that he was simply engaging in zealous negotiation of a plea bargain, the court found that it was "a violation of the rules of professional conduct...to offer to a prosecutor to stay quiet about something the prosecutor has done (or is doing) in exchange for dismissing a charge that has been lodged against one's client."

The court also held that Koenig had violated Nebraska Ct. Rule of Prof. Conduct 3-508(4)(e), which states that a lawyer may not “state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law,” and that his conduct reflected adversely upon his fitness to practice law. Koenig was suspended for 120 days.

Confidentiality and privilege

Commissioner of Revenue v. Comcast Corp., 901 N.E.2d 1185 (Mass. 2009).

Comcast was the successor company to US West, which engaged in a transaction involving the sale of stock of an acquired company under an antitrust settlement. US West’s in-house counsel retained accountants at Arthur Andersen to advise the client as to the possible Massachusetts tax law consequences of the stock sale. The accountants prepared various drafts of the requested memorandum. Subsequently the Commissioner of Revenue began an audit of Comcast and the transaction discussed here and requested documents. Comcast declined to produce the Andersen memorandum and its various drafts, claiming privilege and work product. The court held that the privilege did not apply because the accountants were not assisting in-house counsel in communicating with his client; instead, they were simply providing additional legal and tax advice. It did, however, hold that the memoranda were protected as work product. The memoranda were prepared “because of the prospect of litigation,” addressing the concern that the state of Massachusetts would challenge the tax treatment of the transaction. The request to Andersen asked them to discuss “the pros and cons of the various planning opportunities and the attendant litigation risks.”

ABA Formal Op. 09-455, Disclosure of Conflicts Information When Lawyers Move Between Law Firms

This opinion dealt with the tension between the duty of confidentiality and the need for extensive conflicts checking when a lawyer moves from one firm to another. The opinion recognized that information about “the persons and issues involved in a matter” is protected by Rule 1.6 and that no exception to that rule clearly applies to these kinds of disclosures. Nonetheless, it concluded that disclosure of the “basic information needed for conflicts analysis” should be permitted, without the client’s informed consent. Otherwise, it would be impossible to comply with the conflicts rules. However, such disclosure should be “no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest.” In those rare situations in which the identity of the client or the nature of the representation is protected by the attorney-client privilege, that information should not be disclosed. The opinion notes that determining whether matters are “substantially related” under Rule 1.9 may require more extensive information, and that the lawyer may not disclose such information without consent. The opinion also appears to approve the use of an “intermediary” lawyer to review and analyze conflicts information.

Conflicts

Idaho v. Severson, 215 P.3d 414 (Idaho 2009).

Severson was charged with murdering his wife. He was represented by attorney Frachiseur, who worked at the Elmore County Public Defender’s Office. Severson complained that Frachiseur had a conflict of interest because another public defender, Ratliff, had represented the victim’s mother in her civil case involving the collection of the

victim's life insurance. The insurance case turned on whether Severson had slain the victim. The court held that while Ratliff had a concurrent conflict of interest and could not have represented Severson and the victim's mother concurrently, Ratliff's conflict should not be imputed to the entire public defender's office automatically. Instead, the court should consider on a case-by-case basis whether there was a "potential conflict of interest and a significant likelihood of prejudice." The court held that the office had screened Ratliff from the case, minimizing the likelihood of prejudice, and held that there was no indication that the conflict had resulted in prejudice to Severson and, accordingly, that the conflict did not require disqualification of Severson's lawyer.

Utah v. McClellan, 216 P.3d 956 (Utah 2009).

McClellan was charged with rape. Hadfield undertook to represent him and appeared with him at his preliminary hearing and arraignment. Hadfield then left private practice and joined the county attorney's office that was prosecuting McClellan. Many years and much procedural confusion later, McClellan claimed that it was ineffective assistance for his lawyer to fail to move to disqualify the county attorney's office on the ground that Hadfield's joining the office created a conflict of interest. The court held that under the circumstances there should not be a per se rule of disqualification; while the prosecutor's office should be assumed to be privy to confidences known by the former defense lawyer, the prosecutor should be able to rebut this presumption by showing the use of effective screening procedures. In this case, however, the prosecutor made no showing at all that Hatfield had been screened from the case. The court further held that, owing to the "egregious mismanagement of McClellan's case," (including the twenty years it took to provide McClellan with a first appeal), that prejudice would be presumed; the

court record of the case had been destroyed and the court viewed it unfair to require McClellan to prove prejudice without the necessary record.

Constitutional Law

Hersh v. United States, 553 F.3d 743 (5th Cir. 2008); Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785 (8th Cir. 2008), cert. granted, 129 S. Ct. 2766 and 129 S. Ct. 2769 (2009), docket nos. 08-1119 and 08-1225.

The issue in these two cases is whether an attorney is a "debt relief agency" under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA), and whether the provisions of BAPCA that preclude a debt relief agency from advising an assisted person to incur additional debt in contemplation of bankruptcy may constitutionally be applied to lawyers. In *Milavetz*, the CA8 held that an attorney could be a "debt relief agency" and that the provision prohibiting speech was overbroad as applied to attorneys. In *Hersh*, the CA5 agreed that lawyers were debt relief agencies, but held that the statute could be construed to avoid constitutional problems. The Supreme Court has granted review in *Milavetz*, which will be argued in December.

Discipline

In the Matter of Disciplinary Proceedings Against Brandt, 766 N.W.2d 194 (Wis. 2009).

Wisconsin Supreme Court holds that multiple convictions for OWI (operating while intoxicated) on five separate occasions violated a prohibition on "committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

Malpractice

National Union Fire Ins. Co. of Pittsburgh v. Wuerth, 913 N.E.2d 939 (Ohio 2009).

Nationwide Insurance insured several hotels that were damaged by Hurricane Bonnie. Nationwide hired adjusters to provide claims adjustment services, but quickly discharged them, claiming that they had negligently overstated the damage to the hotels. Nationwide sued the adjusters; National Union was the adjusters' insurer. National Union hired the firm of Lane, Alton & Horst, LLC to defend the adjusters. Attorney Richard Wuerth was the partner assigned to the case. The case went to trial. Wuerth collapsed ten days into the trial; the court denied a mistrial and the trial went forward with other lawyers from Lane Alton. National Union lost and ultimately had to pay \$8.25 million. National Union filed a malpractice suit against Wuerth and Lane Alton in federal district court. It did not name any other individual lawyers in the complaint. The court dismissed the claim against Wuerth because the one-year statute of limitations had already run against him, and held that a legal malpractice claim could not be maintained directly against a law firm where there was no viable claim against a relevant principal or employee of the firm. The CA6 certified the following question to the Ohio Supreme Court: "Under Ohio law, can a legal malpractice claim be maintained directly against a law firm when all of the relevant principals and employees have either been dismissed from the law suit or were never sued in the first instance?" In this opinion, the Ohio Supreme Court answered the certified question in the negative. It concluded that a law firm does not engage in the practice of law and therefore cannot commit legal malpractice; the court analogized to the medical malpractice area, in which it has held that only individuals can be liable for medical malpractice. It also held that a law firm cannot be vicariously liable for

malpractice unless one of its attorneys is, citing Section 58 of the Restatement of the Law Governing Lawyers.

Sarbanes-Oxley

Van Asdale v. International Game Technology, __ F.3d __ (9th Cir. 2009), 209 WL 2461906.

IGT employed the Van Asdales, both lawyers, who reported to the company's general counsel. They were terminated and claimed that they were discharged for reporting possible shareholder fraud in connection with an IGT merger. The court set out the requisites of a Sarbanes-Oxley retaliatory discharge claim, holding that the employee must make out a prima facie case (that the employee engaged in protected activity or conduct, the named person knew or suspected that the employee engaged in the protected activity, the employee suffered an unfavorable personnel action, and the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action) and held that, under the circumstances, the Van Asdales had made out a prima facie case and that IGT could not, on the summary judgment record, show that it would have terminated them even absent protected activity. The court reversed the District Court's grant of summary judgment to IGT on the Sarbanes-Oxley claim.

Technology

Philadelphia Bar Ass'n Professional Guidance Committee Op. 2009-02 (March 2009).

A lawyer wished to examine a witness's Facebook and MySpace pages. The lawyer asked if it would be proper for the lawyer to ask a person "whose name the witness will not recognize" to seek to "friend" the witness in order to obtain access to information on the

pages. The person would use a true name, but would not disclose the connection to the lawyer or the true purpose of the “friending.” The opinion first noted that under Rules 5.3 and 8.4, the lawyer would be responsible for the conduct even though it would be undertaken by a third party. It then concluded that the planned communication was deceptive in violation of Rule 8.4(c) because it omitted a highly material fact—that the asker is seeking access to the page only to share information with the lawyer for use in the lawsuit. The opinion also concludes that this would be a false statement of material fact under Rule 4.1.

Vermont Ethics Op. 2009-1

Yet another in the extensive series of ethics opinions regarding the disclosure and use of metadata. The opinion first reached the uncontroversial conclusion that a lawyer sending documents in electronic form has a duty to exercise reasonable care to ensure that metadata containing confidential information is not disclosed during the transmission process. It then turned to the duty of the receiving lawyer. It concluded that it is not improper for a receiving lawyer to “mine” a document sent by opposing counsel for metadata; such a rule would “in essence, represent a limit on the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel.”

UPL

Cincinnati Bar Ass’n v. Foreclosure Solutions, L.L.C., 914 N.E.2d 386 (Ohio 2009).

Foreclosure Solutions worked with homeowners in foreclosure to assist them in renegotiating their mortgages with their lenders. The customers paid between \$700 and \$1000 for the company’s services. The agreement customers signed with Foreclosure Solutions permitted the company to negotiate

on the customer’s behalf with creditors. Foreclosure Solutions directed the customer to set up a savings account and make deposits to it; the company would then use the money to negotiate with the mortgage lender to keep the customers from losing their homes to foreclosure. The agreement also specified that bankruptcy was the customers’ “last alternative.” The court concluded that Foreclosure Solutions “implemented a one-size-fits-all plan to protect customers’ legal interests” even though they lacked legal skills and training, and held that “nonlawyers attempting to advise debtors of their legal rights and the terms and conditions of settlement in negotiations to avoid pending foreclosure or other collection proceedings” engage in UPL. The court recognized that there was a difference between “nonlawyers permissibly providing financial advice in the course of credit counseling and nonlawyers impermissibly advising debtors as to their best legal remedy in response to the filing of foreclosure proceedings,” but did not go any further in defining the difference. The court enjoined the company and its president from engaging in UPL and imposed a civil penalty of \$50,000 even though the record was “devoid of any evidence that the clients specifically referenced in this matter were harmed.”

(A very warm welcome to Margaret Raymond as the new Caselaw Update columnist for the Section Newsletter. I will miss having the opportunity to work with you on the newsletter. Your column is off to an excellent start! Thank you for your service to the Section.

The Ed.)

DEVELOPMENTS IN THE REGULATION OF LAWYERS

By Roy Simon
(Hofstra University School of Law)

The ABA, the states, Congress, and other entities keep changing and adding to the rules that regulate or guide lawyers. This column summarizes some of the most significant recent developments and previews some changes that are in the works.

NATIONAL DEVELOPMENTS

American Bar Association Developments

The American Bar Association (ABA) is the world's largest professional organization, with nearly 400,000 members. This section reports on significant ABA developments that have occurred during the past year or are on the agenda for the future.

ABA Model Rules of Professional Conduct:

During the past year, the ABA has twice approved landmark amendments to ABA Model Rule 1.10 (the basic rule on imputation of conflicts of interest). In February 2009, the ABA House of Delegates approved a screening provision in Rule 1.10(a). The provision was intended to facilitate the movement of lateral attorneys by enabling law firms to cure conflicts with the lateral's former clients (*i.e.*, conflicts arising for the lateral under Rule 1.9(a)) or with clients and former clients of the lateral's prior firms (*i.e.*, conflicts arising for the lateral under Rule 1.9(b)) via timely screening.

Unfortunately, the literal language of the February 2009 version of amended Rule 1.10(a) was so broad that it would have permitted law firms to oppose their own former clients by screening off the lawyers who had worked on the matters at the firm. For example, if Lawyer A at Cravath &

Cromwell formerly represented Acme Widget in a product liability matter and Lawyer B at the same firm later wanted to represent a client in a new product liability suit against Acme Widget regarding the same product (*i.e.*, the firm wanted to oppose a former client in a substantially related matter), the February 2009 version of Rule 1.10(a) would allow the firm to avoid imputation of Lawyer A's Rule 1.9(a) conflict by screening off Lawyer A, even if Acme Widget objected. No one had intended the screening provision to allow a law firm to turn against its own former clients, so after the February meeting the ABA Standing Committee on Ethics and Professional Responsibility went back to the drawing board to make clear that the screening provision could avoid imputation of former client conflicts arising under Rules 1.9(a) and (b) only if those conflicts were imported by laterals. At the ABA's August 2009 Annual Meeting, revised language for Rule 1.10(a) was adopted on the consent calendar (signifying no opposition). We summarize the history of the February 2009 and August 2009 screening provisions in the Legislative History following ABA Model Rule 1.10.

ABA 20/20 Commission: More changes to the ABA Model Rules of Professional Conduct are in the works. In August of 2009, ABA President Carolyn Lamm announced the creation of an Ethics 20/20 Commission whose mission is to comprehensively review the ABA Model Rules of Professional Conduct (as the Ethics 2000 Commission did from 1997-2002). The Commission will also look at the larger issue of how state and federal authorities should regulate the U.S. legal profession in the context of globalization and rapid advances in information technology. The 20/20 Commission is expected to study these issues for several years before issuing a report and recommendations. The co-chairs of the Commission are former U.S. Deputy Attorney General Jamie Gorelick of

Washington, D.C. and attorney Michael Traynor of California, Chair of the Council of the American Law Institute. Three law professors -- Stephen Gillers of N.Y.U., Carole Silver of Georgetown, and Ted Schneyer of Arizona -- are members of the Commission.

On November 19, 2009, the 20/20 Co-Chairs Gorelick and Traynor circulated a "Preliminary Issues Outline." Stripped of footnotes and commentary, the Outline provides as follows:

I. Issues That Arise Because U.S. Lawyers Are Regulated by States but Work Increasingly Across State and International Borders

A. Regulations Governing Admission to Practice

1. Admission of U.S. Lawyers to Practice in Other Countries
2. Admission of Foreign Lawyers to Practice in the U.S.
3. What are the Pros and Cons of Proposals for State-Based National Licensure?

B. Outsourcing

C. Conflicts of Interest

1. The Current Model Rules
2. Best Practices

D. Confidentiality

1. Model Rule 1.6
2. Inadvertent Disclosure and Waiver

E. Choice of Law

F. Alternative Business Structures

G. Law Firm or Entity Regulation

H. International Arbitration

II. Issues That Arise in Light of Current and Future Advances in Technology That Enhance Virtual Cross-Border Access

A. Whether the Model Rules Unnecessarily Impede a Lawyer or Law Firm's Ability to Employ New Technologies in Representing Clients

B. Protection of Clients

C. Social Networking; "Unbundling," and "Opensourcing" of Legal Services

D. Lawyer Accountability and Accessibility of Public Information

III. Particular Ethical Issues Raised by Changing Technology

A. Access to Justice

B. Competence

C. Data Security and Confidentiality Issues

D. Jurisdictional Issues

The cover letter from Gorelick and Traynor said that "the number and nature of subjects in the Outline will change as its work progresses and comments are received" and that the order of subjects "is not intended to connote any prioritization of or Commission position on issues, nor is consideration of other topics omitted intended to be foreclosed." The Commission invited comments via e-mail at ethics2020@staff.abanet.org by December 31, 2009 and will post all written comments on its website. The Commission will consider the comments at its February 4, 2010 meeting in Orlando, Florida, which will be held in conjunction with the ABA Mid-Year Meeting.

Federal Statutes, Rules, and Regulations

Although the regulation of lawyers is primarily a matter of state law, Congress and

federal rule makers and policy makers also sometimes regulate lawyers. This section reports on federal developments relevant to the regulation of lawyers.

Proposed Legislation to Overturn Stoneridge: In *Stoneridge Investment Partners v. Scientific-Atlanta*, 552 U.S. 148 (2008), the Supreme Court held that §10(b) of the Securities Exchange Act of 1934 does not create a right of private action against aiders and abettors of securities law violations. The decision meant that private plaintiffs could not bring class actions based on §10(b) against lawyers who allegedly aided and abetted their clients in committing securities fraud. Under *Stoneridge*, only the government may sue aiders and abettors. However, on July 30, 2009, Senator Arlen Specter (D-Pa.) introduced a bill known as the Liability for Aiding and Abetting Securities Violations Act of 2009 ([S. 1551](#)) that would override *Stoneridge* by authorizing private plaintiffs to bring civil suits against anyone who "knowingly or recklessly provides substantial assistance" to a person engaged in fraud.

The bill would amend §20(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78t(e)) by adding the following sentence: "For purposes of any private civil action implied under this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of this title, or of any rule or regulation issued under this title, shall be deemed to be in violation of this title to the same extent as the person to whom such assistance is provided." The Senate Judiciary Subcommittee on Crime and Drugs, chaired by Sen. Specter, held a hearing on the bill on September 17, 2009.

Federal Rules of Civil Procedure: Proposed amendments to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure are now circulating that would extend work-product protection to a new category of testifying experts (such as treating physicians and

government accident investigators) who are currently not required to provide a disclosure report under Rule 26(a)(2)(B).

The proposed amendments to Rule 26(a)(2)(B) would

- (1) create a new requirement to disclose a summary of the facts and opinions to be addressed by such an expert witness, and
- (2) extend work-product protection to
 - (a) drafts of the new disclosures,
 - (b) drafts of 26(a)(2)(B) reports, and
 - (c) communications between an attorney and a trial witness expert (except communications that
 - (i) relate to compensation for the expert's study or testimony;
 - (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
 - (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

The amendments would apply only to experts who are expected to testify as trial witnesses. They would not relax the severe limitations on discovery regarding experts employed only for trial preparation who are not expected to testify at trial.

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

Litigation Regarding FTC's "Red Flags Rule": In October of 2007, the Federal Trade Commission (FTC) and various federal financial institution regulatory agencies adopted final rules on identity theft "red flags"

and address discrepancies. These rules implement §§ 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003 by requiring businesses that act as “creditors” to establish a program to prevent identity theft. The program must identify potential areas of vulnerability within a business and include policies for detecting and responding to various “red flags.”

Does this have anything to do with lawyers? One would think not, but the FTC took the position that lawyers are “creditors” under the rule because lawyers do not ordinarily bill clients until after providing services. The ABA lobbied vigorously against the application of the red flags rule to lawyers and law firms, and the FTC twice delayed enforcement of the rule to resolve this problem, but the FTC stated that it lacked authority to exempt any profession unless Congress expressly authorized it to do so.

The FTC’s position was attacked on two fronts. On August 27, 2009, the ABA filed suit against the FTC to enjoin the application of the Red Flags Rule to practicing lawyers. On October 20, 2009, the House of Representatives voted unanimously (400-0) for a bill exempting small law firms, accounting firms, and health care businesses from the red flag rules, and requiring the FTC to issue new regulations allowing any business to apply for an exemption.

On October 30, 2009 – two days before the red flag rule was scheduled to take effect -- the United States District Court for the District of Columbia ruled that the FTC may not apply the Red Flags Rule to attorneys. The Commission immediately announced that it was delaying enforcement of the Rule regarding entities under its jurisdiction until June 1, 2010. More information on the Red Flags Rule is available on the FTC’s web site at www.ftc.gov/redflagrule. (In a delicious bit of irony, a tab at the top of the FTC red flag

site said, “File a complaint” -- I guess the ABA took that literally!)

Securities and Exchange Commission: On October 6, 2008, about six weeks after the United States Department of Justice took parallel steps, the SEC’s Division of Enforcement published an enforcement manual instructing SEC staff attorneys not to request attorney-client privilege waivers during investigations of potential securities law violations. The manual was prepared by the enforcement division’s Office of Chief Counsel and is posted on the SEC’s Web site at

www.sec.gov/divisions/enforce/enforcementmanual.pdf.

Federal Deposit Insurance Corporation: On November 21, 2008, the Federal Deposit Insurance Corporation (FDIC) clarified the Temporary Liquidity Guarantee Program (TLGP) to include IOLTA accounts. Thus, IOLTA accounts became fully insured for an unlimited amount. The provision took effect immediately and (after some extensions) remained valid through June 30, 2010. The hundreds of public comments that led to this change, and the FDIC’s reaction to those comments, are summarized in 73 Fed. Reg. 72256-72257 (Nov. 26, 2008).

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 (which drafted Rules 5.5 and 8.5), and the 2003 amendments to ABA Model Rules 1.6 and 1.13. Over the past year or so, six jurisdictions have comprehensively

amended their ethics rules: Alaska (effective April 15, 2009); Illinois (effective January 1, 2010); Kentucky (effective July 15, 2009); Maine (effective August 1, 2009); New York (effective April 1, 2009); and Vermont (effective September 1, 2009).

Looking at the aggregate national picture, since the Ethics 2000 Commission released its final report in 2001, an impressive forty-three (43) jurisdictions have significantly revised their rules (AK, AL, AR, AZ, CO, CT, DE, DC, FL, IA, ID, IL, IN, KS, KY, LA, MD, ME, MN, MO, MS, MT, NE, NC, ND, NH, NJ, NM, NY, NV, OH, OK, OR, PA, RI, SC, SD, UT, VA, VT, WA, WI, WY); 5 states have circulated proposed rules that remain pending (CA, MI, TN, TX, WV); and 3 states have appointed review committees that have not yet issued their reports (GA, HI, MA). This is amazing. In the 1980s, except for a few years following the original adoption of the ABA Model Rules in 1983, few jurisdictions were actively reviewing their ethics rules, and amendments were infrequent and usually ad hoc rather than comprehensive. Today, most jurisdictions today actively review their ethics rules on an ongoing basis – many have standing committees to monitor the Rules of Professional Conduct – and comprehensive amendments every five or ten years have become the norm. 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.

Insurance disclosure rules: Another broad trend is the adoption of ethics rules or court rules requiring lawyers to disclose whether they carry professional liability insurance. In August 2004, the ABA adopted a Model Court Rule on Insurance Disclosure. At that time, only a few states required lawyers to disclose their malpractice insurance coverage. Today, at least 25 states require some form of malpractice insurance disclosure, either on

their bar registration statements (18 states -- AZ, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA, and WV) or directly to clients (6 states -- AK, CA, NH, OH, PA, and SD). At least 4 additional states (NY, TX, UT, and VT) are actively considering some form of legal malpractice disclosure rule. So far, only four states (AR, CT, FL, and KY) have rejected the ABA Model Court Rule on Insurance Disclosure. For a state-by-state chart on rules governing disclosure of insurance coverage, see www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

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

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

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

For detailed information about developments in particular states, visit the web sites given after each state listed below, or find a link to individual state resources at www.law.cornell.edu/ethics/listing.html or www.abanet.org/cpr/links.html.

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

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

California (www.calbar.ca.gov, www.courtinfo.ca.gov, and www.leginfo.ca.gov): Things are cooking out in California. Since the Spring 2009 Newsletter, the California Supreme Court has added two new rules of professional conduct, and has taken a giant step toward the first comprehensive revision of the California Rules of Professional Conduct since 1989.

Regarding the two new rules, effective August 28, 2009, the Court added Rule 1-650, entitled “Limited Legal Service Programs,” which is similar to ABA Model Rule 6.5 (Nonprofit and Court-Annexed Limited Legal Services Programs). The Rule relaxes conflict of interest imputation rules when a lawyer provides short-term limited legal services to a client under a program sponsored by an organization identified in the Rule, where neither the lawyer nor the client expect the lawyer to provide continuing representation. And effective January 1, 2010, the Court added a long-debated rule, Rule 3-410, entitled “Disclosure of Professional Liability Insurance,” which requires lawyers who do not carry professional liability insurance to disclose that fact to clients under most circumstances.

Regarding comprehensive changes, the State Bar of California’s Commission for the Revision of the Rules of Professional Conduct, assisted by Professor Kevin Mohr of Western State, has been working since 2001 to make the California Rules more like the ABA Model Rules. The Commission issued more than 50 draft rules, in four batches (2006, 2007, 2008, and most recently in July of 2009), and circulated them for public comment. In November of 2009, the State Bar’s Board of Governors approved 35 of the proposed rules, but sent proposals on sex with clients and conflicts of interest (especially advance waivers) back to the Commission for more work, and tabled discussion of proposed rules on reporting the egregious behavior of another attorney and business transactions and adverse interests until its January meeting. The State Bar expects to complete the redrafting and renumbering during the summer of 2010 and to submit a full set of proposed rules to the California Supreme Court shortly after that.

Florida (www.flabar.org or www.floridasupremecourt.org): In *In Re: Amendments to the Rules Regulating The Florida Bar*, (Fla. Nov. 19, 2009), effective February 1, 2010, the Florida Supreme Court approved the Bar’s October 7, 2008 petition proposing various changes to the Florida Rules of Professional Conduct. The Court modified Rule 4-3.3 to conform to the 2002 changes to ABA Model Rule 3.3, and added language to Rule 4-1.5 requiring that nonrefundable fee arrangements be confirmed in writing. An amended Rule 4-7.2(c) prohibits lawyer advertisements from using sounds that are “manipulative” or “likely to confuse the listener,” and an addition to the Comment explains that this “precludes, for example, the sound of sirens or car crashes.” But this would actually liberalize Florida’s existing iron fist advertising rules – Rule 4-7.5(b) currently prohibits “any background sound other than instrumental music.”

(Emphasis added.) The Court also approved a raft of relatively minor changes (*e.g.*, adding headings or clarifying phrases). However, the Court declined the Bar’s proposal to define the terms “retainer,” “flat fee,” and “advanced fee” in the Comment. The Court said that if the Bar wanted to define these terms, it should thoroughly study them and propose the new definitions as a portion of the rule, rather placing them in the Comment.

On another advertising front, *In Re: Amendments To The Rules Regulating The Florida Bar— Rule 4-7.6, Computer Accessed Communications*, (Fla. Nov. 19, 2009) (revising an earlier opinion), the Florida Supreme Court has held that lawyer web sites must comply with all advertising regulations except the requirement that they be submitted to the Bar for review. That means lawyer web sites may not make statements that characterize the quality of legal services being offered, provide information regarding past results, or use testimonials.

In April of 2009, after the first review of Florida admissions standards in fifteen years, the Character and Fitness Commission of the Florida Board of Bar Examiners (FBBE) issued a final report with three main recommendations. First, the Commission recommended that a convicted felon should *never* be admitted to the bar. (Currently, Rule 2-13.3 provides that a felon is not eligible to apply until the person’s civil rights have been restored.) Second, the Commission recommended that *every* disbarment be permanent, with no possibility of reinstatement – but to give some flexibility, the Commission issued a companion recommendation that would allow suspension for up to five years (rather than the current three years). Third, the Commission recommended expanding its current review of online personal web sites (like Facebook and MySpace), and suggested adding a question to the bar application requiring that bar

applicants must list all personal web sites and grant the bar examiners access to them.

In July of 2009, the full Florida Board of Bar Examiners considered the report and rejected the recommendation that convicted felons should never be admitted to the bar, deciding instead to leave that determination in the hands of the Florida Supreme Court. However, the Board also adopted a policy favoring investigation of social networking web sites for six categories of bar applicants: (1) applicants who must establish rehabilitation under Rule 3-13 “so as to ascertain whether they displayed any malice or ill feeling towards those who were compelled to bring about the proceeding leading to the need to establish rehabilitation”; (2) applicants with a history of substance abuse/dependence “so as to ascertain whether they discussed or posted photographs of any recent substance abuse”; (3) applicants with “significant candor concerns” including not telling the truth on employment applications or resumes; (4) applicants with a history of unlicensed practice of law allegations; (5) applicants who have worked as certified legal interns, reported self-employment in a legal field, or reported employment as an attorney pending admission “to ensure that these applicants are not holding themselves out as attorneys”; and (6) applicants who have positively responded to Item 27 of the bar application (which asks about involvement in an organization advocating the overthrow of a government in the United States) “to find out if they are still involved in any related activities.”

Finally, a lawsuit challenging the constitutionality of Florida’s lawyer advertising rules remains pending. See *Harrell v. Florida Bar*, 2008 WL 596086 (M.D. Fla.) (refusing to abstain and holding that both plaintiffs have standing).

Illinois (www.isba.org): The Illinois Supreme Court has comprehensively amended the

Illinois Rules of Professional Conduct effective January 1, 2010. The amendments incorporate most of the changes that were unanimously recommended by the Illinois State Bar Association way back in June of 2004. (What took so long? More than five years to review proposed amendments? Perhaps legal ethics is not very high on the Illinois Supreme Court's list of priorities – except when it comes to high-minded rhetoric, as in the Illinois Supreme Court's famous decision *Balla v. Gambro*, 145 Ill.2d 492, 584 N.E.2d 104 (1991), denying an in-house lawyer the right to file for retaliatory discharge after the lawyer was fired for threatening to report defective kidney dialysis equipment to the FDA.)

Louisiana (www.lsba.org): On October 1, 2009, new rules governing lawyer advertising finally took effect. The new rules were triggered by a 2006 Concurrent Resolution from the Louisiana Senate finding that lawyer advertising in the state had become undignified and posed a threat to the way the public perceives lawyers in the state. The original effective date of the amended rules was December 1, 2008, but in September and November of 2008, Public Citizen and some Louisiana personal injury lawyers filed a lawsuit in federal court challenging various provisions of the new rules on First Amendment and Due Process grounds. In response to the suit, the Louisiana Supreme Court twice delayed the effective date to allow the Louisiana State Bar Association and the Court to further study the constitutional issues. On August 3, 2009, the District Court issued a lengthy decision upholding most of the challenged rules but striking down Rule 7.5(b)(2)(c), Rule 7.6(d), and Rule 7.7's provisions imposing filing requirements for Internet advertising – see *Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 2009 WL 2390866 (E.D. La. 2009).

Maine
(www.courts.state.me.us/court_info/rules/rul)

es.html): Effective August 1, 2009, Maine adopted new Rules of Professional Conduct that use the format and numbering system of the ABA Model Rules of Professional Conduct. (Maine had previously followed unique rules not based on any ABA model or numbering system.) The new rules are based on a September 2007 report by Maine's Task Force on Ethics 2000. (The Reporter for the Task Force was Professor Louis Lupica of the University of Maine.) The proposed rules also conform to the language of the ABA Model Rules except where established Maine law and practice warranted divergence or variation. Materials about the rulemaking process that led to Maine's new rules are available at www.mebaroverseers.org/ethicsweb/ethicsmain.html.

Michigan (www.michbar.org): 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 was more than four years ago, 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, Opinions, and Resources").

Missouri (www.mobar.org): Last year, the Missouri Bar's Special Committee on Lawyer Advertising circulated proposed amendments to all of Missouri's rules governing lawyer advertising for comment, and sought the Bar's comments on the possibility of establishing a new Bar Committee to monitor compliance with the advertising rules. In January 2009, the Special Committee on Lawyer Advertising submitted final recommendations submitted to the Missouri Bar Board of Governors. The proposed rules and all comments from the Bar are posted on the Bar's website. The proposals are still pending.

Meanwhile, on the MCLE front, the Missouri Supreme Court has effectively doubled the hours of required ethics education. Specifically, Supreme Court Rule 15.05(f) now requires two hours of education in professionalism, ethics and malpractice prevention every year rather than the three hours every three years mandated by the old rule. However, Rule 15.05(e) goes the other direction – it now requires newly admitted or newly reinstated lawyers to obtain only two hours of professionalism, ethics and malpractice prevention education within 12 months of admission, rather than the old three hours.

New Jersey

(www.judiciary.state.nj.us/rules/apprprc.htm):

On November 2, 2009, effective immediately the New Jersey Supreme Court adopted a new Rule 7.1(a)(3) to address a lawyer's participation in publications like "Super Lawyers" or "Best Lawyers." The new subparagraph provides that a communication is false or misleading if it "compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: 'No aspect of this advertisement has been approved by the Supreme Court of New Jersey.'" The Supreme Court's Official Comment says that a truthful communication that a lawyer has received an honor or accolade is not misleading or impermissibly comparative if: "(1) the conferrer has made inquiry into the attorney's fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source."

The Supreme Court is still pondering a recommendation by the Court's Professional Responsibility Rules Committee (PRRC) to amend New Jersey Rule 5.5. The proposed amendment would allow out-of-state lawyers to practice occasionally in New Jersey in particular matters if they "associate" with a New Jersey lawyer who would be responsible (though would not necessarily actively participate). The Court has also postponed decision on a PRRC recommendation to exempt lawyers engaged in ADR from registering with the state bar and paying assessments.

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

New Mexico (www.nmbar.org): Effective November 2, 2009, New Mexico adopted an amended version of Rule 16-104 (equivalent to ABA Model Rule 1.4) that requires a lawyer to disclose directly to a client, in writing, if the lawyer does not have a professional liability insurance policy with limits of at least \$100,000 per claim and \$300,000 in the aggregate.

New York (www.nysba.org and www.courts.state.ny.us): On January 22, 2009, the Second Circuit heard oral argument in the appeal from *Alexander v. Cahill*, 634 F.Supp.2d 239 (N.D.N.Y. 2007), which struck down various New York lawyer advertising provisions that took effect in 2007. Although New York has now adopted a Model Rules format, the appeal retains vitality because the

new New York Rules of Professional Conduct contain all of the old advertising rules essentially verbatim, including the provisions that were declared unconstitutional.

Tennessee (www.tba.org): Effective January 1, 2010, in response to a petition filed in 2008 by the Tennessee Bar Association, the Tennessee Supreme Court adopted versions of ABA Model Rules 5.5 and 8.5 (permitting and regulating multijurisdictional practice). The Tennessee versions generally track the ABA Models but add four new paragraphs, including a new subparagraph (h), unrelated to MJP, that provides: “A lawyer or law firm shall not employ or continue the employment of a disbarred or suspended lawyer as an attorney, legal consultant, law clerk, paralegal or in any other position of a quasi-legal nature.”

Also effective January 1, 2010, the Tennessee Supreme Court has amended Rule 6.1 (Pro Bono Publico Service) to set an aspirational standard of fifty pro bono hours per attorney per year, and has adopted a new Rule 6.5 (Nonprofit and Court-Annexed Limited Legal Service Programs). Both rules closely track the ABA Model Rule equivalent. Separately, the court approved a new court rule to permit pro bono work by registered in-house counsel. However, the court did not adopt the Tennessee Bar Association’s proposal to require annual reporting of pro bono hours. Instead, the court took the reporting issue “under advisement” and referred the proposal to the Access to Justice Commission for its consideration and recommendation. The Tennessee Supreme Court is still pondering MJP rules proposed last year.

Also effective January 1, 2010, the Supreme Court adopted a new court rule, § 10.01, entitled “Registration of In-House Counsel.” The proposed, which is based on the ABA Model Rule for Registration of In-House Counsel, requires in-house counsel

who are licensed in other states to register with the state board of bar examiners, pay a registration fee, verify that they are in good standing in their home jurisdictions, and confirm that they are employed by a Tennessee entity.

At the same time, the Supreme Court adopted verbatim the ABA’s Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (the so-called “Katrina Rule”), which allows out-of-state attorneys to provide pro bono legal services to residents of disaster-affected areas, and allows displaced out-of-state attorneys to relocate temporarily to Tennessee while continuing to provide limited legal services that arise out of and are reasonably related to their home-state practice.

Finally, In June of 2008, in the first thorough examination of the rules since their adoption in March 2003, the Tennessee Bar Association Board of Governors authorized the Bar to circulate for public comment a proposed set of “refinements” to the Tennessee Rules of Professional Conduct in about twenty significant areas. The comment deadline was August 15, 2008. The proposals are available at www.tba.org/ethics/index.html.

Texas (www.texasbar.com): The Texas story on malpractice insurance disclosure is full of twists and turns. In 2008, the Texas State Bar’s Task Force on Insurance Disclosure voted 6-5 to recommend that Texas should *not* require Texas lawyers to disclose whether they have malpractice insurance. However, the Task Force also recommended by a 6 to 4 vote that if the Texas Supreme Court mandates some form of insurance disclosure, the court should do so in the form of an administrative rule (as opposed to a disciplinary rule), and that the insurance information should be posted on the State Bar’s web site. In June of 2008, the Texas State Bar’s Board of Directors forwarded the

Task Force's recommendation to the Texas Supreme Court.

On March 9, 2009, while the Task Force's recommendation was pending before the Supreme Court, a bill (H.B. 2825) was introduced in the Texas legislature that would require the Texas Supreme Court to adopt, by December 1, 2009, an insurance disclosure rule requiring lawyers to "(1) display in a prominent location in the attorney's place of business a notice stating that the attorney is not covered by professional liability insurance; or (2) provide notice of that information in another manner to the attorney's clients and prospective clients." On March 17, 2009, the bill was referred to the House Judiciary & Civil Jurisprudence Committee.

On June 1, 2009, the Texas Grievance Oversight Committee (which is independent of the Texas State Bar) recommended that the Supreme Court amend the Rules of Professional Conduct to require insurance disclosure directly to a client – see www.txgoc.com. And on June 23, 2009, the Chief Justice of the Texas Supreme Court the president and immediate past president of the Texas State Bar asking the Bar's Board to review the Bar Task Force's report again and make a new recommendation to the Supreme Court before February of 2010. Consequently, the Texas State Bar Board developed a process for obtaining input from attorneys and the public, including a web page with extensive background information, a series of public hearings, and a blog on which attorneys may post comments.

Virginia (www.vsb.org): At its October 16, 2009 meeting, the Virginia State Bar Council approved a proposed amendment to Comment 5 to Rule 4.2 to address the situation in which a law enforcement officer seeks legal advice from a Commonwealth's Attorney regarding whether the officer may obtain a statement from a defendant who is in custody, formally

charged, and represented by counsel, but who has waived his Miranda rights and wants to give a statement to a law enforcement officer without his counsel present. At the same meeting, the Council also approved a proposed new Rule 1.18 regarding prospective clients, virtually identical to ABA Model Rule 1.18.

On July 1, 2009, the Virginia State Bar Council sent the Virginia Supreme Court a proposed amendment to Rule 1.17(a) that would permit a lawyer who sold only part of a law practice to continue to practice law in the geographic area in areas of the practice that were not sold. On the same date, the Council asked the Supreme Court to support a bill pending in the Virginia Legislature to increase the penalty for certain types of UPL to a felony. The proposed legislation would amend §54.1-3904 to create a two-tiered structure, keeping the current language and misdemeanor penalty for lesser offenses, but describing more serious conduct (*e.g.*, a disbarred lawyer profiting from continued practice) and making that conduct a felony.

On March 23, 2009, the Virginia Supreme Court circulated a proposed amendment to Rule 7.4(d) for public comment. The proposed amendment would allow a lawyer to advertise a specialty certification without a disclaimer if the certification is granted by an organization that is currently accredited by the American Bar Association (ABA). Rule 7.4(d) would continue to require a disclaimer when advertising a certification granted by an organization that is not accredited by the ABA because, the proponents reason, such organizations lack the rigorous requirements set forth in the ABA accreditation process. Comments were due on May 9, 2009.

The Virginia Supreme Court is still considering proposed changes to Rules 1.9 and 1.11 of the Rules of Professional Conduct, which were approved by the Virginia State

Bar Council on March 1, 2008. The Court is also still considering a July 2008 proposal to adopt a “Katrina Rule” to govern Provision of Legal Services Following Determination of Major Disaster. The Virginia proposal generally follows the ABA Model Court Rule on this subject, with a few modifications.

Finally, in an item I missed last Spring, on October 17, 2008, the Virginia State Bar Council voted 60 to 11 to *reject* a proposal that would have required lawyers who are “regularly engaged in the private practice of law involving representation of clients (individuals or entities) drawn from the public” to obtain coverage of either (a) at least \$100,000 per claim with a minimum \$50,000 claim expense allowance outside the policy limits, or (b) at least \$200,000 per claim where claim expenses are inside the policy limits. (Oregon thus remains the only jurisdiction that requires lawyers to maintain professional liability insurance.)

(For the last five years, it has been my great pleasure to work with Roy Simon on this Newsletter. During this time, I have benefited from Roy’s insight, wisdom, determination, graciousness, and example. Thanks to Roy for his incredible dedication to the Section and to the Ethics Community generally.

The Ed.)

A TRIBUTE TO FRED ZACHARIAS 1953-2009

(Placed where his *Recent Scholarship* column has run for so long)

(Many of the quotations appearing here originally appeared on the Association of Professional Responsibility Lawyers web site and the Legal Ethics Forum and Criminal Law Professors blogs)

I had the honor of working with Fred Zacharias on the Newsletter for five years.

Fred was the epitome of efficiency, professionalism, and low maintenance. In those five years, I never had to check twice on the status of an article.

My impression was that Fred took life personally. Ironically, not enough people do. For Fred, both law and life were things that mattered. Neither was, unlike basketball, a sport Fred played, a game. Fred believed that he had a mission in the law and that it was an important one. He believed that prosecutors had a mission too and responsibilities more profound than winning. He never forgot that people had feelings, and he believed that that should affect one’s behavior.

When Fred’s friends and colleagues say, as they do below so frequently, that Fred “will be missed,” I think it is not simply an expression of personal loss but a recognition of the way Fred lived his life. I will miss knowing he’s out there.

-- Randy Lee

In Memory of Fred C. Zacharias, USD Herzog Research Professor of Law 1953- 2009

University of San Diego

Fred C. Zacharias, University of San Diego (USD) School of Law Herzog Research Professor of Law and nationally recognized figure in the field of professional responsibility, passed away on Sunday, November 8, 2009. He was 56.

Professor Zacharias joined the USD law faculty in 1990, teaching courses in constitutional law, criminal procedure and professional responsibility. During his tenure at USD, he was named Herzog Scholar (1995-96), received the Thorsnes Prize for Outstanding Legal Scholarship (2003-04), named the Class of 1975 Professor (2005-06) and in 2009, became the inaugural Donald Weckstein Summer Research Professor.

"Fred Zacharias was one of the finest legal ethics scholars in the United States, a genuine leader in the field. He was also a wise and generous colleague," said Georgetown University Professor of Law and Philosophy David Luban. "This is a great loss not only to his family and friends, but to the profession as well."

"At the start of his career," Luban continued, "Fred did a pioneering empirical study of how much lawyer-client confidentiality matters to what lawyers tell their clients and what clients are willing to tell their lawyers. He was the nation's leading expert on the responsibilities of prosecutors, about which he wrote both solo and in a number of excellent articles he co-authored with Bruce Green. Fred wrote thoughtfully about the relationship between concepts of professionalism and regulatory strategies for lawyers. He was surely among the most prolific scholars in legal ethics, and among the most thoughtful."

A prolific author, Professor Zacharias' many articles included: "The Uniqueness of Federal Prosecutors," *Georgetown Law Journal*; "Waiving Conflicts of Interest," *Yale Law Journal*; "Structuring the Ethics of Prosecutorial Trial Practice," *Vanderbilt Law Review*; "Flowcharting the First Amendment," *Cornell Law Review*; "Federalizing Legal Ethics," *Texas Law Review*; and "The Politics of Torts," *Yale Law Journal*. He was a leading proponent of the proposition that lawyers have ethical roles beyond their duty to advance the interests of individual clients: both as a teacher and scholar he observed that lawyers have countervailing obligations—to the court, the legal system, third parties, society as a whole, and to general morality.

Before joining the USD law faculty, Professor Zacharias taught at Cornell University Law School and George Washington University Law Center. He

clerked for the U.S. District Court in Philadelphia and practiced public interest law in Washington, D.C., first as an E. Barrett Prettyman Fellow at Georgetown Law School and then for the firm Dobrivir, Oakes & Gebhardt. He was also a member of the American Law Institute, the leading organization of scholarly work to clarify, modernize, and otherwise improve the law. His philanthropic work included support for the San Diego Shelter for Homeless Teenagers (SDYCA) and as a long-term advisor to the Legal Ethics Committee of the San Diego County Bar.

Professor Zacharias graduated first in his class from Johns Hopkins University in just two and one-half years in 1974, earned his Juris Doctor from Yale University in 1977 and his Masters in Law from Georgetown University in 1981.

Professor Zacharias will be greatly missed. He is survived by his loving wife, Sharon Soroko Zacharias, his two sons, Eric and Blake, his mother, Laure Zacharias, and his brother, Larry, and family.

"It was my privilege to co-author nine articles with Fred. I could never keep up with him. He wrote very significant pieces, and he was just incredibly prolific. Fred was happy to tackle, and bring his insights to, virtually any issue in the field, and rarely turned down a chance to contribute to a conference or symposium. Fred was among the handful of most frequently cited scholars of his generation, served as past chair of the AALS Professional Responsibility Section, and was a regular contributor to the Section's newsletter. In addition to all this, however, Fred was a devoted teacher and sought to advance teaching no less than scholarship.

"On a personal note, among the things I most

valued in our friendship were Fred's generosity of spirit and his commitment to friends and family. I mourn his passing."

--Bruce Green

"I am stunned. In addition to his massive outpouring of scholarship, Fred was open, and engaging on the issues, and just a very nice guy. My condolences to all his family, friends, and colleagues." -- John Steele

"Fred was indeed prolific, but also something much rarer: always thorough and worth reading, whether one agreed with him or not." -- Andrew Perlman

"Fred's death is a terrible loss for the field. He was one of the most able and productive people. I didn't know him well, but I have a fond memory of an afternoon in San Diego arguing (and agreeing) with him about PR issues while touring the coast." -- William Gallagher

"I knew Fred when we both were grade-schoolers at Manhattan's ultra-progressive Ethical Culture School. Although we were not close friends, I liked him. Even a child could see Fred was particularly thoughtful, curious and nice. Interestingly, we both chose the same profession, but he ran in different circles. I am not surprised he is held in such high regard by his colleagues and students -- the qualities of an outstanding teacher were evident when he was a child. I saw Fred only very occasionally if we happened to be at the same meeting. But, I can say, he certainly fulfilled the promise of his childhood." -- Peter B. Bayer

"What a loss, professionally and personally. Who hasn't he affected? I would get these envelopes full of articles 2 or 3 times yearly. It was hard to keep up. They are imaginative, clever, perceptive. 56 is far too young." -- Stephen Giller

"A terrible and very premature loss for the

professional responsibility community." -- Anita Bernstein

"We have lost a giant and dear member of our PR community." -- Susan Saab Fortney

"He was a stalwart APRL member and a great friend of the cause of legal ethics. He will be missed." -- Lucian Pera

"Fred was an incredibly prolific scholar, but also he was a really nice person and a loyal friend. I often went for walks with him or out for meals at various conferences; he was such a thoughtful, understated person. He had such a wry sense of humor." -- Lisa Lerman

"Fred was the epitome of the involved academic--mentoring junior faculty, writing incisively on a wide variety of topics. We've lost a wonderful colleague and friend." -- Carol Needham

"I was at Yale Law School with Fred. He was a wonderful companion and classmate. He will be missed." -- Bruce E.H. Johnson

"I adored Fred, and he was a stellar author of law review articles. Twice a year he would send me his latest (he was the most prolific writer) and we would email kibitz about his ideas. He knew that the reprint size was perfect for my spinning bike. . . . He will be missed." -- Diane Karpman

"His work - and abiding sense of humor - were so valuable to us all." -- Richard Zitrin

"Fred was a prolific writer of law review articles on a broad range of ethics topics. Some times I would receive two or three articles he had written at the same time. He provided a valuable and some times provocative perspective that will be sorely missed. I enjoyed his sharp mind and made a point of attending CPR and APRL programs when he was on the panel. I will particularly miss Fred's insightful comments and frank

criticisms of rules that being drafted for California lawyers. He was held in very high regard as a law professor and a colleague.” – Mark L. Tuft

“Fred was a gracious and humble person, and a marvelous scholar who always opted for careful analysis over overheated rhetoric. He will be missed!” – Peter Margulies

“With Fred's passing, we are reminded how the best among us are able to touch us in so many ways. I will remember him as a first-rate mind, prolific scholar, teacher, mentor, and one of the most thoughtful people I could ever be around. One of my big regrets as dean at UMKC was that, despite my best efforts, I was not able to recruit him for the school's first major chair. I would have loved to have had him as a colleague. But as we all well know, he was in every true sense of the words our colleague.” – Burnele V. Powell

“Fred was old school in the good ways--not resistant to new ideas, but confident that the time-tested path of diligence and open inquiry was the route to professorial success. He rose early in the morning even before classes he had taught many times to review his materials so that he could be ready to follow whatever tack his students pursued that day. He kept his nose to the scholarly grindstone because that was the job he had agreed to do.

“The last time I played basketball was with Fred. I had ‘retired’ from the sport a couple of years earlier, to the appreciation of my knees and back, but Fred, with whom I had often played in the past, decided to offer up a three-on-three, faculty-against-student game for San Diego's annual Women's Law Caucus auction. The winning students were, as usual, a tall, athletic group looking forward to running circles around and jumping over the faculty pigeons (rounded out by CrimProf's own Larry Alexander). To their surprise--because

they probably hadn't seen a pick-and-roll before--we screened ourselves to victory. We limped for weeks afterwards, but it was worth it.” – Kevin Cole, Dean, University of San Diego School of Law

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